

No. 20 - _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

FATOU SMALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX OF PETITIONER FATOU SMALL
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN S. MALIK
100 East 14th Street
Wilmington, Delaware 19801-3255
302-427-2247
Counsel of Record for the Petitioner,
Fatou Small

Dated: June 4, 2020

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA, :

Plaintiff, :

v. :

Cr.A. No. 17-CR-027-LPS

FATOU SMALL, :

Defendant. :

NOTICE OF APPEAL

TO: Clerk of the Court
United States District Court
For the District of Delaware
Federal Building
844 King Street
Wilmington, Delaware 19801

Whitney Cloud, Esquire
Assistant United States Attorney
United States Attorney's Office
Nemours Building
1007 Orange Street, Suite 700
Wilmington, Delaware 19801

PLEASE TAKE NOTICE that Defendant/Appellant Fatou Small, by and through his attorney, John S. Malik, hereby appeals to the United States Court of Appeals for the Third Circuit from the Judgment and Commitment Order of the Honorable Leonard P. Stark of the United States District Court for the District of Delaware dated on January 24, 2019.

/s/ John S. Malik _____
JOHN S. MALIK
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Defendant/Appellant,
Fatou Small

Dated: February 8, 2019

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA, :
: Plaintiff, :
: :
v. : Cr.A. No. 17-CR-027-LPS
: :
FATOU SMALL, :
: :
Defendant. :
:

CERTIFICATE OF SERVICE

I, John S. Malik, do hereby certify that on this 8th day of February, A.D., 2019, I have had Defendant/Appellant Fatou Small's Notice of Appeal electronically served upon the following individual(s) at the following address(es):

Whitney Cloud, Esquire
Assistant United States Attorney
United States Attorney's Office
Nemours Building
1007 Orange Street, Suite 700
Wilmington, Delaware 19801

/s/ John S. Malik
JOHN S. MALIK
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Defendant/Appellant,
Fatou Small

UNITED STATES DISTRICT COURT

District of Delaware

UNITED STATES OF AMERICA

v.

FATOU SMALL

JUDGMENT IN A CRIMINAL CASE

Case Number: 17-CR-27-LPS

USM Number: 08916-015

JOHN S. MALIK, ESQUIRE

Defendant's Attorney

THE DEFENDANT:

 pleaded guilty to count(s) 1 AND 2 OF THE INDICTMENT pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1) and § 924(a)(2)	POSSESSION OF A FIREARM BY A FELON	3/7/2017	1
21 U.S.C. § 841(a)(1) and (b)(1)(C)	POSSESSION WITH INTENT TO DELIVER MDMA	3/7/2017	2

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 must notify the court and United States attorney of material changes in economic circumstances.

1/10/2019

Date of Imposition of Judgment

Signature of Judge

HONORABLE LEONARD P. STARK, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

Date

A-003

DEFENDANT: FATOU SMALL
CASE NUMBER: 17-CR-27-LPS

IMPRISONMENT

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

151 MONTHS. THIS TERM SHALL CONSIST OF 120 MONTHS ON COUNT ONE AND 151 MONTHS ON COUNT TWO. ALL SUCH TERMS SHALL RUN CONCURRENTLY.

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

THE DEFENDANT BE DESIGNATED TO A FACILITY WITH HVAC TRAINING.

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

A-004

DEFENDANT: FATOU SMALL
CASE NUMBER: 17-CR-27-LPS

SUPERVISED RELEASE

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

3 YEARS ON EACH OF COUNTS ONE AND TWO, TO RUN CONCURRENTLY.

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: FATOU SMALL
CASE NUMBER: 17-CR-27-LPS

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: FATOU SMALL

CASE NUMBER: 17-CR-27-LPS

SPECIAL CONDITIONS OF SUPERVISION

1. THE DEFENDANT SHALL PARTICIPATE IN A SUBSTANCE ABUSE TREATMENT, WHICH MAY INCLUDE DRUG TESTING AND TREATMENT AND/OR COGNITIVE BEHAVIORAL TREATMENT (CBT), AS DIRECTED BY THE PROBATION OFFICER.
2. THE DEFENDANT SHALL PROVIDE THE PROBATION OFFICER WITH ACCESS TO ANY REQUESTED FINANCIAL INFORMATION.
3. THE DEFENDANT SHALL PARTICIPATE IN ANY EDUCATIONAL, VOCATIONAL, OR JOB TRAINING PROGRAM, INCLUDING THE U.S. PROBATION OFFICE'S WORKFORCE DEVELOPMENT PROGRAM.

DEFENDANT: FATOU SMALL
CASE NUMBER: 17-CR-27-LPS**CRIMINAL MONETARY PENALTIES**

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

<u>TOTALS</u>	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 200.00	\$ N/A	\$ WAIVED	\$ N/A

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

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

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

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

Restitution amount ordered pursuant to plea agreement \$ _____

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

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

the interest requirement is waived for the fine restitution.

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

* 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: FATOU SMALL
CASE NUMBER: 17-CR-27-LPS

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 \$ 200.00 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:

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:

PURSUANT TO THE MEMORANDUM OF PLEA AGREEMENT (D.I. 61), ANY ALL INTERESTS IN ANY PROPERTY USED, OR INTENDED TO BE USED, IN ANY MANNER OR PART TO COMMIT, OR TO FACILITATE THE COMMISSION OF, THE VIOLATIONS CHARGED IN COUNTS 1 AND 2 OF THE INDICTMENT, INCLUDING, BUT NOT LIMITED TO: 1) A SMITH & WESSON .357 MAGNUM REVOLVER BEARING SERIAL NUMBER AYS3896 AND 2) \$1,131.00 IN U.S. CURRENCY.

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.

A-009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :

Plaintiff, :

v. :

Crim. No. 17-27-LPS

FATOU SMALL, :

Defendant. :

MEMORANDUM ORDER

At Wilmington this 2nd day of May, 2018, having considered Defendant Fatou Small's ("Defendant" or "Small") Motion to Suppress Evidence (D.I. 25), **IT IS HEREBY ORDERED** that Small's motion (D.I. 25) is **DENIED**.¹

1. Small is charged with possession of a firearm by a person prohibited and possession with intent to distribute a controlled substance. (*See* D.I. 10) On March 7, 2017, Small, a probationer, was pulled over by three then-members of the Dover Safe Streets Task Force: Dover Police Officers Boesenberge ("Officer Boesenberge") and Richey ("Officer Richey") and Delaware Probation and Parole Officer Porter ("Officer Porter"). (*See* D.I. 28 at 2-3; *see also* D.I. 42 ("Tr.") at 19-27) Two of the officers, Boesenberge and Porter, had a limited history with Small, having conducted unsuccessful curfew checks at Small's residence over the previous year. (*See* D.I. 28 at 2-3 (detailing Boesenberge and Porter's involvement in two failed curfew checks at Small's residence on May 16 and September 8, 2016); D.I. 51 at 2-3 (same); *see also*

¹The Court's decision is based on its findings of fact and conclusions of law, which are set out in this Memorandum Order. *See* Fed. R. Crim. P. 12(d).

Tr. at 17-18, 71-73) During one curfew check, Officer Porter saw a black Lincoln Town Car in the driveway of Small's residence at 805 Bacon Avenue, which Officer Porter later determined belonged to Small. (See D.I. 51 at 3; Tr. at 71-73) After the second missed curfew check on September 8, 2016, through to the traffic stop on March 7, 2017, Officers Boesenber and Porter received information from a confidential informant that Small was obtaining and selling drugs using the Town Car. (See Tr. at 18-19, 74-75) Officer Porter testified that, based on that information and his prior experience, he developed a plan to try to confront Small somewhere away from his residence. (See *id.* at 99-100)

2. Around 4:15 PM on the day of the stop, Officers Boesenber, Porter, and Richey were on routine patrol near Bacon Avenue. (See *id.* at 19-20, 29, 78) While driving on Bacon Avenue, the officers noticed the Town Car in the driveway of Small's residence, with its engine running and a passenger in the front seat. (See *id.*) Upon seeing the Town Car running in Small's driveway, Officer Boesenber, who was driving the unmarked patrol car, turned right onto Nimitz Road to wait to see if the Town Car would leave. (See *id.* at 22-23, 79) When the Town Car did, the officers drove past the Town Car in the opposite direction on Nimitz Avenue at approximately 15-20 miles per hour. (See *id.* at 23-24, 79-80) A mobile video recorder captured the event. (See *id.* at 28) Both Officer Boesenber and Officer Porter, who was sitting in the front seat of the patrol car, testified that as they approached the Town Car, they were looking to see if Small was driving. (See *id.* at 23-24, 99-100) The plan, Officer Porter explained, was to stop Defendant as soon as they "positively identified him." (*Id.* at 100)

3. Officer Boesenber testified that as the two cars passed each other, he observed – and stated to Officers Porter and Richey – that the Town Car's windshield was cracked. (See *id.*

at 24-25) Officers Porter and Richey “advised [him] verbally” of the same. (*Id.* at 25) Officer Boesenber further testified that he recognized Small as the driver – and, having observed the crack and identified Small, he turned the patrol car around to pursue the Town Car. (*See id.* at 25-26) Officer Boesenber testified that while this was going on, the officers were having a conversation about Small’s identity as the driver. (*See id.*) Similarly, Officer Porter testified that upon passing the Town Car, he saw the car’s “broken” windshield and recognized Small as the driver. (*See id.* at 79-80) Officer Porter also testified that everyone in the patrol car – immediately and almost simultaneously – said aloud to each other, “[T]hat’s Fatou Small driving, and . . . all agreed that is a broken windshield. That is a traffic stop.” (*Id.* at 80-81; *see also id.* at 96 (“[I]t was so simultaneous that everyone I think just stated aloud there is a cracked windshield.”)) After passing the Town Car, Officer Boesenber turned the patrol car around, activated the patrol car’s take down lights, and pulled over the Town Car. (*See id.* at 51) That same day, Officer Boesenber wrote a report documenting his history with Small and the details of the stop. (*See D.I. 28 Ex. B*) The report states Officers Boesenber and Porter “observed [Small] driving” the Town Car, and “[a]ll officers observed the front windshield to be severely cracked.” (*Id.* at SMALL-RPT-00000009) The following morning, Officer Porter filed a report detailing the stop. (*See D.I. 28 Ex. A*) Officer Porter wrote that he, Officer Boesenber, and Officer Richey “all observed and discussed the vehicle having a severely broken windshield as it drove past [the officers’ vehicle] on Nimitz Road.” (*Id.* at SMALL-RPT-00000002) Based on information obtained during the stop, Officer Porter obtained an administrative search warrant for 805 Bacon Avenue, which resulted in the seizure of various evidence. (*See D.I. 28 at 5*)

4. Small moves to suppress the evidence obtained from his person, car, and

residence, as well as statements he made to law enforcement, as all being the fruit of an allegedly illegal traffic stop. (See D.I. 25) The Court held an evidentiary hearing on January 3, 2018. (See Tr.) The motion, including post-hearing briefing, is fully briefed. (See D.I. 28, 31, 48, 49, 51, 52) Defendant submitted a DVD containing photos on May 1, 2018. (D.I. 53)

5. The Fourth Amendment protects individuals “against unreasonable searches and seizures.” U.S. Const. amend. IV. “The Fourth Amendment permits a traffic stop based on reasonable suspicion that a traffic violation has occurred regardless of the officer’s subjective motivations for making the stop.” *United States v. Byrd*, 679 F. App’x 146, 149 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 54 (2017); Petition for a Writ of Certiorari at i, *Byrd v. United States*, 138 S. Ct. 54 (2017) (mem.) (No. 16-1371), 2017 WL 2130318, at *i (listing question presented as, “Does a driver have a reasonable expectation of privacy in a rental car when he has the renter’s permission to drive the car but is not listed as an authorized driver on the rental agreement?”); *see also United States v. Delfin-Colina*, 464 F.3d 392, 398 (3d Cir. 2006) (explaining “officer need not be factually accurate in her belief that a traffic law had been violated but, instead, need only produce facts establishing that she reasonably believed that a violation had taken place”). “Reasonable, articulable suspicion is a ‘less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.’” *Delfin-Colina*, 464 F.3d at 396 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). Instead, “only a ‘minimal level of objective justification’” is required for the stop to be lawful. *Id.* (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). However, the police bear “the initial burden of providing the ‘specific, articulable facts’ to justify a reasonable suspicion to believe that an individual has violated the traffic laws.” *Id.*

6. The Court is persuaded that the government has satisfied its burden to show that the officers possessed specific, articulable facts to justify a belief that Small was violating a traffic law at the time of the stop. (*See generally* D.I. 49 at 6-7) (Defendant acknowledging “if the record supports a conclusion that the government has proven by a preponderance of the evidence that the hairline crack in the Town Car’s windshield was observable by the officers before the vehicle stop, then the stop of Mr. Small’s car passes constitutional muster”))

Defendant does not dispute that his windshield was cracked, or that driving with a cracked windshield is a violation of the Delaware traffic code. (*See* D.I. 28 at 8-9; D.I. 52 at 3; *see also* 21 Del. C. §§ 4312–13; Tr. at 26 (“Q. What is significant about a cracked windshield in your experience? A. [Boesenber] It’s a motor vehicle violation, a violation of Title 21, the Motor Vehicle Code. Q. Which sections of Title 21? A. 4312, 4313 covers safety glass.”)) Small argues instead that the dash-cam footage and photographs taken of his windshield after his arrest prove the officers could not have seen the windshield crack as they drove past the Town Car. (*See* D.I. 25 at 2; D.I. at 49 at 2 (arguing resolution of this motion is “factually driven”))

7. The Court disagrees. Both Officers Boesenber and Porter testified credibly that they saw the crack in Defendant’s windshield before initiating the traffic stop.² (*See* Tr. at 24-26, 80-81) While the dash-cam footage does not clearly show the crack in the windshield, the Court

²Notwithstanding any minor inconsistency in Officer Porter’s testimony about when he first saw the crack in Defendant’s windshield on the day of the stop (either when the Town Car first turned onto Nimitz Avenue, or upon passing the Town Car – events which happened within seconds of one another), Officer Porter was unequivocal in his testimony that he – and all the other officers in the patrol car – saw the crack, and saw it in the seconds before Officer Boesenber turned the patrol car around to pursue Defendant’s vehicle. (*See* Tr. at 80-81, 96) In evaluating the witnesses’ credibility, the Court has also considered Defendant’s emphasis on the apparent location of the sun and where sun glare might have been expected. (*See, e.g.*, D.I. 52 at 2)

accepts the officers' testimony that the dash-cam did not capture everything the officers could see as the two cars passed each other. (*See id.* at 30, 97) Indeed, Officer Boesenbergs candidly admitted that the dash-cam footage does not show the crack as he saw it on the day of the stop (*see id.* at 29), and the Court recognizes that there are limitations to what can be captured on photos and dash-cam film, *see United States v. Meran*, 2017 WL 4803927, at *8 (W.D. Pa. Oct. 23, 2017) (accepting officer's "reasonable explanation that there are some limitations [to] what the MVR can capture because of its position in the vehicle, as opposed to what he [was] able to see in real time from his vantage point"). For example, while the crack is not readily visible on the dash-cam footage, neither is Small's face, although the officers were able to identify Small as the driver of the Town Car. (*See* Tr. at 29) Similarly, the Town Car was, all agree, black in color, but on certain photos taken by the officers later in the day the vehicle does not appear to be black – rather it appears (to the Court at least) to be blue, seemingly due to the angle and glare of the sun, as well as shadows from surrounding trees, structures, and clouds. (*See* GX3) Thus, it is a reality that the officers could have seen something (like a crack in a windshield) that cannot be discerned in all photographic or video representations of the same (or similar) image. Depending on factors such as angle and light, a hairline fracture in glass (such as here) may or may not be visible in a photo or video footage. (*Compare* D.I. 28 Ex. C at 1 (showing windshield crack) *with id.* at 3 (not showing crack)) In the Court's view, the dash-cam footage and photos here cannot be persuasively argued to *disprove* the officers' testimony.³ *See Byrd*, 679 F. App'x at

³This is unlike one of the Superior Court of Delaware cases relied on by Defendant. In *State v. Benson*, No. 1605002486 (Del. Super. Ct. Oct. 25, 2016), the dash-cam footage offered at the evidentiary hearing tended to contradict portions of the relevant testimony, which, as the Court has explained, is not the case here. *See id.* at 3-4. Neither does *State v. Rivers*, No. 1502003222 (Del. Super. Ct. Apr. 21, 2016), discredit Officer Boesenbergs testimony. While

149 (“Because the video does not disprove the officer’s assertion, we find no basis to disturb the District Court’s factual determination.”). Indeed, contrary to Defendant’s suggestion, the Court finds the “high quality, color, digital still photographs of the Town Car’s windshield,” recently submitted by Defendant, make the windshield crack *more* visible than it was in the black and white pictures Defendant initially submitted to the Court.⁴ (*Compare* D.I. 53 *with* D.I. 28 Ex. C) Moreover, Officers Boesenbergs and Porter’s reports, both written shortly after the stop, are consistent with their testimonies. (*See* D.I. 28 Ex. B at SMALL-RPT-00000009; *id.* Ex. A at SMALL-RPT-00000002) The Court finds that the officers possessed specific, articulable facts to justify a belief that Small was committing a traffic infraction, making the stop lawful.

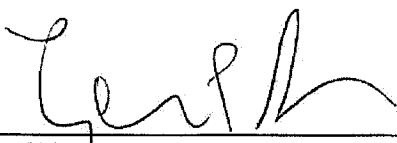
7. “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Whren v. United States*, 517 U.S. 806, 813 (1996). Because an objective review of the evidence shows the officers had reasonable suspicion to believe Small had committed a traffic violation, the stop – even if likely to occur in the absence of the officers observing what they believed to be a traffic violation – was lawful. *See id.* (“[A] court should only look to whether specific, articulable facts produced by the officer would support reasonable

the court in *State v. Rivers* was “not convinced” by Officer Boesenberg, and found in toto a lack of probable cause, the Court also stated that Officer Boesenberg “certainly possessed a reasonable suspicion that Rivers had committed a crime.” *Id.* at 7. Neither case made a finding that Boesenberg lacked credibility.

⁴Defendant indicated in his March 3, 2018 reply brief that he “w[ould] file with the Clerk’s Office . . . a DVD containing copies of the actual digital, color, still photographs taken of the Town Car’s windshield on the date of Defendant Small’s arrest that were produced by the government in discovery,” which, Defendant contended – and the Court agrees – “provide a better quality image of the Town Car’s windshield than the images of these still photographs that were projected on the screen . . . at the suppression hearing.” (D.I. 52 at 2 n.1) The Court received the DVD from Defendant on May 1, 2018. (*See* D.I. 53)

suspicion of a traffic infraction."); *see also United States v. Petersen*, 622 F.3d 196, 201 (3d Cir. 2010) ("[A]ny technical violation of a traffic code legitimizes a stop, even if the stop is merely pretext for an investigation of some other crime.") (internal quotation marks and citation omitted).

IT IS FURTHER ORDERED that the Court will hold a status teleconference on **Wednesday, May 16, 2018 at 1:45 p.m.** Counsel for the government shall initiate the call. The time between now and May 16 is excluded from the speedy trial act calculations and is in the interests of justice.



HONORABLE LEONARD P. STARK
UNITED STATES DISTRICT JUDGE

**U.S. District Court
District of Delaware (Wilmington)
CRIMINAL DOCKET FOR CASE #: 1:17-cr-00027-LPS-1**

Case title: USA v. Small
Magistrate judge case number: 1:17-mj-00059

Date Filed: 04/04/2017
Date Terminated: 01/25/2019

Assigned to: Judge Leonard P. Stark

Appeals court case number: 19-1344
Third Circuit

Defendant (1)

Fatou Small

TERMINATED: 01/25/2019

represented by **Edson A. Bostic**

Federal Public Defender's Office
800 King Street, Suite 200
Wilmington, DE 19801
302-573-6010

Email: DE_ECF@fd.org
TERMINATED: 03/28/2017

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

*Designation: Public Defender or
Community Defender Appointment*

John S. Malik

John S. Malik, Esq.
100 East 14th. St.
Wilmington, DE 19801
(302) 427-2247

Fax: (302)427-2414
Email: jmalik@malik-law.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Designation: CJA Appointment

Pending Counts

18:922(g)(1)and 924(a)(2) -
POSSESSION OF A FIREARM BY A
FELON - (COUNT I - 3/7/2017)
(1)

Disposition

120 MONTHS IMPRISONMENT (TO
RUN CONCURRENTLY WITH
COUNT 2), 3 YEARS SUPERVISED
RELEASE (TO RUN
CONCURRENTLY WITH COUNT 2),
\$100.00 SPECIAL ASSESSMENT
(\$200 TOTAL SPECIAL
ASSESSMENT)

21:841(A)(1) AND (B)(1)(C) -
POSSESSION WITH THE INTENT TO
DISTRIBUTE ECSTASY - (COUNT I -
3/7/2017)
(2)

151 MONTHS IMPRISONMENT (TO
RUN CONCURRENTLY WITH
COUNT 1), 3 YEARS SUPERVISED
RELEASE (TO RUN
CONCURRENTLY WITH COUNT 1),
\$100.00 SPECIAL ASSESSMENT
(\$200.00 TOTAL SPECIAL
ASSESSMENT)

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

Highest Offense Level (Terminated)

None

Complaints

18 U.S.C. 922(g)(1) - POSSESSION OF
A FIREARM BY A PERSON
PROHIBITED (3/7/2017)

Disposition

Plaintiff

USA

represented by **Whitney Cloud**
U.S. Attorney's Office
Hercules Building
1313 N. Market Street
P.O. Box 2046
Wilmington, DE 19801
(302) 573-6277
Fax: (302) 573-6211
Email: whitney.cloud@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Shawn Weede
U.S. Attorney's Office
Hercules Building
1313 N. Market Street
P.O. Box 2046
Wilmington, DE 19801
302-573-6277
Email: shawn.weede@usdoj.gov

ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/22/2017	<u>1</u>	MOTION to Seal Case by USA as to Sealed Defendant. (dlk) (dlk). [1:17-mj-00059] (Entered: 03/23/2017)
03/22/2017		ORDER granting <u>1</u> Motion to Seal Case as to Sealed Defendant (1). Signed by Judge Christopher J. Burke on 3/22/2017. (dlk) [1:17-mj-00059] (Entered: 03/23/2017)
03/22/2017		Case sealed as to Sealed Defendant (dlk) [1:17-mj-00059] (Entered: 03/23/2017)
03/22/2017	<u>2</u>	CRIMINAL COMPLAINT by ATF Special Agent, sworn to before Judge Christopher J. Burke as to Sealed Defendant (1). (dlk) (dlk). [1:17-mj-00059] (Entered: 03/23/2017)
03/22/2017	<u>3</u>	MOTION for Arrest Warrant by USA as to Sealed Defendant. (dlk) (dlk). [1:17-mj-00059] (Entered: 03/23/2017)
03/22/2017		ORDER granting <u>3</u> Motion for Warrant as to Sealed Defendant (1). Signed by Judge Christopher J. Burke on 3/22/2017. (dlk) [1:17-mj-00059] (Entered: 03/23/2017)
03/23/2017		Arrest of Sealed Defendant (dlk) [1:17-mj-00059] (Entered: 03/24/2017)
03/23/2017	<u>4</u>	MOTION to Unseal Case by USA as to Fatou Small. (dlk) [1:17-mj-00059] (Entered: 03/24/2017)
03/23/2017		ORDER granting D.I. <u>4</u> Motion to Unseal Case as to Fatou Small (1). Signed by Judge Christopher J. Burke on 3/23/2017. (dlk) [1:17-mj-00059] (Entered: 03/24/2017)
03/23/2017		Case unsealed as to Fatou Small (dlk) [1:17-mj-00059] (Entered: 03/24/2017)
03/23/2017		Minute Entry for proceedings held before Judge Christopher J. Burke - Initial Appearance as to Fatou Small held on 3/23/2017. Govt. filed a Motion to Unseal Case and a Motion for Detention. The Court granted the Motion to Unseal Case. Deft. requested counsel be appointed, Court appoints Edson Bostic, Esquire. Deft. requests Preliminary and Detention Hearings be set. The Court will set hearings and Orders that Deft. remain temporarily detained pending further hearings. (Clerk - Krett) APPEARANCES: Govt.- G. Robinson; Deft. - D. Chivar; USPO - A. Ramirez. (dlk) [1:17-mj-00059] (Entered: 03/24/2017)
03/23/2017	<u>5</u>	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to Fatou Small. Appointment of Edson A. Bostic for Fatou Small. Signed by Judge Christopher J. Burke on 3/23/2017. (dlk) [1:17-mj-00059] (Entered: 03/24/2017)
03/23/2017	<u>6</u>	MOTION to Detain Pending Trial by USA as to Fatou Small. (dlk) [1:17-mj-00059] (Entered: 03/24/2017)
03/23/2017	<u>7</u>	ORDER OF TEMPORARY DETENTION as to Fatou Small. A Detention Hearing is set for 3/29/2017 at 10:00 AM in Courtroom 2A before Judge Christopher J. Burke. Signed by Judge Christopher J. Burke on 3/23/2017. (dlk) [1:17-mj-00059] (Entered: 03/24/2017)
03/23/2017		Set Hearing as to Fatou Small: A Preliminary Hearing is set for 3/29/2017 at 10:00

		AM in Courtroom 2A before Judge Christopher J. Burke. (dlk) [1:17-mj-00059] (Entered: 03/24/2017)
03/23/2017	<u>17</u>	Arrest Warrant Returned as Executed on 3/23/2017 in case as to Fatou Small. (dlk) (Entered: 04/18/2017)
03/29/2017	<u>8</u>	ORDER TO CONTINUE in the Interests of Justice as to Fatou Small.. Signed by Judge Christopher J. Burke on 3/29/2017. (dlk) [1:17-mj-00059] (Entered: 03/29/2017)
03/29/2017		Set/Reset Hearings as to Fatou Small: A Detention Hearing is set for 4/6/2017 at 09:45 AM in Courtroom 2A before Judge Christopher J. Burke A Preliminary Hearing is set for 4/6/2017 at 09:45 AM in Courtroom 2A before Judge Christopher J. Burke. (dlk) [1:17-mj-00059] (Entered: 03/29/2017)
04/04/2017	<u>9</u>	INDICTMENT with a Notice of Forfeiture as to Fatou Small (1) count(s) 1, 2. (Original SEALED - to be maintained in the Clerk's Office). (kjk) (Entered: 04/05/2017)
04/04/2017	<u>10</u>	REDACTED VERSION of 9 Indictment with a Notice of Forfeiture by USA as to Fatou Small. (kjk) (Entered: 04/05/2017)
04/04/2017	<u>11</u>	MOTION and ORDER for Arrest Warrant by USA as to Fatou Small. (kjk) (Entered: 04/05/2017)
04/04/2017		SO ORDERED granting <u>11</u> Motion and Order for Arrest Warrant as to Fatou Small (1). Signed by Judge Sherry R. Fallon on 4/4/17. (kjk) (Entered: 04/05/2017)
04/05/2017	<u>12</u>	MOTION for Pretrial Release by Fatou Small. (Malik, John) (Entered: 04/05/2017)
04/06/2017		Set/Reset Hearings as to Fatou Small: An Arraignment is set for 4/20/2017 at 01:00 PM in Courtroom 2B before Judge Mary Pat Thyng. (dlk) (Entered: 04/07/2017)
04/06/2017	<u>13</u>	MOTION to Detain Pending Trial by USA as to Fatou Small. (dlk) (Entered: 04/07/2017)
04/06/2017	<u>14</u>	EXHIBIT/Witness LIST re Fatou Small Detention Hearing 4/6/2017. (dlk) (Entered: 04/07/2017)
04/06/2017	<u>15</u>	SEALED Court Exhibit as to Fatou Small (dlk) (Entered: 04/07/2017)
04/06/2017	<u>16</u>	Arrest Warrant Returned Executed on 3/23/17 in case as to Fatou Small. (kjk) (Entered: 04/11/2017)
04/07/2017		Minute Entry for proceedings held before Judge Christopher J. Burke - Defendant was present with counsel ; Detention Hearing as to Fatou Small held on 4/7/2017. After hearing from the parties, the Court orally ORDERS that Defendant shall remain detained pending trial. Initial Appearance held as to Indictment. Counsel for Defendant requests Arraignment be scheduled at a later date. (Clerk: D. Krett) APPEARANCES: G. Robinson for Govt.; J. Malik for Defense; A. Ramirez for USPO. (dlk) (Entered: 04/07/2017)
04/12/2017		Case assigned to Judge Leonard P. Stark, as to Fatou Small. Please include the initials of the Judge (LPS) after the case number on all documents filed. (rjb) (Entered: 04/12/2017)

04/20/2017		Minute Entry for proceedings held before Judge Mary Pat Thyng - Miscellaneous Hearing (re: Arraignment) as to Fatou Small held on 4/20/2017; Deft. was present with counsel; Deft.'s counsel requested a continuance of the arraignment; GRANTED; Arraignment reset for 5/4/17 at 1:00 pm before Judge Burke in Courtroom#2A; ATTENDEES: AUSA - A. Ibrahim, Esq.; DEFT. - J. Malik, Esq.; USPO - A. Ramirez, D. Sturgis; CLERK - Kincaid. (kjk) (Entered: 04/21/2017)
04/20/2017		Reset Hearings as to Fatou Small: An Arraignment is set for 5/4/2017 at 01:00 PM in Courtroom 2A before Judge Christopher J. Burke. (kjk) (Entered: 04/21/2017)
04/21/2017	<u>18</u>	ORDER TO CONTINUE in the Interests of Justice as to Fatou Small; Time is excluded from 4/20/17 until 5/4/17 for the continuance of the arraignment. Signed by Judge Mary Pat Thyng on 4/21/17. (kjk) (Entered: 04/21/2017)
05/04/2017		Minute Entry for proceedings held before Judge Christopher J. Burke - Defendant was present with counsel; Deft. waived reading of the Indictment; Arraignment as to Fatou Small (1) Count 1,2 held; Not Guilty Plea Entered. Pretrial Motions due by 6/5/2017. ATTENDEES: AUSA - A. Mackler, Esq.; DEFT. - J. Malik, Esq.; CLERK - Kincaid. (kjk) (Entered: 05/04/2017)
05/04/2017	<u>19</u>	ORDER TO CONTINUE in the Interests of Justice in order to file pretrial motions as to Fatou Small ; Time excluded from 5/4/17 until 6/5/17. Pretrial Motions due by 6/5/2017. Signed by Judge Christopher J. Burke on 5/4/17. (kjk) (Entered: 05/04/2017)
06/04/2017	<u>20</u>	Consent MOTION for Extension of Time to File <i>Pretrial Motions</i> by Fatou Small. (Malik, John) (Entered: 06/04/2017)
06/06/2017	<u>21</u>	ORDER granting <u>20</u> Consent MOTION for Extension of Time to File Pretrial Motions by Fatou Small. Pretrial Motions due by 7/7/2017. Time excluded from 6/6/17 until 7/7/17. Signed by Judge Leonard P. Stark on 6/6/17. (etg) (Entered: 06/07/2017)
07/05/2017	<u>22</u>	ORDER OF DETENTION as to Fatou Small. Signed by Judge Christopher J. Burke on 7/5/2017. (dlb) (Entered: 07/05/2017)
07/10/2017	<u>23</u>	Consent MOTION for Extension of Time to File <i>Pretrial Motions</i> by Fatou Small. (Malik, John) (Entered: 07/10/2017)
07/13/2017	<u>24</u>	ORDER granting <u>23</u> Consent MOTION for Extension of Time to File Pretrial Motions by Fatou Small. Pretrial Motions due by 8/17/2017. Time is excluded from 7/13/2017 until 8/17/2017. Signed by Judge Leonard P. Stark on 7/13/17. (etg) (Entered: 07/13/2017)
08/18/2017	<u>25</u>	MOTION to Suppress Evidence by Fatou Small. (Attachments: # <u>1</u> Exhibit Photographs of windshield of Defendant Smalls' Lincoln Town Car)(Malik, John) (Entered: 08/18/2017)
08/24/2017	<u>26</u>	MOTION to Set Briefing Schedule on Defendant's Motion to Suppress Evidence by USA as to Fatou Small. (Cloud, Whitney) (Entered: 08/24/2017)
08/28/2017	<u>27</u>	ORDER granting <u>26</u> MOTION to Set Briefing Schedule on Defendant's Motion to Suppress Evidence by USA as to Fatou Small. The government is Ordered to File a Response to Defendant's Motion to Suppress Evidence on or before 9/29/2017. Signed by Judge Leonard P. Stark on 8/28/2017. (etg) (Entered: 08/28/2017)

09/28/2017	<u>28</u>	BRIEF/MEMORANDUM in Support by Fatou Small re <u>25</u> MOTION to Suppress Evidence (Attachments: # <u>1</u> Exhibit Exhibit "A" to Suppression Memo - Probation Arrest Report, # <u>2</u> Exhibit Exhibit "B" to Suppression Memo - Dover Police Report, # <u>3</u> Exhibit Exhibit "C" to Suppression Memo - Photos of Town Car's Windshield) (Malik, John) (Entered: 09/28/2017)
09/29/2017	<u>29</u>	Consent MOTION to Modify Briefing Schedule by Fatou Small. (Malik, John) (Entered: 09/29/2017)
10/04/2017	<u>30</u>	ORDER granting <u>29</u> Consent MOTION to Modify Briefing Schedule by Fatou Small. The government's response is to be filed on or before 10/20/2017. Signed by Judge Leonard P. Stark on 10/04/2017. (etg) (Entered: 10/04/2017)
10/16/2017	<u>31</u>	RESPONSE to Motion by USA as to Fatou Small re <u>25</u> MOTION to Suppress Evidence (Attachments: # <u>1</u> Exhibit A)(Cloud, Whitney) (Entered: 10/16/2017)
11/09/2017	<u>32</u>	ORDER - A Hearing on Defendant's Motion to Suppress (D.I. <u>25</u>) is set for 12/8/2017 at 09:00 AM in Courtroom 6B before Judge Leonard P. Stark. Signed by Judge Leonard P. Stark on 11/9/2017. (etg) (Entered: 11/09/2017)
11/30/2017	<u>33</u>	Consent MOTION to Continue <i>December 8, 2017 Suppression Hearing</i> by Fatou Small. (Malik, John) (Entered: 11/30/2017)
12/01/2017	<u>34</u>	ORDER granting <u>33</u> Consent MOTION to Continue <i>December 8, 2017 Suppression Hearing</i> filed by Fatou Small - The Hearing on Defendant's Motion to Suppress (D.I. <u>25</u>) is rescheduled for 1/3/2018 at 03:00 PM in Courtroom 6B before Judge Leonard P. Stark. Time is excluded from 12/1/2017 until 01/03/2018. Signed by Judge Leonard P. Stark on 12/01/2017. (etg) (Entered: 12/01/2017)
01/01/2018	<u>35</u>	MOTION to Continue <i>Suppression Hearing Scheduled for January 3, 2018</i> by Fatou Small. (Malik, John) (Entered: 01/01/2018)
01/02/2018	<u>36</u>	SEALED MOTION (To be maintained on file in Clerk's Office) (etg) (Entered: 01/02/2018)
01/02/2018	<u>37</u>	SEALED RESPONSE to Motion by USA as to Fatou Small re <u>36</u> SEALED MOTION (To be maintained on file in Clerk's Office) (etg) (Entered: 01/03/2018)
01/03/2018		Minute Entry for proceedings held before Judge Leonard P. Stark - Motions Hearing as to Fatou Small held on 1/3/2018 re <u>35</u> MOTION to Continue and <u>36</u> SEALED MOTION filed by Fatou Small. (Court Reporter B. Gaffigan.) (etg) (Entered: 01/08/2018)
01/03/2018	<u>41</u>	EXHIBIT LIST and WITNESS LIST re Motions hearing as to Fatou Small (etg) (Entered: 01/10/2018)
01/05/2018	<u>38</u>	STATUS REPORT by USA as to Fatou Small (Cloud, Whitney) (Entered: 01/05/2018)
01/09/2018	<u>39</u>	SEALED PROTECTIVE ORDER as to Fatou Small. Signed by Judge Leonard P. Stark on 1/9/2018. (etg) (Entered: 01/09/2018)
01/09/2018	<u>40</u>	ORDER Setting Briefing Schedule re <u>25</u> MOTION to Suppress Evidence filed by Fatou Small. Signed by Judge Leonard P. Stark on 1/9/18. (etg) (Entered: 01/09/2018)

01/19/2018	<u>42</u>	OFFICIAL TRANSCRIPT of Motion to Suppress Hearing held on January 3, 2018 before Chief Judge Leonard P. Stark. Court Reporter: Brian Gaffigan, Telephone No. (302) 573-6360. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date, it may be obtained through PACER. Redaction Request due 2/9/2018. Redacted Transcript Deadline set for 2/20/2018. Release of Transcript Restriction set for 4/19/2018. (bpg) (Entered: 01/19/2018)
01/19/2018	<u>43</u>	SEALED TRANSCRIPT of Motion to Suppress Hearing - Sidebar Conference held on January 3, 2018 before Judge Leonard P. Stark. (Transcript on file in Clerk's Office) (etg) (Entered: 01/19/2018)
02/01/2018	<u>44</u>	Consent MOTION to Modify Briefing Schedule re <u>40</u> Order <i>Setting Briefing Schedule on Suppression Motion</i> by Fatou Small. (Malik, John) (Entered: 02/01/2018)
02/02/2018	<u>45</u>	ORDER granting <u>44</u> Consent MOTION to Modify Briefing Schedule re <u>40</u> Order <i>Setting Briefing Schedule on Suppression Motion</i> filed by Fatou Small. Signed by Judge Leonard P. Stark on 2/2/18. (etg) (Entered: 02/02/2018)
02/07/2018	<u>46</u>	MOTION for Hearing <i>Status Conference</i> by USA as to Fatou Small. (Cloud, Whitney) (Entered: 02/07/2018)
02/07/2018	<u>47</u>	ORDER granting <u>46</u> MOTION for Hearing <i>Status Conference</i> filed by USA. A Status Telephone Conference is set for 2/16/2018 at 08:30 AM before Judge Leonard P. Stark. Time is excluded from 2/7/18 until 2/16/18. Signed by Judge Leonard P. Stark on 2/7/18. (etg) (Entered: 02/07/2018)
02/07/2018	<u>48</u>	BRIEF/MEMORANDUM in Support by Fatou Small re <u>25</u> MOTION to Suppress Evidence (Malik, John) (Entered: 02/07/2018)
02/08/2018	<u>49</u>	BRIEF/MEMORANDUM in Support by Fatou Small re <u>25</u> MOTION to Suppress Evidence [<i>Amended Memorandum</i>] (Attachments: # <u>1</u> Exhibit "A" - State of Delaware v. Marshall Rivers Opinion, # <u>2</u> Exhibit "B" - State of Delaware v. Courtney Benson Opinion)(Malik, John) (Entered: 02/08/2018)
02/16/2018		Minute Entry for proceedings held before Judge Leonard P. Stark - Telephone Conference as to Fatou Small held on 2/16/2018 (Court Reporter B. Gaffigan.) (etg) (Entered: 02/16/2018)
02/16/2018	<u>50</u>	ORAL ORDER: IT IS HEREBY ORDERED that the briefing schedule on <u>25</u> Motion to Suppress Evidence by Fatou Small is modified as follows: Government's Answering Brief shall be due 2/22/2018; Defendant's Reply Brief shall be due 3/5/2018. Ordered by Judge Leonard P. Stark on 2/16/18. (etg) (Entered: 02/16/2018)
02/22/2018	<u>51</u>	BRIEF/MEMORANDUM in Opposition by USA as to Fatou Small re <u>25</u> MOTION to Suppress Evidence and <i>Post-Hearing Briefing</i> (Attachments: # <u>1</u> Exhibit A) (Cloud, Whitney) (Entered: 02/22/2018)
03/05/2018	<u>52</u>	REPLY BRIEF/MEMORANDUM by Fatou Small re <u>25</u> MOTION to Suppress Evidence (Malik, John) (Entered: 03/06/2018)
05/01/2018	<u>53</u>	EXHIBIT re <u>52</u> Reply Brief/Memorandum <i>in Support of Motion to Suppress</i>

		<i>Evidence - DVD Containing Three (3) Digital Photographs to Be Filed with Clerk's Office</i> by Fatou Small (Malik, John) (Entered: 05/01/2018)
05/01/2018		MULTIMEDIA DOCUMENT (DVD) by Fatou Small re <u>53</u> EXHIBIT A re <u>52</u> Reply Brief/Memorandum in Support of <u>25</u> Motion to Suppress Evidence (Media on file in Clerk's Office). (etg) (Entered: 05/01/2018)
05/02/2018	<u>54</u>	MEMORANDUM ORDER as to Fatou Small - <u>25</u> MOTION to Suppress Evidence filed by Fatou Small is DENIED. A Telephone Conference is set for 5/16/2018 at 01:45 PM before Judge Leonard P. Stark. Time is excluded from 5/2/2018 until 5/16/2018. Signed by Judge Leonard P. Stark on 5/2/2018. (etg) (Entered: 05/02/2018)
05/16/2018	<u>55</u>	NOTICE OF ATTORNEY APPEARANCE: Shawn Weede appearing for USA. <i>as Co-Counsel</i> (Weede, Shawn) (Entered: 05/16/2018)
05/16/2018		Minute Entry for proceedings held before Judge Leonard P. Stark - Telephone Conference as to Fatou Small held on 5/16/2018 (Court Reporter D. Hawkins.) (etg) (Entered: 05/16/2018)
05/18/2018	<u>56</u>	ORDER - IT IS HEREBY ORDERED that the government shall file a Joint Status Report on or before 6/15/2018. ORDER TO CONTINUE in the Interests of Justice as to Fatou Small. Time is excluded from 5/16/2018 until 6/15/2018. Signed by Judge Leonard P. Stark on 5/18/18. (etg) (Entered: 05/18/2018)
06/15/2018	<u>57</u>	STATUS REPORT by USA as to Fatou Small (Weede, Shawn) (Entered: 06/15/2018)
06/18/2018	<u>58</u>	ORDER - IT IS HEREBY ORDERED that a Telephone Conference is set for 7/25/2018 at 04:45 PM before Judge Leonard P. Stark. Time is excluded from 6/15/2018 until 7/25/2018. Signed by Judge Leonard P. Stark on 6/18/2018. (etg) (Entered: 06/18/2018)
07/09/2018	<u>59</u>	ORDER - IT IS HEREBY ORDERED that the Teleconference previously scheduled for 7/25/18 at 4:45 p.m. is rescheduled to 7/25/2018 at 03:30 PM before Judge Leonard P. Stark. Signed by Judge Leonard P. Stark on 7/9/2018. (etg) (Entered: 07/09/2018)
07/23/2018	<u>60</u>	ORDER - IT IS HEREBY ORDERED that the telephone conference scheduled for 7/25/2018 at 3:30 PM is cancelled. A Change of Plea Hearing is set for 8/6/2018 at 11:30 AM in Courtroom 6B before Judge Leonard P. Stark. ORDER TO CONTINUE in the Interests of Justice as to Fatou Small. Time is excluded from 7/23/2018 until 8/6/2018. Signed by Judge Leonard P. Stark on 7/23/2018. (etg) (Entered: 07/23/2018)
08/06/2018		Minute Entry for proceedings held before Judge Leonard P. Stark - Change of Plea Hearing held. Plea entered by Fatou Small - Guilty Count 1,2. Plea accepted. Sentencing is set for 11/28/2018 at 01:00 PM in Courtroom 6B before Judge Leonard P. Stark. (Court Reporter B. Gaffigan.) (etg) (Entered: 08/07/2018)
08/06/2018	<u>61</u>	MEMORANDUM OF PLEA AGREEMENT as to Fatou Small (etg) (Entered: 08/07/2018)
08/06/2018	<u>62</u>	Sealed Document (To be maintained on file in Clerk's Office) (etg) (Entered: 08/07/2018)

08/07/2018	<u>63</u>	ORDER SCHEDULING SENTENCING as to Fatou Small. Sentencing is set for 11/28/2018 at 01:00 PM in Courtroom 6B before Judge Leonard P. Stark. Signed by Judge Leonard P. Stark on 8/7/18. (etg) (Entered: 08/08/2018)
11/15/2018	<u>66</u>	SENTENCING MEMORANDUM by Fatou Small (Malik, John) (Entered: 11/15/2018)
11/20/2018	<u>68</u>	Letter to Honorable Leonard P. Stark from Assistant U.S. Attorney Whitney Cloud regarding Governement's Response - re <u>66</u> Sentencing Memorandum filed by Fatou Small. (Cloud, Whitney) (Entered: 11/20/2018)
11/21/2018	<u>69</u>	SENTENCING MEMORANDUM by USA as to Fatou Small (Attachments: # <u>1</u> Exhibit A)(Cloud, Whitney) (Entered: 11/21/2018)
11/21/2018	<u>70</u>	ORAL ORDER: IT IS HEREBY ORDERED that the Sentencing set for 11/28/2018 at 01:00 PM will take place in Courtroom 6A before Judge Leonard P. Stark. Ordered by Judge Leonard P. Stark on 11/21/2018. (etg) (Entered: 11/21/2018)
11/28/2018		Minute Entry for proceedings held before Judge Leonard P. Stark - Status Conference as to Fatou Small held on 11/28/2018. Sentencing will be continued to a date and time to be determined by the court. (Court Reporter B. Gaffigan.) (etg) (Entered: 11/29/2018)
12/10/2018	<u>71</u>	ORDER - IT IS HEREBY ORDERED that a Telephone Conference is set for 12/12/2018 at 09:00 AM before Judge Leonard P. Stark. Signed by Judge Leonard P. Stark on 12/12/2018. (etg) (Entered: 12/10/2018)
12/11/2018	<u>72</u>	ORDER - IT IS HEREBY ORDERED that the Telephone Conference set for 12/12/2018 at 09:00 AM is CANCELLED. Sentencing is set for 12/20/2018 at 09:00 AM in Courtroom 6B before Judge Leonard P. Stark. Signed by Judge Leonard P. Stark on 12/11/2018. (etg) (Entered: 12/11/2018)
12/21/2018	<u>73</u>	ORDER RESCHEDULING SENTENCING as to Fatou Small. Sentencing is continued to 1/10/2019 at 04:00 PM in Courtroom 6B before Judge Leonard P. Stark. Signed by Judge Leonard P. Stark on 12/21/2018. (etg) (Entered: 12/21/2018)
01/10/2019		Minute Entry for proceedings held before Judge Leonard P. Stark - Sentencing held on 1/10/2019. SENTENCE OF THE COURT: Fatou Small - Count 1: 120 MONTHS IMPRISONMENT (TO RUN CONCURRENTLY WITH COUNT 2), 3 YEARS SUPERVISED RELEASE (TO RUN CONCURRENTLY WITH COUNT 2), \$100.00 SPECIAL ASSESSMENT (\$200 TOTAL SPECIAL ASSESSMENT); Count 2: 151 MONTHS IMPRISONMENT (TO RUN CONCURRENTLY WITH COUNT 1), 3 YEARS SUPERVISED RELEASE (TO RUN CONCURRENTLY WITH COUNT 1), \$100.00 SPECIAL ASSESSMENT (\$200.00 TOTAL SPECIAL ASSESSMENT). (Court Reporter B. Gaffigan.) (etg) (Entered: 01/14/2019)
01/25/2019	<u>74</u>	JUDGMENT as to Fatou Small - Count 1: 120 MONTHS IMPRISONMENT (TO RUN CONCURRENTLY WITH COUNT 2), 3 YEARS SUPERVISED RELEASE (TO RUN CONCURRENTLY WITH COUNT 2), \$100.00 SPECIAL ASSESSMENT (\$200 TOTAL SPECIAL ASSESSMENT); Count 2: 151 MONTHS IMPRISONMENT (TO RUN CONCURRENTLY WITH COUNT 1), 3 YEARS SUPERVISED RELEASE (TO RUN CONCURRENTLY WITH COUNT 1), \$100.00 SPECIAL ASSESSMENT (\$200.00 TOTAL SPECIAL ASSESSMENT). Signed by Judge Leonard P. Stark on 1/24/2019. (etg) (Entered: 01/25/2019)

01/25/2019	<u>75</u>	EXHIBIT LIST re Sentencing hearing held as to Fatou Small (etg) (Entered: 01/25/2019)
02/08/2019	<u>76</u>	MOTION to Proceed In Forma Pauperis <i>on Appeal</i> by Fatou Small. (Malik, John) (Entered: 02/08/2019)
02/08/2019	<u>77</u>	NOTICE OF APPEAL of <u>74</u> Judgment, and Order dated May 2, 2018 denying Defendant Small's Motion to Suppress Evidence. Appeal filed by Fatou Small. (Malik, John) (Entered: 02/08/2019)
02/11/2019	<u>78</u>	NOTICE of Docketing Record on Appeal from USCA for the Third Circuit re <u>77</u> Notice of Appeal - Final Judgment filed by Fatou Small. USCA Case Number 19-1344. USCA Case Manager: Marianne. (DOCUMENT IS RESTRICTED AND CAN ONLY BE VIEWED BY COURT STAFF) (mb,) (Entered: 02/11/2019)
02/11/2019	<u>79</u>	ORDER granting <u>76</u> MOTION to Proceed In Forma Pauperis <i>on Appeal</i> filed by Fatou Small. John S. Malik, Esquire is hereby appointed pursuant to the Criminal Justice Act to continue representing Defendant/Appellant Small on appeal. Signed by Judge Leonard P. Stark on 2/11/2019. (etg) (Entered: 02/11/2019)

PACER Service Center			
Transaction Receipt			
05/12/2019 18:00:54			
PACER Login:	jmalik2320:2911580:0	Client Code:	US v. Small, F.
Description:	Docket Report	Search Criteria:	1:17-cr-00027-LPS Start date: 1/1/1970 End date: 5/13/2019
Billable Pages:	8	Cost:	0.80

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
v.)
Fatou SMALL,)
Defendant.)

Criminal Action No. 17-27-UNA

REDACTED

INDICTMENT

The Grand Jury for the District of Delaware charges that:

COUNT ONE

On or about March 7, 2017, in the District of Delaware, the defendant Fatou SMALL, after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in the Superior Court of Delaware, did knowingly possess in and affecting interstate commerce a firearm, that is, a Smith & Wesson .357 caliber Magnum Revolver bearing serial number AYS3896, which had previously been shipped and transported in interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

2017 APR -4 PM 4:06
CLERK U.S. DISTRICT COURT
DISTRICT OF DELAWARE
FILED

COUNT TWO

On or about March 7, 2017, in the District of Delaware, the defendant Fatou SMALL did knowingly possess with intent to distribute a controlled substance, to wit, a mixture and substance containing a detectible amount of 3,4-Methylenedioxymethamphetamine/MDMA [ecstasy], a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C).

NOTICE OF FORFEITURE AS TO COUNT ONE

Pursuant to 18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c), upon conviction of the offense charged in Count One of the Indictment, incorporated herein by reference, the defendant shall forfeit to the United States of America all proceeds or other property, real or personal, used or intended to be used, in any manner or part, to commit, or to facilitate the commission of the offense set forth in Count One of this Indictment, including, but not limited to, a Smith & Wesson .357 Magnum Revolver bearing serial number AYS3896, seized on March 7, 2017.

NOTICE OF FORFEITURE AS TO COUNT TWO

Pursuant to 21 U.S.C. § 853, upon conviction of the offense charged in Count Two of the Indictment, incorporated herein by reference, the defendant shall forfeit to the United States of America all proceeds or other property, real or personal, used or intended to be used, in any manner or part, to commit, or to facilitate the commission of the offense set forth in Count Two of the Indictment, including, but not limited to, \$1,131.00 seized on March 7, 2017.

If any of the property described above, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third party;
- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty; then,

the United States of America shall be entitled to forfeiture of substitute property pursuant to 21 U.S.C. § 853(p).

A TRUE BILL:

Foreperson

DAVID C. WEISS
ACTING UNITED STATES ATTORNEY

By: Whitney C. Cloud
Whitney C. Cloud
Assistant United States Attorney

Dated: April 4, 2017

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA, :
:
Plaintiff, :
:
v. : Cr.A. No. 17-CR-027-LPS
:
FATOU SMALL, :
:
Defendant. :
:

**MOTION TO SUPPRESS EVIDENCE OF
DEFENDANT FATOU SMALL**

COMES NOW, Defendant Fatou Small, by and through his attorney, John S. Malik, and hereby respectfully requests that this Honorable Court enter an Order suppressing from use as evidence at trial all evidence seized from Defendant Small, his Lincoln Town Car automobile, and his residence at 805 Bacon Avenue, Dover, Delaware as well as all statements taken from Defendant Small by law enforcement officers on March 7, 2017, based upon the following grounds:

1. On March 7, 2017, at approximately 4:30 P.M., Dover Police Officers Boesenber and Richey and Delaware Probation and Parole Officer Porter were on “routine patrol” on Bacon Avenue in Dover, Delaware when they observed a black Lincoln Town Car parked at 805 Bacon Avenue that was occupied by Defendant Fatou Small in the driver’s seat and an unidentified person sitting in the passenger seat. The vehicle was running and appeared as if it was preparing to depart from 805 Bacon Street.

2. Dover Police Officers Boesenber and Richey and Delaware Probation and Parole Officer Porter left the area of Bacon Avenue in their patrol car and while

traveling southbound on Nimitz Avenue passed by Defendant Smalls' Lincoln Town Car, which was traveling in a northbound direction.

3. Allegedly, Dover Police Officers Boesenber and Richey and Delaware Probation and Parole Officer Porter observed what they described as a "severely broken" or "severely cracked" windshield on Defendant Smalls' Lincoln Town Car.

4. A mobile video recorder, ("MVR"), from the officer's patrol car captured video footage of the patrol car passing Defendant Small's Lincoln Town Car on Nimitz Avenue. The video shows that it took only seconds for the patrol car and Defendant Small's Lincoln Town Car to pass and does not indicate that the windshield of the Lincoln Town Car was cracked or broken.¹

5. The officers relate in their respective reports that the "severely" cracked or broken windshield on the Town Car constituted a motor vehicle violation and provided probable cause for the warrantless stop of Defendant Small's vehicle

6. It is submitted that the barely visible hairline crack in the windshield of Defendant Small's Lincoln Town Car, when stationary, would not have been visible to an observer passing the vehicle in the opposite direction in a matter of mere seconds and that, consequently, there existed no probable cause to conduct a warrantless stop of Defendant Small's vehicle.

7. All evidence seized from Defendant Smalls' vehicle must be suppressed as fruit of the poisonous tree.

¹ Still close-up photographs of the Lincoln Town Car in a stationary, parked position after it was stopped by the officers show that a hairline crack in the windshield of the vehicle is barely visible when observed in a photograph taken of the windshield of the Town Car outside of the car and that the hairline crack is only slightly visible in a photograph taken from inside of the Town Car. [See photographs of Town Car attached hereto as Exhibit "A".]

WHEREFORE, Defendant Fatou Small respectfully requests that this Honorable Court grant Defendant Small's Motion to Suppress Evidence.

Respectfully submitted,

/s/ John S. Malik
JOHN S. MALIK
100 East 14th Street
Wilmington, Delaware 19801
302-427-2247
Attorney for Defendant,
Fatou Small

Dated: August 17, 2017

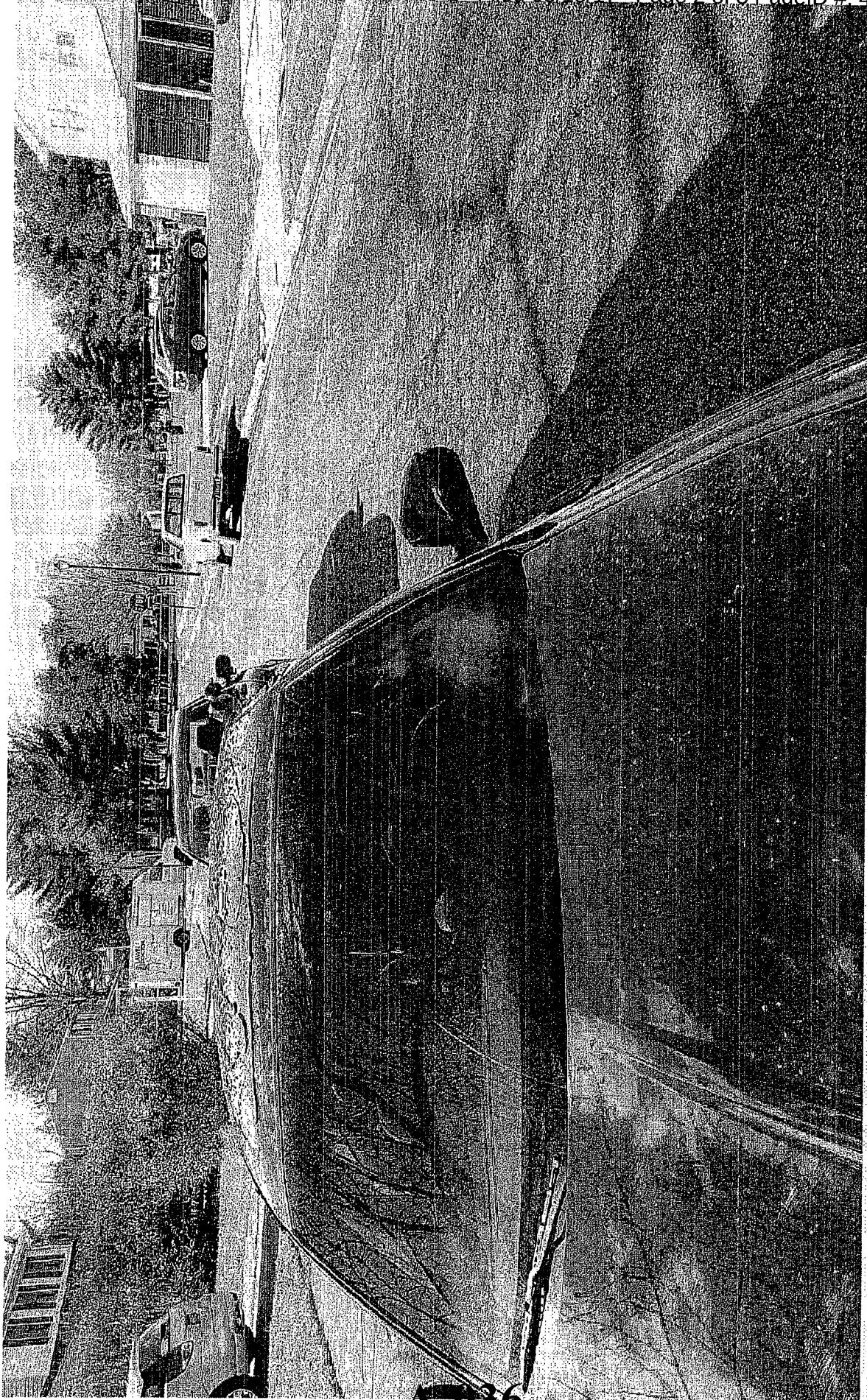
EXHIBIT “A”

A-034



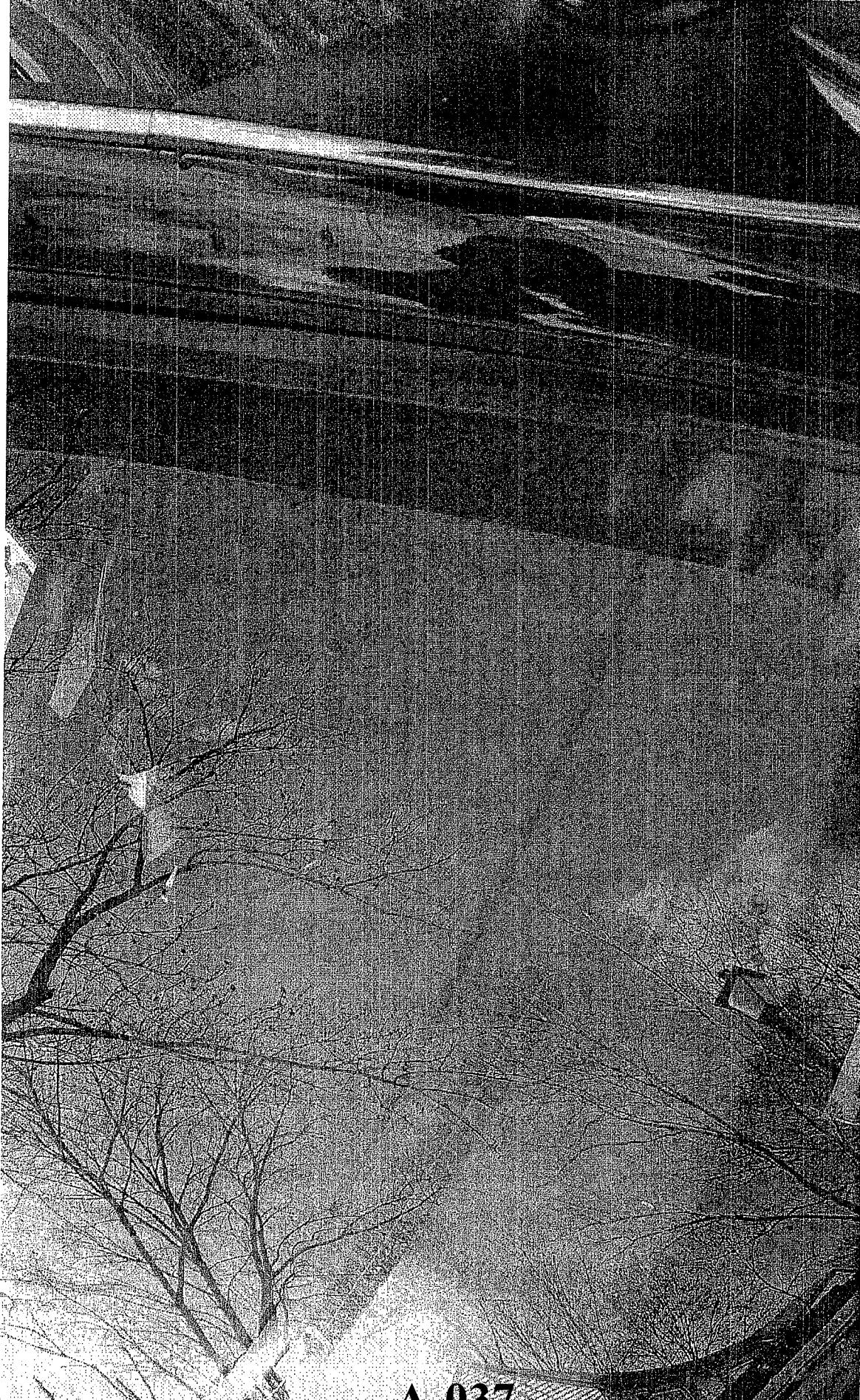
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A-037

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
Plaintiff, :
v. : Cr.A. No. 17-CR-027-LPS
FATOU SMALL, :
Defendant. :

ORDER

AND NOW, TO WIT, this _____ day of _____, A.D., 2017,
Defendant Fatou Small's Motion to Suppress Evidence having been duly considered,

IT IS SO ORDERED:

That all evidence seized from Defendant Small's person, Lincoln Town Car automobile, and residence at 805 Bacon Avenue, Dover, Delaware on March 7, 2017 and all evidence seized from Defendant Smalls' cell phone on or after March 7, 2017; and, all statements taken from Defendant Small on March 7, 2017 are hereby suppressed from use as evidence at trial since insufficient probable cause existed for the stop of Defendant Small's vehicle on March 7, 2014 and all evidence seized and statements taken there after constituted "fruit of the poisonous tree".

THE HONORABLE LEONARD P. STARK

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA, :
:
Plaintiff, :
:
v. : Cr.A. No. 17-CR-027-LPS
:
FATOU SMALL, :
:
Defendant. :
:

CERTIFICATE OF SERVICE

I, John S. Malik, attorney for Defendant Fatou Small, do hereby certify that on this 14th day of August, A.D., 2017, I have had the attached Motion to Suppress Evidence electronically delivered to the individual(s) listed below at the following address(es):

Whitney Cloud, Esquire
Assistant United States Attorneys
United States Attorney's Office
Nemours Building
1007 Orange Street, Suite 700
Wilmington, Delaware 19801

/s/ John S. Malik
JOHN S. MALIK
ID No. 2320
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Defendant,
Fatou Small

UNITED STATES DISTRICT COURT

DISTRICT OF

DELAWARE

UNITED STATES OF AMERICA

EXHIBIT AND WITNESS LIST

V.

FATOU SMALL

Case Number: 17-27-LPS

* Include a notation as to the location of any exhibit not held with the case file or not available because of size.

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 - - -

4 UNITED STATES OF AMERICA, : CRIMINAL ACTION
5 Plaintiff, :
6 v. :
7 FATOU SMALL, :
8 Defendant. : NO. 17-27-LPS

9 - - -

10 Wilmington, Delaware
11 Wednesday, January 3, 2018
12 Motion to Suppress Hearing

13 - - -

14 BEFORE: HONORABLE LEONARD A. STARK, Chief Judge

15 - - -

16 APPEARANCES:

17 UNITED STATES ATTORNEY'S OFFICE
18 BY: WHITNEY CLOUD, ESQ.,
19 And, SHAWN WEEDE, ESQ.
20 Assistant United States Attorneys

21 Counsel for Government

22 LAW OFFICE OF JOHN S. MALIK
23 BY: JOHN S. MALIK, ESQ.

24 Counsel for Defendant

25 Brian P. Gaffigan
Registered Merit Reporter

1 - oOo -

2 P R O C E E D I N G S

3 (REPORTER'S NOTE: Motion to suppress hearing
4 was held in open court, beginning at 3:35 p.m.)

5 THE COURT: Good afternoon.

6 MR. MALIK: Good afternoon, Your Honor.

7 MS. CLOUD: Good afternoon, Your Honor. Whitney
8 Cloud representing the United States. And also with me the
9 a counsel table is Task Force Officer, Christopher
10 Baumgartner with the ATF, Assistant United States Attorney,
11 Shawn Weede and Ms. Tracy Busch who is also with the U.S.
12 Attorney's Office.

13 Now is the time that the Court has set for the
14 suppression hearing in the United States v Fatou Small,
15 Criminal Action 17-27-LPS. The defendant, Mr. Small and his
16 counsel, Mr. Malik are now present, and the government is
17 ready to proceed.

18 THE COURT: Thank you very much. And good
19 afternoon, Mr. Malik.

20 MR. MALIK: Good afternoon.

21 THE COURT: Mr. Small.

22 Mr. Malik, are you prepared to proceed as well?

23 MR. MALIK: Yes, I am, Your Honor. Thank you.

24 THE COURT: I think the first order of business
25 is what we are doing by proceeding. We did receive your

1 motion for continuance as well as the government's
2 opposition and I indicated in an e-mail to you all yesterday
3 that we would go forward but that you would have a chance
4 to talk about what going forward means. So if you want to
5 suggest anything other than that we just go forward, now
6 would be the time to argue that.

7 MR. MALIK: Your Honor, I know my motion was
8 filed under seal, as was the government's, so I don't really
9 want to say too much at this point because of the nature of
10 the issues raised in the motion, but there were documents
11 that were produced to me and they were related to the motion
12 that I had filed.

13 THE COURT: Well, let me stop you there. We can
14 talk at sidebar.

15 MR. MALIK: Yes, Your Honor.

16 THE COURT: I think I'm first just looking for
17 not necessarily at the substance of why you are making the
18 request but do you at this point have a request as you did
19 yesterday?

20 MR. MALIK: Not to go forward. No, Your Honor,
21 I do wish to go forward.

22 THE COURT: You do wish to go forward.

23 MR. MALIK: Yes, Your Honor. Yes.

24 THE COURT: Okay. That said, do you have your
25 subsidiary request or I guess it was the government's

1 request about how certain evidence could be used or not
2 used? Do you have any other requests for relief other than
3 the suppression itself?

4 MR. MALIK: Your Honor, there is -- I briefly
5 discussed this with Ms. Cloud and Mr. Weede and I may have
6 some requests based on how the evidence goes. If we could
7 address those now or we could address them if, and when,
8 they come up. That is why I don't want to get into the
9 substance speaking from the podium to Your Honor because of
10 the nature of those issues.

11 THE COURT: Well, let me hear what the
12 government has to say, and we'll decide if we can wait to
13 hear the rest of it.

14 MR. MALIK: Thank you, Your Honor.

15 THE COURT: Ms. Cloud.

16 MS. CLOUD: Your Honor, the government certainly
17 wishes to go forward today. In reference to the materials
18 submitted under seal, the government does stand by its
19 request and hopes the Court will enter without objection
20 by the defendant for a protective order relating to any
21 materials that are discussed or introduced.

22 As for the format of today's hearing and whether
23 those issues should be decided now or later, the government
24 would request some argument on it sooner rather than later
25 as it impacts the nature of how the government wishes to

1 present its case, depending on the Court's ruling and the
2 defense's strategy.

3 THE COURT: Okay. Thank you.

4 MS. CLOUD: Thank you.

5 THE COURT: So, Mr. Malik, first off, the
6 protective order, is there any objection to that?

7 MR. MALIK: None whatsoever.

8 THE COURT: So I hereby grant the government's
9 unopposed request for protective order and we'll sign the
10 order that was submitted.

11 I think what is best now is to have a discussion
12 at sidebar with counsel and we can see if we can figure out
13 the issues that you are all alluding to.

14 (Following portion ordered sealed by the Court,
15 bound separately.)

16 THE COURT: All right. Mr. Malik, go ahead.

17 MR. MALIK: Your Honor, just as an evidentiary
18 issue to preface the beginning of the hearing, Your Honor.

19 There were two decisions that were from the
20 Superior Court of the State of Delaware in Kent County that
21 involved either both Officer Boesenberg and Officer Porter,
22 and they related to vehicle stops and they related to issues
23 regarding whether there was a factual basis to stop a
24 vehicle based upon an alleged observable traffic violation
25 and one of the cases was *State of Delaware v Marshall*

1 Rivers, and that was decided in April of 2016 by Judge
2 Witham. And there was a second decision, just really a
3 bench decision, a transcript of about five or six pages of
4 a ruling that was given by Judge Clark, a Superior Court
5 Judge in Kent County on the suppression motion, once again
6 involving the stop of the vehicle based upon an alleged
7 observable traffic violation.

8 I believe there may be relevancy to the facts of
9 those cases based upon what the officer or officers claim
10 they observed as the basis for stops for both of those
11 cases. I think that they shed some light on the claimed
12 basis for the stop in this instance where there was this
13 severely cracked windshield that allegedly was observed. I
14 would offer that the cases up Your Honor to the Court to
15 consider.

16 I don't know that I would be asking any specific
17 questions of the officers about them. And I would submit to
18 argue at the end of the case but I know we discussed this
19 briefly beforehand, and I wanted to alert the Court that
20 there are two cases that I wish to present, and I think the
21 Government has some objections to that so I wanted to give
22 them an opportunity to make the objections and the Court to
23 rule.

24 THE COURT: All right. Let me hear the
25 government's objections, please.

1 MS. CLOUD: Yes, Your Honor. The government
2 was aware of the *Marshall Rivers* case, having independently
3 found that. We just have been made aware of the *Delaware*
4 *v Courtney Benson*. In both of these cases, which we have
5 had an opportunity to review, there is no credibility
6 determination. There is no adverse credibility
7 determination as to Officer Boesenber. The Court heard
8 evidence and ended up ruling as occasionally courts do
9 that in the Court's opinion, the evidence did not provide
10 a reasonable basis, it did not at any point find Officer
11 Boesenber incredible. For that reason, the government
12 submits that under the Rules of Evidence, there is no basis
13 under the Rules of Evidence to question Officer Boesenber
14 regarding these extrinsic matters.

Under 608, under Rule 608 which generally goes to character evidence of a witness, a defendant can cross-examine a government witness regarding matters probative of truthfulness but seeing as neither court found Officer Boesenbergs incredible or untruthful, we're not clear why this would be relevant under 608.

21 THE COURT: I haven't seen the cases, but as I
22 think about the case in front of me, I at least understand
23 the argument that I'm going to hear from the government but
24 tell me if this is wrong to be that you believe Officer
25 Boesenborg, he and his colleague saw a hairline crack in the

1 windshield and therefore there was reasonable suspicion. If
2 you don't believe him, then we didn't have any basis to pull
3 the car over. Is that a fair characterization of the
4 argument that you are going to make here?

5 MS. CLOUD: That is a fair characterization.

6 There is an alternative argument. But for today's purposes,
7 likely --

8 THE COURT: So assuming --

9 MS. CLOUD: -- it's credibility.

10 THE COURT: So assuming the government's
11 argument, is there any way I could rule against the
12 government while still believing the testimony that I'm
13 about to hear?

14 MS. CLOUD: No, Your Honor. If you find, if you
15 believe the testimony of Officer Boesenberg or any of the
16 officers -- and/or the other officers, then, yes, the Court
17 should rule in the defendant's favor.

18 THE COURT: Because it follows from that that
19 if I were to grant the suppression motion based on the
20 testimony, that I either explicitly or implicitly made a
21 credibility determination that the witness in front of me
22 was not truthfully telling me what he observed.

23 MS. CLOUD: Your Honor, perhaps. That is
24 probably the most likely scenario, although, again, this is
25 not before Your Honor right now, but in looking at *State of*

1 *Delaware v Courtney Benson* -- and I'm happy to provide the
2 Court with my copy.

3 THE COURT: I don't need it yet.

4 MS. CLOUD: The Court in that case found -- did
5 not find Officer Boesenberg to be incredible but based on
6 its observation of the videotape evidence disagreed with the
7 basis for the stop.

8 THE COURT: Okay.

9 MS. CLOUD: So I think there are -- this is a
10 long-winded way of saying I think there are matters in which
11 the Court could grant the suppression motion but not
12 necessarily find the officer incredible.

13 THE COURT: So then we're about to call Officer
14 Boesenberg.

15 The government is asking me not to permit Mr.
16 Malik to even ask him questions about these other two cases
17 or is your position something different than that?

18 MS. CLOUD: Your Honor, yes, I think our
19 position is there is no -- because there is no credibility
20 finding, there is no character for untruthfulness evidence
21 within these two cases, there has not been a relevant basis
22 for questioning Officer Boesenberg as to them.

23 THE COURT: Okay. Thank you. Mr. Malik, is
24 there anything you want to add?

25 MR. MALIK: Your Honor, I just wanted to add that

1 when you have these types of issues, they're very difficult
2 because all of us have tremendous respect for law enforcement
3 and in a case like this, I think that Your Honor had
4 crystallized the issue. If you look at the videos, if you
5 look at the photographs, if you hear the testimony as the
6 fact-finder which is Your Honor and conclude that the State
7 has not established beyond a preponderance of the evidence
8 that there was a reasonable suspicion that there was a traffic
9 violation, the Court can rule in our favor. And I think that
10 that rejects the claim of Officer Boesenberge that he was able
11 to observe this crack in the windshield.

12 The cases that I suggested to the Court, the
13 *Courtney Rivers* case and the other case was *State v* -- I'm
14 sorry -- the *Marshall Rivers* case and the case of *State v*
15 *Courtney Benson*, both involve situations. One was whether or
16 not there was a license plate illumination light that was
17 operative. That was the basis for the stop. The officer
18 testified it was and Judge Clark ruled that based upon his
19 observation of an NVR video that it was not because when the
20 vehicle made a left-hand turn, the license plate didn't stay
21 illuminated because of the headlights from the police car but
22 it was illuminated by the light that was above the license
23 plate and on that basis granted the suppression motion.

24 And then similarly, in the case of *Marshall*
25 *Rivers*, there was a finding by Judge Witham that it was

1 unlikely that Officer Boesenberg would have been unable to
2 observe what was in the pocket of a passenger occupying a
3 full-size Chevy pickup truck when approaching it behind in
4 poor lighting conditions but with a flashlight and he
5 basically said while it is implausible for it to be
6 observed, I'm not finding it impossible but the evidence,
7 the weight of the evidence does not support the conclusion
8 that this was something was observed.

9 So I think unfortunately it is a decision as to
10 whether the testimony of the officers is accepted or not.
11 In both of the cases that I referred to, the courts very
12 diplomatically addressed and touched upon that issue. I
13 think it is the same thing we have here, and for those
14 reasons I think those cases are relevant.

15 I don't know how much purpose is going to be
16 served from my questioning Officer Boesenberg about that,
17 but. I submit to the Court it was my intention to have the
18 Court review those at the conclusion of the hearing.

19 THE COURT: Okay.

20 MR. MALIK: Thank you.

21 THE COURT: Thank you. Well, certainly the easy
22 part is I will permit defense to present those cases. I do
23 want a chance to review them before I make a decision on the
24 merits of the motion. I suppose it is possible that I might
25 be in a position to make a decision today but it's also

1 possible you are going to want briefing following the
2 evidentiary presentation today. But either way, I will not
3 make a decision on the motion without at least reviewing
4 those opinions. I don't see any reason not to review them.

5 But further, if the defendant believes he has
6 got a good faith basis to ask questions on cross-examination
7 of Officer Boesenberg on them, I don't find that to be
8 improper based on what I understand of those two cases. I
9 take it I won't find any explicit credibility determination
10 in those other cases but there is, at least it seems to me
11 from what you have told me about the cases, a basis to find
12 that there might have been some implicit credibility
13 determination adverse to the witness. And I think that that
14 would allow for permissible cross-examination consistent
15 with the Rules of Evidence. So I'm going to permit that
16 examination if defense wishes to do it.

17 Anything else before we call the witness,
18 Mr. Malik?

19 MR. MALIK: Nothing from the defense, Your
20 Honor. Thank you.

21 THE COURT: Ms. Cloud.

22 MS. CLOUD: Your Honor, one quick matter before
23 the government begins. The government, based on defendant's
24 motion to suppress the evidence, is limiting its examination
25 to the basis for the initial stop. As was probably clear

1 from reports that were submitted and certainly from the
2 full extent of the car video, there were other events that
3 happened after the stop, but as I just stated, based on the
4 defendant's suppression motion, we are limiting our direct
5 examination and would hope that the defendant's examination
6 would also be limited to the initial basis for the stop and
7 not subsequent events.

8 THE COURT: All right. Mr. Malik, any concerns
9 about that?

10 MR. MALIK: Nothing good happened after the stop
11 so you can rest assured I don't plan to get into that. I
12 have a very narrow issue here, and that is all I intend to
13 present and focus upon.

14 THE COURT: My understanding is there is a fruit
15 of the poisonous tree argument but it seemed to me not
16 disputed between the parties that if the stop was supported
17 under the law, then the suppression motion should be denied
18 in full whereas if the stop is not supported by the law and
19 the suppression motion should be granted in full. Is that
20 your understanding?

21 MR. MALIK: It's true, Your Honor, because one
22 of the things that the Court will find out is Mr. Small was
23 on probation and there are things that can be done after the
24 stop, such as further search of the house and search the
25 vehicle. So, no, it is a very narrow issue, the stop, fruit

Boesenber - direct

1 of the poisonous tree. Beyond that, I don't intend to argue.

2 THE COURT: Do you agree with that?

3 MS. CLOUD: Yes, Your Honor.

4 THE COURT: Let's call the officer.

5 MS. CLOUD: The government calls officer Joshua
6 Boesenber to the stand.

7 ... DETECTIVE JOSHUA BOESENBERG, having been
8 first duly sworn, was examined and testified as follows ...

9 THE COURT: Welcome, good afternoon. Officer
10 Boesenber.

11 THE WITNESS: Good afternoon, Your Honor.

12 THE COURT: You may proceed.

13 DIRECT EXAMINATION

14 BY MS. CLOUD:

15 Q. Good afternoon, Detective Boesenber.

16 A. Good afternoon.

17 Q. Can you please state your position of employment for
18 the record?

19 A. I work with the City of Dover Police Department in
20 the Drug, Vice, and Organized Crime Unit.

21 Q. How long have you been an officer with the Dover
22 Police Department?

23 A. I've been with the Dover Police Department for nine
24 years. Prior to that, I was with the Camden Police
25 Department for three years.

Boesenber - direct

1 Q. In your capacity as a police officer, do you ever
2 have occasion to work with officers from the Dover Probation
3 Department?

4 A. Yes.

5 Q. Were you a part of the Operations Safe Street Task
6 Force?

7 A. Yes, I was, prior to my current position as a detective.

8 Q. When did you achieve your current position as a
9 detective?

10 A. In September of 2016.

11 Q. When?

12 A. 17, sorry.

13 Q. 2017?

14 A. Yes.

15 Q. Thank you. When did you begin your work with
16 Operation Safe Streets?

17 A. In 2014.

18 Q. So 2014 through September 2017?

19 A. Yes.

20 Q. Can you briefly describe your involvement with
21 Operation Safe Streets Task Force?

22 A. Operation Safe Streets has to proactively patrol high
23 crime areas and assist Probation and Parole with ensuring
24 compliance, probation conditions set by the Court.

25 Q. Detective Boesenber, are you familiar with an

Boesenber - direct

1 individual by the name of Fatou Small?

2 A. Yes, I am.

3 Q. Do you see Mr. Small in the courtroom today?

4 A. Yes, I do. He is sitting next to Mr. Malik at
5 defense counsel's table.

6 MS. CLOUD: Your Honor, for the record, we would
7 like to note that Detective Boesenber has identified the
8 defendant, Fatou Small.

9 THE COURT: That is so noted.

10 BY MS. CLOUD:

11 Q. Detective Boesenber, how are you familiar with Fatou
12 Small?

13 A. He became a person of interest in a drug
14 investigation in September of 2016.

15 Q. To your knowledge, was Mr. Small on probation in
16 September of 2016?

17 A. Yes.

18 Q. Do you know whether Mr. Small listed an address of
19 residence for the purposes of his probation?

20 A. Yes.

21 Q. Do you know what address he listed?

22 A. 805 Bacon Avenue, Dover, Delaware.

23 Q. On the evening of September 8th, 2016, were you on
24 duty with Operation Safe Streets?

25 A. Yes.

Boesenber - direct

1 Q. Who did you work with that evening?

2 A. Officer Rick Porter and Corporal Justin Richey.

3 Q. Did the three of you visit 805 Bacon Avenue in Dover,
4 Delaware on September 8th, 2016?

5 A. Yes.

6 Q. When approximately did you arrive at the house?

7 A. It would have been after 2200 hours, 10:00 o'clock at
8 night for a curfew check.

9 Q. Why did you go to 805 Bacon Avenue that evening?

10 A. For the specific intention of contacting Fatou Small,
11 who is a probationer, in a curfew compliance check.

12 Q. When you arrived at 805 Bacon Avenue for the purpose
13 of the curfew compliance check on September 8th, 2016, did
14 you observe anything?

15 A. I did. There was a subject, male subject seen
16 leaving that residence upon our arrival. That subject
17 entered the vehicle. He was contacted by Officer Porter, at
18 which time the subject fled in that vehicle after backing
19 over a curb.

20 Q. What happened after the individual fled?

21 A. We pursued that subject, ended up in a vehicle
22 collision. He was arrested. The subject was arrested.
23 Officer Porter then returned to the residence with other
24 Safe Street Officers.

25 Q. Did Officer Porter tell you, relate to you anything

Boesenber - direct

1 **that happened after he returned to the residence --**

2 **A. Yes.**

3 **Q. -- that evening?**

4 **A. Yes. He relayed to me that he arrived at the**
5 **residence at 805 Bacon Avenue, knocked on the door, wasn't**
6 **greeted by anybody, no answer and heard a male voice inside**
7 **the residence. And also that he observed a black Lincoln**
8 **Town Car in the driveway but nobody else was there.**

9 **Q. At some time later in September 2016 or soon**
10 **thereafter, did you develop a confidential informant?**

11 **A. Yes.**

12 **Q. Did that confidential informant tell you anything**
13 **with respect to Mr. Small?**

14 **A. Yes. He advised me that Fatou Small was in the**
15 **Dover area in possession of ecstasy and heroin for sale and**
16 **further that Fatou Small was a large supply of ecstasy in**
17 **Dover, Delaware area.**

18 **Q. Did that informant provide information with respect**
19 **to other cases as well?**

20 **A. Yes.**

21 **Q. Did that informant prove to be reliable with respect**
22 **to information provided as to other cases?**

23 **A. Yes.**

24 **Q. Did you speak with the informant more than once**
25 **regarding Mr. Small?**

Boesenber - direct

1 A. Yes.

2 Q. Do you remember the dates that you spoke with him?

3 A. I do not.

4 Q. How many times would you estimate that you spoke with
5 the informant regarding Mr. Small?

6 A. I would say approximately five to six times.

7 Q. Did you have any personal attempt to contact with
8 Mr. Small between September 2016 and March 7, 2017.9 A. Yes. While I was working with Operation Safe
10 Streets, Officer Porter also tried to contact Fatou Small at
11 his residence on several other occasions but the results of
12 them were also negative.13 Q. Moving forward to March 7, 2017. Were you on duty
14 that day?

15 A. Yes.

16 Q. With whom were you working?

17 A. Officer Rick Porter and Corporal Justin Richey.

18 Q. Were you in a vehicle that afternoon?

19 A. Yes, I was in an unmarked Dover Police Patrol vehicle.

20 Q. Were the other officers with you in that vehicle?

21 A. Yes.

22 Q. Officers Porter and Richey?

23 A. Yes.

24 Q. Where were you sitting in the vehicle?

25 A. I was driving the vehicle.

Boesenber - direct

1 Q. Did you drive in the direction of 805 Bacon Avenue
2 that day?

3 A. Yes, I did.

4 Q. What time approximately did you arrive at 805 Bacon
5 Avenue?

6 A. It was in the afternoon, 3:00 or 4:00 o'clock in the
7 afternoon, approximately.

8 Q. Did you observe anything at 805 Bacon Avenue?

9 A. I did.

10 Q. What did you observe?

11 A. I observed a black Lincoln Town Car, similar to the
12 one we had seen that night, September, and threw out that
13 information we had about the black Lincoln Town Car sitting
14 in the driveway and the subject was sitting inside the
15 vehicle. The vehicle was running.

16 Q. Now, you just mentioned that you received other
17 information regarding the black Lincoln Town Car besides the
18 September 2016 observation. Can you elaborate?

19 A. It was the information that I had received from
20 Officer Porter about the black Lincoln Town Car he had seen.

21 Q. Okay. So you just, you just mentioned that there was
22 someone sitting in the vehicle and the vehicle was running;
23 is that correct?

24 A. Yes, that's correct.

25 Q. How far away from the car were you approximately when

Boesenber - direct

1 you observed it running in the driveway?

2 A. There was a, Nimitz Road has a turnoff there, it's an
3 intersection at the intersection of Nimitz and Bacon. I was
4 around Nimitz Road when I observed that vehicle in the
5 driveway.

6 MS. CLOUD: Your Honor, may I approach the
7 witness with an exhibit?

8 THE COURT: You may.

9 (Document passed forward.)

10 BY MS. CLOUD:

11 Q. Detective Boesenber, I just handed you an exhibit I
12 had premarked as Government Exhibit 1. Officer Boesenber,
13 can you identify this exhibit?

14 A. Yes. It's the area that I was just referring to.

15 Q. Does it appear to be a map?

16 A. It does.

17 MS. CLOUD: Your Honor, I will submit that this
18 is an image from Google Maps of the area of Bacon Avenue and
19 Nimitz Road.

20 THE COURT: Are you offering it into evidence?

21 MS. CLOUD: I would like to offer that into
22 evidence.

23 MR. MALIK: I have no objection to that.

24 THE COURT: Exhibit 1 is admitted.

25 (GX-1 was admitted into evidence.)

Boesenber - direct

1 MS. CLOUD: Your Honor, permission to publish
2 the exhibit.

3 THE COURT: Certainly.

4 MS. CLOUD: Thank you.

5 officer Boesenber, on the screen is the map
6 that I just handed to you as Exhibit 1.

7 Your Honor, permission to the approach the
8 witness again.

9 THE COURT: You may freely approach.

10 BY MS. CLOUD:

11 Q. Detective Boesenber, I offered you a clicker, hoping
12 it will work.

13 Can you point out where approximately your car
14 was when you saw the car running in the driveway?

15 A. Around here (indicating).

16 Q. And do you recall where 805 Bacon Avenue is?

17 A. It was on the left-hand side up here (indicating).

18 Q. Okay. After you saw the car running in the driveway,
19 what happened next?

20 A. Well, I'll show it with the clicker. Myself, Officer
21 Porter, who is the backseat, in the rear seat behind me, we
22 turned right on to Nimitz Road here and began travel
23 southbound.

24 Q. Officer Boesenber, did you take any other actions
25 other than turning on to Nimitz Road upon seeing the car?

Boesenber - direct

1 A. We did. What we did, it was more of a tactical
2 action. We didn't let Fatou Small know that we were in that
3 area. We came down to this area, it may have been Miller
4 Drive here. There was another road in here, I believe it
5 was the first one.

6 Q. Officer, or Detective Boesenber, did you call for
7 backup to report to 805 Bacon Avenue?

8 A. Yes. When we went down Nimitz Road and turned
9 around, we called for undercover surveillance officers
10 to respond to that area and put an eye on the residence
11 and the vehicle that we observed in the driveway to see if
12 Fatou Small was in the vehicle or left the residence.

13 Q. Now, I believe you testified that you turned right
14 on Nimitz Road and traveled southbound. At some point,
15 did you turn around to travel northbound on Nimitz Road?

16 A. Once we realized the undercover officers weren't
17 going to be in the area immediately, we wanted to keep
18 eyes on the residence, so we called and turned around and
19 traveled back northbound on Nimitz Road.

20 Q. Were you looking for Mr. Small?

21 A. Yes.

22 Q. Why were you looking for Mr. Small?

23 A. Specifically not just this day but over the course
24 of September to March, it was an active drug investigation
25 and he was -- Probation Parole had wanted to confirm his

Boesenber - direct

1 residence. He was a person of interest to Officer Rick
2 Porter who I work with, a partner.

3 Q. Did you pass any vehicles as you headed northbound on
4 Nimitz Road?

5 A. I did.

6 Q. Did you pass two vehicles or how many vehicles?

7 A. I passed one, and then the second vehicle was the
8 black Lincoln Town Car that we had seen in the driveway.

9 Q. When you passed the black Lincoln Town Car, how fast
10 did you think your vehicle was driving?

11 A. I'd say 15 to 20 miles an hour.

12 Q. How did you recognize the black Lincoln Town Car?

13 A. It was the same vehicle that was sitting inside of
14 the residence's driveway at 805 Bacon Avenue.

15 Q. As you passed the vehicle, you were able to identify
16 that it was a black Lincoln Town Car?

17 A. I was able to see it from the front that it was the
18 same vehicle, yeah.

19 Q. As you passed the vehicle, did you observe anything
20 else about it?

21 A. I observed that the front windshield was cracked.

22 Q. Were you able to recognize any persons in the
23 vehicle?

24 A. When the vehicle drove southbound on Nimitz Road
25 past my vehicle that was northbound, I observed that the

Boesenber - direct

1 **driver was Fatou Small who I was familiar with from a prior**
2 **photograph.**

3 **Q. Did you see any other persons in the vehicle?**

4 **A. I did. There was a front seat passenger.**

5 **Q. Officer Boesenber, can you describe Nimitz Road in**
6 **terms of surroundings?**

7 **A. Nimitz Road is a two lane roadway. It is unmarked**
8 **with no center line. It's a residential neighborhood,**
9 **25 miles an hour, surrounded by single family homes.**

10 **Q. Well, did you just say that the speed limit was**
11 **25 miles per hour?**

12 **A. It's a 25 miles per hour residential neighborhood.**

13 **Q. And no marked lines of traffic but two, one going in**
14 **each direction; is that fair?**

15 **A. That's fair.**

16 **Q. After you saw the crack in the vehicle, did you have**
17 **a conversation with any of the other officers in the vehicle**
18 **regarding it?**

19 **A. I stated that the vehicle's windshield was cracked**
20 **and those officers also observed that the windshield was**
21 **cracked and advised me verbally the same thing.**

22 **Q. What happened after you observed that the windshield**
23 **was cracked?**

24 **A. Once we observed this, the other officers and myself**
25 **were still in the same vehicle, we turned, began to turn**

Boesenber - direct

1 around while having the conversation that was Fatou Small,
2 and they also in turn observed Fatou Small, had that
3 conversation. We then traveled southbound to catch up to
4 the black Lincoln Town Car.

5 Q. In the course of your work as a Dover Police officer
6 and previously as a Camden police officer, have you stopped
7 other cars for crashed windshields?

8 A. Yes.

9 Q. Approximately, how many times?

10 A. I'd say approximately 100 times. Approximately 100.

11 Q. Was your work in Camden different at all from your
12 work in Dover?

13 A. Yes, it was. The work in Camden was more a
14 traffic-based agency than where I am now.

15 Q. Would you say that you had occasion to pull over cars
16 for cracked windshields in Camden frequently?

17 A. Yes.

18 Q. What is significant about a cracked windshield in
19 your experience?

20 A. It's a motor vehicle violation, a violation of Title
21, the Motor Vehicle Code.

22 Q. Which sections of Title 21?

23 A. 4312, 4313 covers safety glass.

24 Q. In your experience, working with Operation Safe
25 Streets, do you pull over every car with a crack in the

Boesenber - direct

1 **windshield?**2 A. **No.**3 Q. **What would you describe is a severely broken**4 **windshield?**5 A. **One that could be seen. That from my point of view**
6 **from our vehicle, what I saw that day, it was clearly**
7 **visible, enough to cause a safety issue. Something that can**
8 **be seen. It doesn't look very sturdy.**9 **MS. CLOUD: Your Honor, I would like to display**
10 **the beginning of a video which I have premarked as Exhibit 2**
11 **on the screen with the Court's permission.**12 **THE COURT: Any objection?**13 **MR. MALIK: Your Honor, this has been produced**
14 **in discovery. I reviewed it, Your Honor, so I have no**
15 **objection.**16 **THE COURT: How long do you intend to show?**17 **MS. CLOUD: Your Honor, I intend to show I**
18 **believe the first minute of the video.**19 **THE COURT: That's certainly fine.**20 **Officer, I just want to confirm, when you speak**
21 **of Camden -- Camden, Delaware?**22 **THE WITNESS: Camden Delaware Police Department.**23 **Yes, sir.**24 **THE COURT: Thank you.**25 **(Video played.)**

Boesenber - direct

1 MS. CLOUD: I apologize. Ms. Busch, would you
2 go back to the beginning.

3 THE COURT: Just for the record, we saw about
4 ten seconds of a video. Go ahead.

5 MS. CLOUD: My apologies.

6 BY MS. CLOUD:

7 Q. Detective Boesenber, is there a timestamp in the top
8 left corner of this video?

9 A. Yes, there is. It is on the March 7th, 2017, at
10 16:16 hours.

11 Q. Detective Boesenber, are you familiar with this
12 video?

13 A. I am. It came from a patrol vehicle I was using that
14 day.

15 Q. Okay. Thank you.

16 Ms. Busch, please play the first minute.

17 (Video played.)

18 MS. CLOUD: Thank you, Ms. Busch. That is
19 sufficient.

20 BY MS. CLOUD:

21 Q. Officer Boesenber, will you read the full timestamp
22 at this point?

23 A. It's March 7th, 2017 at 16:17 hours.

24 Q. And 39 seconds?

25 A. And 39 seconds. I'm sorry.

Boesenber - direct

1 Q. Detective Boesenber, can you describe what you saw
2 in the first minute of this video?

3 A. I saw my patrol vehicle traveling northbound on
4 Nimitz Road. It passed one vehicle that was traveling
5 southbound, and then Fatou Small's black Lincoln Town Car
6 was the second vehicle.

7 Q. Now, from the video, did you see a cracked
8 windshield?

9 A. No.

10 Q. Did you see Mr. Small driving the vehicle in the
11 video?

12 A. In the video, no.

13 Q. So when you said that you saw Fatou Small's black
14 Lincoln Town Car, is that from your recollection or from
15 watching the video?

16 A. That is from my recollection.

17 Q. Now, you just testified previously that as you drove
18 past the Lincoln Town Car, you did observe a crack in the
19 windshield; is that correct?

20 A. Yes.

21 Q. Does observing this video change your recollection at
22 all?

23 A. No.

24 Q. Why not?

25 A. Because it was a cracked windshield right in front of

Boesenber - direct

1 the driver's side seat coming from the frame of the vehicle
2 to the center of the windshield. And I also saw Fatou Small
3 driving the vehicle.

4 Q. In your ten years of experience as an -- over ten
5 years of experience as an officer, has video equipment ever
6 failed to fully capture what you witnessed with your naked
7 eye?

8 A. Yes.

9 MS. CLOUD: Your Honor, the government would
10 like to admit Exhibit 2.

11 THE COURT: Any objection?

12 MR. MALIK: There is no objection, Your Honor.

13 THE COURT: Okay. It's admitted.

14 (GX-2 was admitted into evidence.)

15 BY MS. CLOUD:

16 Q. Officer Boesenber, I'd like to hand you what has
17 been remarked as Government's Exhibit 3.

18 (Document passed forward.)

19 Q. Detective Boesenber, do you recognize what I just
20 handed you as Exhibit 3?

21 A. Yes, I do. It's a photograph I took of defendant
22 Fatou Small's black Lincoln Town Car.

23 MS. CLOUD: Your Honor, the government would
24 like to admit government Exhibit 3.

25 MR. MALIK: Without objection, Your Honor.

Boesenber - direct

1 THE COURT: It's admitted.

2 (GX-3 was admitted into evidence.)

3 MS. CLOUD: Permission to publish.

4 THE COURT: Yes.

5 MS. CLOUD: Ms. Busch, it's the image of the car
6 front on.

7 BY MS. CLOUD:

8 Q. Detective Boesenber, you just said you took this image?

9 A. I did.

10 Q. Detective Boesenber, I believe I handed you a
11 clicker which I may ask you to employ. But before you do
12 that, can you see the crack in the windshield from this image?

13 A. I've reviewed this image myself, and I know where the
14 crack is, and I can see it in the photograph.

15 Q. Would you please use the clicker to point out where
16 the crack is?

17 A. It will be right above the steering wheel here, you
18 can see in this photograph. So a line here (indicating).

19 Q. Detective Boesenber, when you view this crack in
20 this photograph, how is it viewed with the crack as you
21 viewed it as you drove past Mr. Small's vehicle?

22 A. The way I can view, I viewed this crack, and it's
23 very hard to see. So if you didn't know where the crack
24 was, it would be impossible to see here with the way the
25 lighting is, the shade and everything. Where I saw the

Boesenborg - direct

1 crack, when the vehicle past me driving southbound this
2 road, the lighting was different. It was a glare, it was
3 glaring off of this crack and stood out.

4 Q. Now, you took this photo, Detective Boesenbergs. Did
5 you take this photo on Nimitz Road?

6 A. No, I did not.

7 Q. Where was this photo taken?

8 A. This photo was taken in front of Fatou Small's
9 residence after the vehicle was returned and parked in front
10 of the residence on Bacon avenue.

11 Q. Is the direction of the sun -- to your recollection,
12 is the direction of the sun the same on 805 Bacon Avenue the
13 way this car is parked as it would have been on Nimitz Road?

14 A. I don't recall.

15 Q. In your experience as an officer, have you ever
16 taken photos that failed to capture what you saw in person?

17 A. Yes.

18 Q. Officer Boesenber, I'd like to hand you a final
19 exhibit. premarked as Government Exhibit 4?

20 || (Document passed forward.)

21 BY MS. CLOUD:

22 Detective Boesenberg, do you recognize this image?

23 A. I do. It is another photograph of Fatou Small's
24 black Lincoln Town Car from the rear of the vehicle, towards
25 the it would be at the rear of the black Lincoln Town Car

Boesenberg - direct

1 facing the front of the vehicle.

2 MS. CLOUD: Your Honor, permission to admit and
3 publish the exhibit.

4 THE COURT: Any objection?

5 MR. MALIK: There is no objection, Your Honor.

6 THE COURT: It is admitted, and you may publish it.

7 (GX-4 was admitted into evidence.)

8 BY MS. CLOUD:

9 Q. Detective Boesenberg, can you see the crack in this
10 image?

11 A. Yes, I can.

12 MS. CLOUD: Your Honor, I believe that concludes
13 the government's direct examination.

14 THE COURT: Okay. Thank you very much.

15 Mr. Malik.

16 MR. MALIK: Thank you, Your Honor.

17 Good afternoon, Detective Boesenberg.

18 THE COURT: Do you want some water?

19 MR. MALIK: I'm sorry.

20 (Witness pours water from carafe.)

21 THE COURT: I'm not sure if there is water in
22 there.

23 It looks like there is. I think he has got it.

24 MR. MALIK: Oh, there was.

25 THE COURT: Yes. Thank you.

Boesenborg - cross

1 **You may proceed.**2 **THE WITNESS: Excuse me.**3 **CROSS-EXAMINATION**4 **BY MR. MALIK:**

5 Q. Good afternoon, Detective.

6 A. Good afternoon.

7 Q. You had indicated -- I know in some of the police
8 reports there has been reference to be on routine patrol.
9 Do you recall listing that in your report?

10 A. I do not.

11 Q. Routine patrol on March the 7th?

12 A. I do not recall.

13 Q. Okay. So you had testified that you were out there
14 with a purpose to try to conduct some surveillance at a
15 minimum on 805 Bacon Avenue, the known home of Fatou Small?16 A. We were out there in the area actually involved in
17 another operation at the time of this, and we periodically
18 would check on Fatou Small's residence.19 Q. Okay. So you were there really for another purpose,
20 but since you were in the vicinity, it was decided to take a
21 look at his residence on that day?

22 A. Yes, sir.

23 Q. Okay. Now, I was talking about March of 2017. You
24 had also prefaced your testimony about an incident that had
25 occurred in September of 2016; is that right? At 805 Bacon

Boesenborg - cross

1 **Avenue regarding Mr. Small's residence?**2 A. **Yes, sir.**3 Q. **And my understanding is you stated that both you and**
4 **another officer, specifically, Probation Officer Porter,**
5 **were on the Safe Streets Patrol and had went to conduct a**
6 **curfew check upon Mr. Small's at his home on September 8th**
7 **of 2016?**8 A. **Yes, sir. Corporal Richey was also with us then,**
9 **too.**10 Q. **Corporal Richey was with you as well?**11 A. **Yes, sir.**12 Q. **Okay. And my understanding is upon approaching,**
13 **there was an individual that was leaving Mr. Small's**
14 **residence, but it was not Mr. Small's; is that right?**15 A. **That's correct.**16 Q. **And that's the person that fled from either you or**
17 **you and Officer Porter?**18 A. **Yes.**19 Q. **Okay. And Officer Porter pursued that person and**
20 **ultimately apprehended that person?**21 A. **We pursued him as a unit and that person was involved**
22 **in a traffic accident, collision.**23 Q. **Okay. But, well, when he fled the residence, was his**
24 **identity known to you or Officer Porter or Corporal Richey**
25 **as this person was fleeing Mr. Small's residence at 805 back**

Boesenborg - cross

1 **in September of 2016?**2 A. **As he was fleeing, no.**3 Q. **Okay. Was there a decision made to pursue him as he**
4 **was fleeing?**5 A. **I don't recall.**6 Q. **Okay. Did you stay at the house or would you go**
7 **after the fleeing person?**8 A. **Went after the fleeing person.**9 Q. **Okay. And were you part of the apprehension of the**
10 **fleeing person with Officer -- Probation Officer Porter?**11 A. **Corporal Richey and a number of other officers**
12 **arrived at the scene.**13 Q. **Okay. And when he was -- my understanding is that**
14 **when he was apprehended, it was because he became involved**
15 **in a motor vehicle accident?**16 A. **Yes.**17 Q. **Okay. Was he found to be in possession of any**
18 **contraband?**19 A. **I don't recall.**20 Q. **So there is no drug arrest with this fleeing**
21 **individual?**22 A. **I don't recall.**23 Q. **Okay. Is it possible there was?**24 A. **I don't recall.**25 Q. **Okay. The reason I ask is it appeared there was an**

Boesenborg - cross

1 interest in getting into Mr. Small's house. My
2 understanding is he was a probationer. That was part of the
3 curfew check in September of 2016 that was being conducted
4 by Officer Porter being assisted by you.

5 A. That was the intention until this other incident
6 occurred.

7 Q. Okay.

8 A. Pursuit was separate, and then Officer Porter and
9 other officers from Safe Streets went back to 805 Bacon
10 Avenue to conduct the curfew check. I wasn't there for
11 that.

12 Q. Okay. My thought was if there was a person who had
13 fled from that residence, Mr. Small's residence, tries to
14 avoid the police, he is involved in an accident. If he had
15 any contraband, drugs or anything on him that there may have
16 been an administrative search requested by Probation and
17 Parole since he came from a probationer's house. That
18 didn't happen?

19 A. That is not why.

20 Q. It wasn't why?

21 A. That is not why we were looking at that house, no.

22 Q. Right. My question was if he had a person who fled
23 from it, if they had contraband on them, wouldn't it have
24 made sense to try to go back to that house at that point and
25 conduct a search, an administrative probation search because

Boesenber - cross

1 Mr. Small was on probation?

2 MS. CLOUD: Objection, Your Honor. This is
3 getting -- this hypothetical is getting a little far afield.

4 THE COURT: Mr. Malik.

5 MR. MALIK: Your Honor, I don't really need much
6 more. The State prefaced this. And what my point is, I
7 think I could introduce evidence later on in the hearing
8 that there was a curfew check that was done in September,
9 the next one was done in January. There were -- I think
10 there were at least 14 Probation Office visits. So the
11 suggestion that Mr. Small wasn't around, there were a lot
12 of other avenues of attempting to detect him and go to his
13 home.

14 THE COURT: Ms. Cloud, is there anything
15 further?

16 MS. CLOUD: Your Honor, only that Detective
17 Boesenber is not a probation officer. He works with the
18 probation officer, but this is, he doesn't have as much
19 basis for this line of questioning.

20 MR. MALIK: I'll move on.

21 THE COURT: What is that?

22 MR. MALIK: Your Honor, I'll move on from that.
23 I can ask some of those questions of Officer Porter.

24 THE COURT: Okay. Fine.

25 BY MR. MALIK:

Boesenborg - cross

1 Q. You indicated that you had spoken to a confidential
2 informant regarding alleged drug activity with Mr. Small at
3 805 Bacon Avenue; is that correct, Detective?

4 A. Yes.

5 Q. And you said you spoke with this confidential
6 informant on at least five or six occasions?

7 A. Yes.

8 Q. And would the first time have been in September or
9 close to September of 2016, about? When I say that, when
10 you are talking to the informant, you are talking about
11 Mr. Small.

12 A. The confidential source was spoken to during the
13 month of September.

14 Q. Okay. And then when we had the incident that took
15 place on May the 7th, 2017, are you able to state how soon
16 prior to that was the last, the fifth or sixth occasion that
17 you spoke with the confidential source?

18 A. Mr. Malik, what was the date you said?

19 Q. The date of the apprehension? May 7th.

20 A. May.

21 Q. Did I say May, I meant March.

22 A. March.

23 Q. March. My mistake. I apologize. March 17th, 2017.

24 A. March.

25 Q. March 7th, 2017.

Boesenborg - cross

1 A. There was contact made with this confidential source
2 between September and March, yes.

3 Q. And my -- we know that it started in September. When
4 was the last contact you had with the confidential source?

5 A. I don't recall.

6 Q. Was it closer to September or closer to March or you
7 just don't remember?

8 A. I don't recall.

9 Q. Is it fair to say that you didn't have any contact
10 with the confidential source on March -- in March 7th, 2017?

11 A. I don't recall.

12 Q. And the individual that had given you this
13 information you said that you had worked with, you, in prior
14 investigations?

15 A. Yes.

16 Q. Was the work that this person did, did it turn out to
17 be -- in other words, did he establish, he or her establish
18 himself or herself as a past proven reliable informant?

19 A. Sir, they -- this source provided information that
20 was proven to be accurate and truthful through my own
21 independent investigation.

22 Q. And would that have been prior to the information
23 that this source provided to you regarding Mr. Small?

24 A. The initial information I received from this source
25 in September, it would not have been. I received the

Boesenborg - cross

1 information after.

2 Q. Afterwards, okay. That did not relate to Mr. Small
3 but proved to be reliable and accurate?

4 A. Correct.

5 Q. And did the informant indicate that the information
6 was from their personal knowledge or was it from a secondary
7 source?

8 A. Personal knowledge.

9 Q. With respect to Mr. Small?

10 A. Yes.

11 Q. Now, again, you had testified you were in the area
12 and that you went to the vicinity of 805 but you were making
13 your observations from the corner of like it was Nimitz,
14 when we had the photograph up there, and Bacon Avenue; is
15 that right?

16 A. That's correct.

17 Q. Okay. Did you ever go down -- Bacon Avenue, if you
18 were traveling in a direction with Mr. Small's residence on
19 the left and you were traveling down towards the end of the
20 street, would you come to a cul-de-sac or like a dead end?

21 A. If you were eastbound on Bacon Avenue, you would come
22 to a cul-de-sac.

23 Q. Okay. And did you go down the cul-de-sac and turn
24 and drive by his house or were you strictly observing it
25 from the intersection of Nimitz and Bacon?

Boesenborg - cross

1 A. Strictly observing it from Nimitz and Bacon.

2 Q. You were able to see the residence well enough that
3 you identified the black Lincoln Town Car; right?

4 A. Yes.

5 Q. And you were able to also observe that the vehicle
6 was occupied by a person; is that right?

7 A. Yes.

8 Q. And the passenger side?

9 A. Yes.

10 Q. Do you recall if the vehicle was parked so that it
11 was facing the garage that is at Nimitz Avenue or was it
12 facing the street so you could just drive out into the
13 street without backing up?

14 A. It's as if you pulled into the driveway when you were
15 facing the garage.

16 Q. Okay. So the headlights would face the garage? The
17 taillights would be facing the street?

18 A. Yes.

19 Q. Were you able to tell the gender of the person that
20 was in the vehicle in the passenger side?

21 A. No.

22 Q. Okay. And you indicated you were able to tell the
23 vehicle was running. How were you able to do that? Was
24 there exhaust coming? Was it a loud engine?

25 A. Parking lights. The vehicle appeared to be running

Boesenborg - cross

1 in the driveway. I believe that is the way it was written.

2 Q. Okay. And was there anybody in the driver's seat?

3 Do you know?

4 A. We just saw one person in the vehicle.

5 Q. And that was the passenger?

6 A. Yes.

7 Q. But this was some time between 3:00 and 4:00 p.m. on
8 March the 7th?

9 A. No.

10 Q. It was -- do I have the wrong time frame here?

11 A. On March the 7th, it was in the afternoon between
12 3:00 and 4:00.

13 Q. Yes. Between 3:00 and 4:00 p.m. on March 7th?

14 A. Yes.

15 Q. I'm sorry. And your testimony was you were able to
16 determine the vehicle was driving because of -- because of
17 the lights on the vehicle, the motor was running -- I'm
18 sorry -- because there were lights on the vehicle like
19 taillights?

20 A. I was just referring to more detail about how you
21 notice a car was running. You said exhaust and taillights
22 on and things like that. I just said it appeared to be
23 running from what we saw.

24 Q. Okay.

25 A. Someone was sitting in it in the driveway.

Boesenborg - cross

1 Q. So it appeared to be running. So we don't know. I
2 don't think it really matters whether it was running, but he
3 was sitting there with the windows down; right?

4 A. I don't know.

5 Q. Did you put in your report that the windows were
6 down? I thought maybe that was Officer Porter.

7 A. I don't recall.

8 Q. Okay.

9 A. I don't believe I had that in my report.

10 Q. And I know there is a paragraph in your report where
11 you basically described that as follows: On March
12 the 7th -- March 7th, 2017, Writer Corporal Richey and
13 Special Probation Officer Porter were in the area of Bacon
14 Avenue, observed a black Lincoln Town Car at 805 Bacon which
15 was the residence of Mr. Small. Mr. Small was on Level 2
16 Probation. The vehicle was running and a subject was
17 sitting in the passenger seat. It appeared the vehicle was
18 getting ready to depart.

19 Do you want to see your report or is that
20 consistent with what you recall writing in your report?

21 A. If I may see it?

22 Q. Sure.

23 MR. MALIK: May I approach the witness, Your
24 Honor?

25 THE COURT: You may.

Boesenber - cross

1 BY MR. MALIK:

2 Q. It's this paragraph here, Detective. It only has
3 four lines.

4 (Witness reviews document.)

5 Q. Okay. Do you recall writing in your report that you
6 noted the vehicle was running?

7 A. I don't recall.

8 Q. Okay. But is that what is stated in your report,
9 that the vehicle was running and a subject was sitting in
10 the passenger seat?

11 A. That is what it states.

12 Q. Okay. And I take it here today you don't recall
13 what specific thing it was that you saw that led you to the
14 conclusion that the vehicle was running. Is that a fair
15 statement?

16 A. I do not.

17 Q. Okay. Now, my understanding is that then you had
18 called, when you saw that the vehicle was in a position it
19 may be leaving, you called Detective DiGirolomo and other
20 officers to try to assist in conducting surveillance at 805
21 Bacon Avenue?

22 A. After the vehicle had left the residence.

23 Q. Okay. So when the vehicle left?

24 A. Correction. Correction.

25 Q. Okay.

Boesenborg - cross

1 A. When we made our right-hand turn on to Nimitz Road,
2 we requested that.

3 Q. Okay. And what was the purpose of having them to
4 come out there? Just to sort of sit on the house and look
5 to see if anybody was going to be leaving?

6 A. To see if Fatou Small was going to be leaving in the
7 vehicle.

8 Q. Okay. And if he was going to be leaving, was there a
9 game plan as to what would take place if he was seen exiting
10 the house on foot or in the vehicle?

11 A. That is not how the plan worked out. It worked out a
12 different way.

13 Q. What was the plan going to?

14 A. Just kind of going with the protocol procedure with
15 us, how we operate, a tactic that we use.

16 Q. If there were going to be other officers watching the
17 residence to see if Mr. Small left and it was determined
18 that he left, would they just report to you that he left --

19 A. Yes.

20 Q. -- or would there be another step taken after he had
21 left and you were informed he was mobile?

22 A. They would just have reported to us that he was
23 leaving.

24 Q. And did you and Officer Porter have a game plan at
25 that point in time if he was leaving the vehicle?

Boesenborg - cross

1 A. No.

2 Q. Now, you had went up Nimitz and were you -- we saw in
3 the video that your vehicle passed Mr. Small's vehicle. And
4 I understand at some point in time, you turned around and
5 were coming back to his house. You didn't expect him to be
6 mobile at that point, did you?

7 A. I did not.

8 Q. Okay. And were you going back just to again make a
9 pass by the intersection of Bacon and Nimitz, make a left
10 going up Bacon Avenue towards Bacon Court or were you going
11 to park the vehicle and wait where you were?

12 A. I was trying to get in a position that I could
13 observe Fatou Small's residence and any movement from that
14 residence.

15 Q. Okay. And as we saw in the video, there was a
16 vehicle that passed you, just a regular vehicle. Then
17 the next one you saw was the Lincoln that was Mr. Small's
18 vehicle; right?

19 A. Yes.

20 Q. Okay. Now, when the video was played, would there be
21 any chance of playing that first portion of the video again?
22 I had a version of this I looked at. It appeared on the
23 video there was about maybe four seconds from the time that
24 the vehicle, the second vehicle comes into view until it
25 passes your vehicle.

Boesenborg - cross

1 Up at the top, you see like 45 seconds, 46, and
2 it's about 50 when it passes you by. Would you agree there
3 was give or take four seconds of direct view you had of
4 Mr. Small's vehicle?

5 A. Sir, I wasn't watching the seconds ticker.

6 Q. Okay. We can run it back. Would you be able to run
7 it back? It's in the upper sort of left-hand corner towards
8 the middle.

9 THE COURT: For the record, it was just played
10 once on cross and now we're going to play it again.

11 (Video played.)

12 MR. MALIK: Do you want to make the clock any
13 better there?

14 MS. Busch: I'll try.

15 MR. MALIK: Okay. Here we go. No, it went
16 away.

17 THE COURT: Now we're rewinding.

18 MR. MALIK: The clock wasn't on the screen on
19 that one. Thank you. I think it comes into view at about
20 46 seconds.

21 BY MR. MALIK:

22 Q. 16:46, 47, 48, 49, 50. It's gone. Would you agree
23 it's roughly four seconds on the video?

24 A. Yes.

25 Q. And my next question was: Would you agree that your

Boesenborg - cross

1 ability to view that car was about four seconds before it
2 came into your view around the corner and passed you?

3 A. I don't, I don't know the time frame of how long I
4 had to -- you know, given miles per hour to when the vehicle
5 is approaching, and I don't know the exact time on that.

6 Q. Okay. You don't disagree with any of the timing that
7 appears on the video that is being played on the screen now?

8 A. The time on the screen is correct.

9 Q. It is what it is?

10 A. Yes.

11 MR. MALIK: If you would continue to play it?

12 And then just stop it.

13 BY MR. MALIK:

14 Q. So after you passed the vehicle, it is your testimony
15 that you were able, in that four seconds, to observe the
16 crack in the windshield?

17 A. I observed the crack in the windshield when it was
18 traveling southbound on Nimitz Road and I was traveling
19 northbound when it was coming towards me.

20 Q. And that would have been what we had seen on the
21 video. Is there any other point in time where you saw the
22 front of the vehicle other than what we just saw in the
23 video as you passed and turned around to make the stop?

24 A. I saw it when the vehicle turned on to Nimitz Road,
25 traveling southbound. My vehicle is northbound. That was

Boesenborg - cross

1 the time when I saw the cracked windshield and made my
2 decision that it was a traffic violation.

3 THE COURT: Let me stop you a second. The video
4 appears to still be playing. I don't think --

5 MR. MALIK: You can stop it now.

6 THE COURT: I can't look at both things.

7 BY MR. MALIK:

8 Q. Now, you had indicated that you were able to see the
9 crack because the lighting conditions on Nimitz Road, there
10 was a glare that somehow made the crack, according to your
11 testimony, more visible?

12 A. You said not visible. I only say it's not visible in
13 this poor photograph here. It is a poor photograph. I did
14 see it clearly. It stuck out like a sore thumb on Nimitz
15 Road when I saw it.

16 Q. Okay. Now, there were the three photographs that
17 were taken. In particular -- actually, there is only two.
18 I had submitted a third. But Government's Exhibit 3, that's
19 the photograph.

20 MR. MALIK: Would you be able to put that back
21 up on the screen please? Thank you very much.

22 Did I say -- let's see. That is 4.

23 (Counsel and IT person confer.)

24 BY MR. MALIK:

25 Q. Okay. Is there anything different about the lighting

Boesenborg - cross

1 where this photograph was taken compared to the lighting you
2 had seen, that you observed the crack as it was coming on
3 Nimitz Road, passing your vehicle?

4 A. Probably. I testified I didn't know what the lighting
5 was that day or where the sun was and the difference on
6 Bacon Avenue compared to Nimitz Road.

7 Q. Okay.

8 A. I don't know. I just know the lighting was different
9 enough for me to 100 percent see the windshield was cracked
10 when I drove by on Nimitz Road.

11 Q. Now, we had seen on the video when we stopped it, it
12 appeared that the vehicle continued on Nimitz Road, turned
13 around, went through an intersection. As it went through
14 the intersection, the emergency lights were put on and then
15 the vehicle was pulled over. That was still on Nimitz Road?

16 A. That was Nimitz Road, Yes.

17 Q. That was Nimitz Road. And I take it this photograph
18 was taken on Bacon Avenue?

19 A. Yes.

20 Q. This is, did the vehicle get moved from where it was
21 stopped at Nimitz Road to Bacon Avenue then?

22 A. Yes, it did.

23 Q. And did you or one of the other officers drive from
24 Nimitz to Bacon Avenue?

25 A. Yes.

Boesenborg - cross

1 Q. Would you or somebody else have been able to take the
2 vehicle to Nimitz Road and photograph it in the same area
3 that you saw in a very visible fashion as you claimed the
4 crack in the windshield?

5 A. That was not what was done, though. The photograph
6 was taken on Bacon Avenue.

7 Q. Okay. Do you know who took the photograph?

8 A. Myself.

9 Q. You took it. Do you know what type of camera you
10 took the photograph with? The reason I ask that, was the
11 that the time you see it, that you take the picture on the
12 phone and you see the photograph or is it one you get
13 developed and you see the results later?

14 A. It's the one -- it's a digital photograph.

15 Q. Digital. Okay. Were you trying to capture the crack
16 in the windshield by taking the photograph?

17 A. Yes.

18 Q. And were you able to see when you looked at the
19 digital photograph that it was at least difficult to observe
20 the crack in the windshield from that photograph?

21 A. I didn't, I didn't see it at the time.

22 Q. You didn't see it at the time. Okay. And there was
23 Photograph No. 4 that was taken. It looks like you have got
24 the steering wheel, and then you can see the crack pretty
25 well around it.

Boesenborg - cross

1 MR. MALIK: Are you able to put up Photograph

2 No. 4, please?

3 BY MR. MALIK:

4 Q. Was that taken from inside the car or just from the
5 back of the car, Detective?6 A. Sir, I believe that is taken from the back. I did
7 testify that is taken from the back of the car toward the
8 front of the car toward the steering wheel.

9 Q. So was it taken from like looking through the rear --

10 A. Rear glass.

11 Q. -- the rear glass?

12 A. Yes.

13 Q. Okay. Now, at no time prior to your stopping the
14 vehicle, when you observed the crack in the windshield, you
15 said you saw that the vehicle was coming towards you, head
16 on; right?

17 A. Yes.

18 Q. When you were behind it, did you see the crack in the
19 windshield prior to taking this photograph as the vehicle
20 was in motion?

21 A. I don't recall.

22 Q. Okay. What was the purpose of taking the photographs
23 of the crack in the windshield?

24 A. This is a zoomed in photograph?

25 Q. To a zoomed in photograph?

Boesenborg - cross

1 A. I don't know if it was zoomed or not. I probably was
2 taking a picture of the registration from the back of the
3 vehicle and capturing the crack from the back of the car,
4 just a photograph of the same crack.

5 Q. And do you recall, I know that it's not up on the
6 video but I could show you what has been attached to Exhibit
7 C in my memorandum in support of to suppression motion.

8 MR. MALIK: May I approach, Your Honor?

9 THE COURT: You may.

10 BY MR. MALIK:

11 Q. This isn't as good as the color ones, Detective, but
12 that looks to me to be another photograph of the windshield.
13 Is that one that you recall having taken?

14 A. The other was in color. This is black and white.

15 Q. Okay. At the time that the vehicle, it was decided
16 to make the vehicle stop, do you have to radio in that the
17 vehicle stop is being conducted so the other units know what
18 you are doing, what is going on?

19 A. Not all the time.

20 Q. Okay. Do you know if there was a radio transmission
21 made in connection with the stop of this vehicle?

22 A. I do not.

23 Q. Okay. If the vehicle -- if there is going to be a
24 stop of a vehicle, is it a common practice to indicate why
25 the vehicle was being stopped, whether it is for speeding,

Boesenborg - cross

1 red light, and other types of equipment violation?

2 A. Can you repeat your question?

3 Q. Sure. In other words, if you are making a
4 transmission regarding the stop of the vehicle, is it a
5 police procedure to transmit the reason the vehicle is being
6 stopped whether it is for a speeding citation, a careless
7 driver citation, a '77 DUI or equipment violation?

8 A. No. Only in the case of a motor vehicle pursuit
9 would you put out the reason for the stop.

10 Q. So there would have been no transmissions regarding
11 the reason for the stop here?

12 A. No, sir.

13 Q. Okay. You would agree that the video that we had
14 observed, you can't see the crack in the windshield as the
15 Town car is passing you. Would you agree with that,
16 Detective?

17 A. Yes.

18 Q. Okay. And you said in Government Exhibit 3, you drew
19 a sort of a -- you pointed to the middle of the windshield
20 that was above the steering wheel and you said that is where
21 the crack was. Would you agree it is very difficult to see
22 in Government's Exhibit 3 --

23 A. Yes.

24 Q. -- which was the ... But it's your testimony that
25 the difference in the lighting as it existed on Nimitz

Boesenborg - cross

1 Avenue as you were -- I guess you were driving northbound
2 and it was coming southbound. Do I have the directions
3 right, sir?

4 A. Yes.

5 Q. But no attempts were made to take the vehicle there
6 to get a photograph to show the severe crack that you
7 indicated was highly visible as you passed it in about four
8 seconds?

9 A. Yes.

10 Q. Okay. Thank you.

11 MR. MALIK: I have no further questions,
12 Detective. Thank you.

13 Thank you, Your Honor. Nothing further.

14 THE COURT: All right. I need to take a short
15 recess. Hopefully, it will be about five minutes.

16 (Brief recess taken.)

17 * * *

18 (Proceedings reconvened after recess.)

19 THE COURT: Have a seat.

20 Mr. Malik.

21 MR. MALIK: Thank you, Your Honor. I asked Ms.
22 Cloud if I could ask one more question --

23 THE COURT: Sure.

24 MR. MALIK: -- I had in my notes I forgot to
25 ask. May I, Your Honor?

Boesenber - redirect

1 THE COURT: You may.

2 MR. MALIK: Thank you.

3 BY MR. MALIK:

4 Q. One more question, Mr. Boesenber. As the vehicle
5 was approaching you on Nimitz, were you able to -- you
6 indicated you were able to identify Mr. Small as the driver
7 of the vehicle?

8 A. When the vehicle passed me going southbound.

9 Q. Yes, um-hmm. When the vehicle, when you identified
10 Mr. Small, were you able to identify whether the passenger
11 was a male or female as the vehicle passed you?

12 A. No, sir.

13 Q. Okay. Thank you.

14 THE COURT: Thank you.

15 MR. MALIK: Nothing further.

16 THE COURT: Thank you.

17 Ms. Cloud.

18 MS. CLOUD: Detective Boesenber, I just have a
19 few questions for you.

20 REDIRECT EXAMINATION

21 BY MS. CLOUD:

22 Q. When you observed the view from the video camera as
23 played today, was that the exact same view as your view
24 sitting in the car passing Mr. Small on March 7th, 2017?

25 A. It's an angle that shows the direction of my vehicle,

Boesenber - redirect

1 that my vehicle is traveling, but not the same view that you
2 see from me, that I would see.

3 Q. What would be the difference as to the view you would
4 see as opposed to the angle of the video?

5 A. I could see -- I mean the video camera shows one
6 angle, one direction, one focus. I could see around my
7 vehicle, looking. The lighting is different. You could
8 tell by the lighting just from the video alone it's real
9 grainy. It is out of focus.

10 Q. Another question, Detective Boesenber.

11 In the Government Exhibit 3, if Ms. Busch will
12 pull it up, please.

13 What was your angle taking this photograph? And
14 by that, I mean were you sitting? Were you standing?

15 A. Standing still in front of the vehicle.

16 Q. Was that the same position you were in as you passed
17 the vehicle on March 7th, 2017 on Nimitz Road?

18 A. No.

19 Q. What position were you in as you passed the vehicle?

20 A. I was sitting in the police car.

21 Q. Is it possible the lighting and the angle were
22 different in terms of the visibility of the crack between?

23 A. Yes.

24 MR. MALIK: Objection, calls for speculation.

25 THE COURT: Overruled. He can answer.

Boesenber - redirect

1 BY THE WITNESS:

2 A. Yes.

3 Q. Detective Boesenber, do you recall how long after
4 you passed Mr. Small's vehicle that you turned your vehicle
5 around?6 A. I don't recall exactly how much. I mean it was -- it
7 passed me, and then the determination to turn around.

8 Q. Would you care --

9 MS. CLOUD: Ms. Busch, actually will you play
10 Government Exhibit 2 briefly? Just the first 15 seconds,
11 please.

12 (Video played.)

13 BY MS. CLOUD:

14 Q. And, Detective Boesenber, I'd like to draw your
15 attention to the timestamp, to the extent you can see it.

16 A. The vehicle is seen at 46.

17 MS. CLOUD: Thank you, Ms. Busch.

18 BY MS. CLOUD:

19 Q. Detective Boesenber, were you able to estimate --

20 A. About six seconds.

21 Q. Okay.

22 THE COURT: What was the question? Could you
23 reask the question?

24 BY MS. CLOUD:

25 Q. Were you able to estimate how long it took you from

Boesenbergen - recross

1 the time of passing Mr. Small's vehicle to turn your vehicle
2 around?

3 A. About six seconds there.

4 MS. CLOUD: Nothing further, Your Honor.

5 THE COURT: Okay.

6 MR. MALIK: Your Honor, may I just raise an
7 issue?

8 RECROSS-EXAMINATION

9 BY MR. MALIK:

10 Q. Detective, you mentioned something about the glare.
11 What was it about the glare? When you say "glare" in
12 general, that could mean a lot of things. What was it about
13 the glare that made it easier to see the crack or more
14 difficult to see the crack?

15 A. The glare, sunlight to a mirror, you are going to get
16 a glare. You are going to get more shine off it. Sunlight
17 hitting that windshield at that time of day. The angle was
18 in the glare.

19 MR. MALIK: Could we just play the first
20 15 seconds one more time, please.

21 (Video played.)

22 BY MR. MALIK:

23 Q. And as the vehicle is coming up Nimitz towards you,
24 you are going south, would you agree -- can you stop it
25 there for a second.

Boesenborg - recross

1 Would you agree the sun appears to be in the
2 sort of upper right-hand corner of the video that is being
3 played, Detective?

4 A. I can't --

5 MR. MALIK: And if you could back it up to the
6 beginning. I think I spoke too slowly there.

7 BY MR. MALIK:

8 Q. Would you agree what is in the upper left hand corner
9 sort of dancing around was the sun glare?

10 A. This camera doesn't really show exactly where the
11 sun is, sir. It just could be the sun there. It could be
12 something on the windshield of my car.

13 Q. And so you are suggesting that what was in the upper
14 left-hand corner there is not the sun?

15 A. Sir, my camera at the time in my patrol car was
16 located in the center of the vehicle, behind, on the inside
17 of the car on the windshield. So what you see here is any
18 glare that would bounce off that windshield there. I don't
19 know. I'm just looking at the video. I don't remember
20 where the sun was.

21 Q. All right. So I thought it was the glare from the
22 windshield that -- the way the sun reflected on the
23 windshield of the Lincoln that made the crack stand out
24 where it wasn't standing out in the still photograph, was
25 that not the case?

Boesenber - recross

1 A. Where I saw that crack on the windshield on Fatou
2 Small's black Lincoln Town Car was when it was driving
3 southbound.

4 Q. Okay.

5 A. And it just stood out. It was there.

6 Q. And that is what I'm saying. Was that because it was
7 your impression that the sun was reflecting into that window
8 and making the crack stand out more?

9 MS. CLOUD: Objection. Calls for speculation.

10 THE COURT: Overruled.

11 BY THE WITNESS:

12 A. Just glare, the lighting in that area not being under
13 a tree like this one is. He is obviously -- I mean, that
14 vehicle wouldn't have been under a tree here. It's open.
15 You can see that.

16 MR. MALIK: Okay. Can you continue the video
17 please, just the 15 seconds, please?

18 (Video played.)

19 MR. MALIK: Stop there.

20 That's the first car.

21 Continue, please.

22 (Video played.)

23 MR. MALIK: And, again, you can stop it there.
24 I'm sorry.

25 BY MR. MALIK:

Boesenborg - recross

1 Q. There appears to be something constant in the upper
2 left-hand corner of that video that would seem to be coming
3 from behind Mr. Small's car as it is approaching you. Is it
4 your testimony that that is not the sun?

5 Can you just repeat it one more time from the
6 beginning of the 15 seconds? And that will be it.

7 (Video played.)

8 BY MR. MALIK:

9 Q. Is it your testimony that the sun wasn't in that
10 upper right-hand corner there?

11 A. I'm not going to say it wasn't the sun.

12 Q. Okay.

13 A. I don't know.

14 Q. In the video, were you able to see any glare or
15 anything shining or reflecting off the windshield of the
16 Lincoln that may stand out in this video?

17 A. When it passed me?

18 Q. Yes.

19 A. On the video? No, I couldn't --

20 Q. When it passed you.

21 A. -- the video.

22 Q. But When it passed you, you saw something reflecting
23 off of the windshield?

24 A. No, no. No, no. I saw the crack when I passed it,
25 when I was driving. I saw the crack. The video doesn't

Boesenberg - Court examination

1 show up on that crack.

2 Q. Okay. And, again, correct me if I'm wrong. I
3 thought you said somehow the sun glare made it stand out
4 more as it passed you?

5 A. It had to have. You can't -- I mean just looking at
6 Exhibit, Government Exhibit 3 --

7 Q. Okay.

8 A. -- you can't see the crack as well as I saw it that
9 day.

10 Q. Okay. Thank you, Detective.

11 MR. MALIK: I have no further questions. Thank
12 you, Your Honor.

13 THE COURT: Ms. Cloud.

14 MS. CLOUD: Your Honor, no further questions of
15 Detective Boesenberg.

16 THE COURT: All right. I have some questions,
17 Detective Boesenberg. They relate in some respect to what
18 Ms. Cloud was asking about after the break.

19 EXAMINATION BY THE COURT

20 THE COURT: As you were passing the vehicle that
21 you say was driven by the defendant, so just focusing on
22 that time frame, you're the driver of the vehicle; correct?

23 THE WITNESS: Yes, sir.

24 THE COURT: And both Officers Richey and Porter
25 are in the vehicle with you?

Boesenborg - Court examination

1 A JUROR: That's correct.

2 THE COURT: And I believe you testified that
3 all three of you saw the crack in the windshield; is that
4 correct?

5 THE WITNESS: We did.

6 THE COURT: And I believe you testified that all
7 three of you saw that it was the defendant driving the other
8 vehicle coming at you; is that correct?

9 THE WITNESS: I know I saw the defendant in the
10 vehicle. We had a discussion in the car that it was Fatou
11 Small. So they also did see it.

12 THE COURT: Did you also have a discussion as to
13 whether or not any of the three of you saw the crack in the
14 windshield?

15 THE WITNESS: We did.

16 THE COURT: And when did the discussion take
17 place about the crack in the windshield in that you had all
18 seen it.

19 THE WITNESS: Once the vehicle went by, we
20 turned the police car around, the vehicle, and we are having
21 this conversation that the windshield was cracked.
22 Everybody saw that vehicle, that the windshield was cracked.

23 THE COURT: When did the conversation take place
24 among the three of you that it was the defendant who was
25 driving the vehicle?

Boesenborg - Court examination

1 **THE WITNESS:** When he passed us.

2 **THE COURT:** So in that same time?

3 **THE WITNESS:** From the time he passed us to the
4 time we turned around and pulled his car over, we had this
5 conversation in the car.

6 **THE COURT:** Now, what is your recollection as to
7 how long it took you as the driver of the vehicle to decide
8 to turn the vehicle around after you passed the defendant's
9 vehicle?

10 **THE WITNESS:** Looking at the video, I'd say it
11 was about six seconds, but my recollection without the
12 video, it was immediate. I tried to get turned around as
13 soon as possible.

14 **THE COURT:** So help me understand how it is the
15 three of you, what kind of words were exchanged such that
16 all three of you could express to one another agreement that
17 it's the defendant driving and we all see this crack in this
18 vehicle that just passed us?

19 **THE WITNESS:** When that vehicle was coming at
20 us, we had a conversation that the windshield was broken. I
21 saw the windshield broken. I saw defendant Small. I voiced
22 it to the other officers. The other officers voiced it to
23 me. I don't have the exact time frame of how this occurred
24 in the car, but it did.

25 **THE COURT:** Do you recall when you first voiced

Boesenborg - Court examination

1 that, had the car coming at you already passed you or had
2 you -- was it from the first second you saw it or where
3 along that roughly ten second span? Do you recall?

4 THE WITNESS: I don't recall.

5 THE COURT: And you are the one that took the
6 photographs we saw; correct?

7 THE WITNESS: I did, Your Honor.

8 THE COURT: Do you recall how many photographs
9 you took? We have seen three today.

10 THE WITNESS: I don't. I don't recall how many
11 photographs there were.

12 THE COURT: Do you think it was more than ten or
13 less than ten?

14 THE WITNESS: No, less than ten.

15 THE COURT: And did you notice that any of the
16 photographs you took that day clearly showed the crack that
17 you had seen?

18 THE WITNESS: No, until I looked at them now. I
19 mean not now but I reviewed them before. That there is a
20 crack. You could definitely see it from the back of the
21 car.

22 THE COURT: But that day, you did not notice
23 whether the photographs you took clearly showed the crack in
24 the windshield or do not clearly show it?

25 THE WITNESS: No.

1 THE COURT: What was the reason you were taking
2 the photographs?

3 THE WITNESS: To photograph the vehicle, the
4 registration, the crack in the windshield, that would have
5 been my reason. To show the crack in the windshield.

6 THE COURT: Then why did you not study the
7 photographs at that time to see whether they clearly showed
8 the crack that you saw?

9 THE WITNESS: I don't know, Your Honor.

10 THE COURT: Okay. Any questions from the
11 government?

12 MS. CLOUD: No, Your Honor.

13 THE COURT: Mr. Malik?

14 MR. MALIK: No, Your Honor. May I confer for a
15 moment with Ms. Cloud?

16 THE COURT: Sure. I'm done with the questioning
17 of the detective. Do either of you have any more questions?

18 MR. MALIK: Just one moment, Your Honor.

19 THE COURT: Sure.

20 || Sit tight.

21 (Counsel confer.)

22 MR. MALIK: Thank you, Your Honor.

23 THE COURT: Can we excuse the witness then?

24 MS. CLOUD: Yes, Your Honor.

25 THE COURT: Deputy, may step down.

Porter - direct

1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: Thank you very much.

3 Does the government wish to call anybody else?

4 MS. CLOUD: Yes, Your Honor. The government
5 does wish to call Officer Ricky Porter.

6 Your Honor, Detective Boesenberg left his
7 photographs. May I get them?

8 THE COURT: Of course.

9 (Witness stand cleared.)

10 MS. CLOUD: Your Honor, the government calls
11 officers Ricky L. Porter to the stand.

12 THE COURT: Thank you.

13 ... RICKY LYNN PORTER, JR, having been first
14 duly sworn, was examined and testified as follows ...

15 THE COURT: Thank you. Good evening, Officer
16 Porter.

17 THE WITNESS: Good evening, Your Honor.

18 THE COURT: You may have a seat.

19 DIRECT EXAMINATION

20 BY MS. CLOUD:

21 Q. Good evening, Officer Porter. Can you please state
22 your position of employment for the record?

23 A. I work for the State of Delaware. I'm assigned to
24 the Safe Streets Unit with the Department of -- the Dover
25 Police Department. Excuse me.

Porter - direct

1 Q. Do you work with -- in your assignment, are you also
2 working as a probation officer?

3 A. Yes.

4 Q. You are employed by the Department of Correction?

5 A. Yes.

6 Q. Officer Porter, are you familiar with an individual
7 by the name of Fatou Small?

8 A. Yes.

9 Q. Do you see Mr. Small in the courtroom today?

10 A. Yes.

11 Q. Can you please identify him?

12 A. He is to the right of Mr. Malik in the green
13 jumpsuit.

14 Q. Okay. Please let the record show that Officer Porter
15 identified Mr. Small.

16 THE COURT: So noted.

17 BY MS. CLOUD:

18 Q. Officer Porter, how are you familiar with Mr. Small?

19 A. He was on probation. I had dealt with him through
20 probation and also through other drug investigations.

21 Q. Are you aware of Mr. Small's probation history over
22 the last two years?

23 A. Yes.

24 Q. Do you know whether Mr. Small was on probation
25 throughout the 2016 calendar year?

Porter - direct

1 A. **He was.**2 Q. **Do you know whether he was on probation through**
3 **March 7th, 2017?**4 A. **Yes.**5 Q. **Officer Porter, did Mr. Small have to list an address**
6 **of residence for the purposes of his probation?**7 A. **He does.**8 Q. **Do you know what address he listed?**9 A. **805 Bacon.**10 Q. **Did you attempt to conduct any -- in the course of**
11 **your work as a probation officer, did you attempt to conduct**
12 **any curfew checks of Mr. Small in 2016?**13 A. **Yes.**14 Q. **Did you attempt to conduct curfew checks in May 2016?**15 A. **I did.**16 Q. **What was the result of that curfew check?**17 A. **Negative. Did not make contact with Mr. Small.**18 Q. **Did you attempt to conduct a curfew check on**
19 **September 8th, 2016?**20 A. **Yes.**21 Q. **Who did you work with that evening?**22 A. **I worked with Officer Boesenberg and Officer Richey.**23 Q. **So your attempt to conduct a curfew check was at 805**
24 **Bacon Avenue?**25 A. **Yes.**

Porter - direct

1 Q. What time approximately did you get to 805 Bacon
2 Avenue to conduct the curfew check?

3 A. After 10:00 p.m.

4 Q. What is involved in a curfew check?

5 A. Made contact, visual contact with the probationer, to
6 ensure that they are abiding by their curfew, and often
7 we'll go in and do a walk through, check the conditions of
8 their home.

9 Q. When you arrived at 805 Bacon Avenue for the curfew
10 check on September 8th, 2016, did you observe anything?

11 A. Yes.

12 Q. What did you observe?

13 A. I observe a male exiting the front door. I went
14 to contact that black male. He rapidly jumped into his
15 vehicle, tried to avoid my contact. As I went to the
16 window, he rapidly put his vehicle in reverse, drove over
17 the curb and took off at a high rate of speed.

18 Q. What happened after he took off at a high rate of
19 speed?

20 A. Myself and the other officers got in our police
21 patrol vehicle and followed him.

22 Q. Did you return to 805 Bacon Avenue at some point that
23 evening?

24 A. Yes.

25 Q. Why did you return?

Porter - direct

1 A. After that individual left, he got into a vehicle
2 accident and fled on foot. We didn't know who that was at
3 the time. I went back to 805 to try to contact Mr. Small
4 and figure out who had just left and also to see if maybe
5 that person went back to that residence.

6 Q. Did you knock on the front door of 805 Bacon Avenue
7 when you went back?

8 A. Yes.

9 Q. Did anyone answer the door?

10 A. Well, as I approached, I heard a male's voice. Then
11 I knocked on the door. The male went quiet. I loudly
12 announced myself as Probation and Parole, Dover Police
13 Department. I could clearly hear him but he refused to
14 answer the door.

15 Q. An unidentified male voice?

16 A. Yes.

17 Q. Did you observe any cars in the driveway of 805 Bacon
18 Avenue that evening?

19 A. There was a 2001 black Lincoln Town Car that I later
20 determined belonged to Fatou Small.

21 Q. Is it fair to say on September 8th, 2016, did you
22 know that that car belonged to Fatou Small at that time?

23 A. I don't recall.

24 Q. Okay. But you said "later determined." Do you
25 recall approximately when you determined or what the

Porter - direct

1 circumstances were?

2 A. We -- I don't, ma'am. I think, I think what I did
3 was took the registration and ran it and determined it was
4 registered to Fatou Small, but I don't recall.

5 Q. You don't have a perfect recollection of this?

6 A. No.

7 Q. Okay. Did you have occasion to speak with a
8 confidential informant regarding Mr. Small some time after
9 September 8th, 2016?

10 A. Multiple times.

11 Q. What did the confidential informant say with respect
12 to Mr. Small?

13 A. The informant provided information that Fatou Small
14 was dealing drugs. He outlined a little bit of how he did
15 that. He said that he traveled to the City of New York. He
16 would get large quantities of ecstasy, transport those back,
17 and he would sell them from his residence at 805. He also
18 stated that he would operate his black Lincoln Town Car to
19 do this.

20 Q. Okay. Did you speak with this confidential informant
21 one time or more than once?

22 A. Multiple times.

23 Q. Can you estimate approximately how many times you
24 personally spoke with this confidential informant?

25 A. Officer Boesenbergs was the direct handler. He was

Porter - direct

1 the one that had a relationship with the informant. And
2 also Boesenberg spoke to him several times, but I was
3 present at least probably four or five times over the couple
4 months prior to the arrest of Fatou Small.

5 Q. Officer Porter, do you recall when was the latest
6 time that you spoke with this confidential informant
7 regarding Mr. Small?

8 A. I believe it was maybe ten days to two weeks prior to
9 the arrest.

10 Q. Did you have a perfect recollection of the date?

11 A. I don't, but I can recall it was current.

12 Q. And when you say "the arrest," are you referring to
13 the arrest that took place on March 7th, 2017?

14 A. I am.

15 Q. Did you have any further attempt to contact with
16 Mr. Small between September 2016 and March 2017?

17 MR. MALIK: Your Honor, could we get the dates
18 again? I'm sorry.

19 THE COURT: I'm sorry?

20 MS. CLOUD: I can clarify the question. It may
21 have been confusing.

22 BY MS. CLOUD:

23 Q. Did you ever attempt to contact Mr. Small again
24 between September 8th, 2016 and March 7th, 2017?

25 A. So September 8th was the date that we went there

Porter - direct

1 and the male departed and he did not answer the door, or --
2 excuse me -- a male was inside that did not answer the door.

3 After that, I made several attempts to contact
4 Mr. Small with the intent of contacting him at his
5 residence. No, I did not knock at the door but did make
6 several attempts to contact him. We conducted surveillance.

7 Q. Is there any reason you didn't knock on the door and
8 attempt to contact him directly at his residence?

9 A. Well, there had been several months, several months
10 had passed where Mr. Small had not had a positive home visit
11 where no officers had been inside his residence. I had,
12 myself had done two curfew checks where he did not open the
13 door: Once where I knew that his vehicle was outside and I
14 heard a male's voice inside. I determined, I believed that
15 he was trying to avoid contact, so I'd come up with a plan
16 that we would continue to do surveillance, and we would
17 contact him outside his residence, and then I would go back
18 and conduct a home visit.

19 Q. Officer Porter, after the incident on September 8th,
20 2016, did you speak with a supervisor regarding possible
21 permission to search Mr. Small's residence?

22 A. Yes.

23 Q. Can you elaborate on that conversation?

24 A. I spoke with my supervisor, Bob Hume. I told him of
25 the incident that had occurred in September the night before

Porter - direct

1 how someone had fled the area, how no one answered the door,
2 how I had been there before, no one answered the door. And
3 I felt Mr. Small was trying to avoid contact, and I believe
4 there may be a reason to conduct a search. I believe there
5 possibly was contraband or some reason that we should do a
6 search of that residence.

7 He agreed. However, our searches are only good
8 for 24 hours. And the plan was to -- when I saw Mr. Small
9 outside his residence, I would call back and freshen that
10 search to do that admin search.

11 Q. So prior to March 7th, 2017, did you have occasion to
12 freshen that request for the administrative search?

13 A. Well, between those times, we conducted multiple
14 surveillances. Any time I was in the area, I would look for
15 Fatou in that area. I looked for his vehicle.

16 During that time, we contacted other individuals
17 who would say Fatou was a large ectasy dealer in the area.
18 Our confidential source was providing information that led
19 to other arrests. That person was still giving detailed
20 information about Fatou.

21 I don't recall if I spoke to my supervisor any
22 more between that time, but I continued with my plan of
23 action about contacting Fatou and doing an administrative
24 search.

25 Q. Were you on duty on March 7th, 2017?

Porter - direct

1 A. Yes.

2 Q. Who were you working with that afternoon or that day?

3 A. Officer Boesenberg and Officer Richey.

4 Q. Were you in a vehicle?

5 A. Yes.

6 Q. Whose vehicle was it?

7 A. It was a vehicle operated by Officer Boesenberg.

8 Q. Thank you. Where were you sitting in the vehicle?

9 A. Front passenger seat.

10 Q. Did you drive to 805 Bacon Avenue on March 7th, 2017
11 with Officer Boesenberg driving?

12 A. Yes, we drove past.

13 Q. Why did you go to 805 Bacon Avenue?

14 A. We were on routine patrol and we had made it a point
15 that when we were around that area to drive by, continuing
16 with the theory that if we saw Mr. Small, we would go in
17 and do a home visit. This particular day, we did see --
18 correction. I saw Mr. Small's vehicle parked in front
19 of the residence. There was a passenger sitting in the
20 passenger seat. The window was down and it appeared the
21 vehicle was, it was on. So I had determined that it seemed
22 to me that Mr. Small was probably inside and getting ready
23 to go mobile.

24 Q. That was an assumption you made from?

25 A. What I witnessed.

Porter - direct

1 Q. From what you witnessed. Did the car that you
2 witnessed sitting in the driveway look familiar to you?

3 A. I could see that it was the 2001 black Lincoln Town
4 Car that I had identified belongs to Mr. Small.

5 Q. Did Detective or Officer Boesenberge turn on to Nimitz
6 Road after you observed the car in the driveway?

7 A. We had a brief discussion as we drove by and we said
8 that is Mr. Small's car. Let's get set up in the area and
9 let's get some surveillance units over here to assist. I
10 had thought that if Mr. Small saw our patrol vehicle in the
11 area he would not leave.

12 Q. At some point, did the car turn on -- did the patrol
13 car turn on to Nimitz Road?

14 A. Yes. Pretty quickly actually. Prior to our
15 surveillance units arriving, we were getting set up where we
16 could put eyes on the road so if he departed we could see.
17 However, he would not be able to see us from our position.
18 And before we got set up and parked, Mr. Small went mobile.

19 Q. Okay. Did you pass Mr. Small's vehicle on March 7,
20 2017?

21 A. Yes.

22 Q. Do you remember what direction you were heading on
23 Nimitz Road when you passed the vehicle?

24 A. Yes, northbound.

25 Q. Was Mr. -- what direction was Mr. Small's car

Porter - direct

1 **traveling?**

2 A. **The opposite direction, southbound.**

3 Q. **When you passed the vehicle, did you recognize it as**
4 **Mr. Small's vehicle?**

5 A. **I did.**

6 Q. **How did you recognize it as Mr. Small's vehicle?**

7 A. **Well, I could see it was a 2001 Lincoln Town Car that**
8 **I had identified belongs to Mr. Small.**

9 Q. **Were you able to recognize any persons in the vehicle**
10 **as you passed?**

11 A. **Well, I only focused on Mr. Small, and I could**
12 **positively identify that he was the operator.**

13 Q. **Did you see anyone else in the car?**

14 A. **There was a black female in the passenger side.**

15 Q. **But you were only able to positively identify**
16 **Mr. Small?**

17 A. **That's correct.**

18 Q. **Did you observe anything else about the vehicle as**
19 **you passed it?**

20 A. **The vehicle had a broken windshield.**

21 Q. **Did you have a conversation with any of the other**
22 **officers regarding the broken windshield?**

23 A. **Yes.**

24 Q. **When did that conversation occur?**

25 A. **Immediately as it passed. I know what I said. I**

Porter - cross

1 believe everyone in the car said that's Fatou Small driving,
2 and we all agreed that is a broken windshield. That is a
3 traffic stop.

4 MS. CLOUD: Your Honor, just a moment. If I may
5 confer with my ...

6 THE COURT: Certainly.

7 MS. CLOUD: Thank you, Your Honor.

8 THE COURT: You can certainly pour some water if
9 there is any left.

10 MS. CLOUD: That concludes our direct
11 examination.

12 THE COURT: Okay. Thank you.

13 Once the witness has had a chance to drink some
14 water, Mr. Malik, you may proceed.

15 MR. MALIK: Thank you.

16 CROSS-EXAMINATION

17 BY MR. MALIK:

18 Q. Good evening, Officer Potter.

19 A. Good evening, Mr. Malik.

20 Q. Officer Porter, you had indicated that you were -- had
21 a level of interest in contacting Mr. Small seemingly from
22 September until September of 2016 until March of 2017 when
23 he was apprehended; is that correct?

24 A. Yes, sir.

25 Q. And were you his probation officer at the time?

Porter - cross

1 A. No.

2 Q. Okay. Was he being supervised by other probation
3 officers during the time you were investigating him?

4 A. Yes, sir.

5 Q. Okay. And when he is on probation, does he have to
6 regularly come in, depending on the level of probation he is
7 serving, and report for office visits with other supervising
8 probation officers?

9 A. Yes, sir.

10 Q. And were you aware that Mr. Small was coming in for
11 visits with his supervising probation officer in the time
12 frame from September 2016 until May or, rather -- not May --
13 until March of 2017?

14 A. Yes, sir.

15 Q. Okay. Did you contact his probation officers to see
16 if he was compliance with his probation office visits?17 A. I looked at the case notes but I did not have a
18 discussion with the supervising officer.19 Q. Okay. Would you agree that you have looked at the
20 case notes?

21 A. Yes.

22 Q. Okay. And I have looked at them too, and it appeared
23 that between September the 8th and March the 7th, he had
24 come in for office visits on September 20th, October 4th,
25 November 2th, November 16th, December 6th, January 4th,

Porter - cross

1 January 18th, January 23rd, and February the 15th.

2 I believe that's about nine office visits.

3 Would you have any reason to disagree with that?

4 A. I would not.

5 Q. Okay. And it appears to me based on the record that
6 you had went to do a curfew check regarding Mr. Small at his
7 residence at 805 Bacon Avenue on May 16th, 2016?

8 A. Yes, sir.

9 Q. You testified to that?

10 A. Yes, sir.

11 Q. And was it your testimony that he was not present for
12 that visit?

13 A. He did not answer the door. No one answered the door.

14 Q. When you go do a curfew check and someone doesn't
15 answer the door, do you enter anything into the Probation, I
16 guess the Probation Office notes whether it is a visit at
17 home or a visit at the office or something else?

18 A. I'm supposed to, yes. I should have, yes.

19 MR. MALIK: Your Honor, may I approach the
20 witness, please?

21 THE COURT: You may.

22 MR. MALIK: Thank you.

23 BY MR. MALIK:

24 Q. I'm going to show you the Probation notes. It's
25 Bates stamped page 1673. And it would be the notes from

Porter - cross

1 May 16th, 2016. It looks like it was an 11:17, or 22:17
2 curfew check. Would that have been the documentation
3 regarding the curfew check of Mr. Small?

4 A. Yes, sir.

5 Q. Is there any notation on that report, whether it was
6 positive or negative, your contact with him?

7 A. Yes, sir. I documented no answer. That would mean
8 negative.

9 Q. No answer. Okay. And that was down here in
10 comments, no answer?

11 A. Yes, sir.

12 Q. Because I note in some other ones, it would either
13 have positive or negative next to house visit. You
14 documented down at the bottom there was no answer?

15 A. Yes, sir.

16 Q. Did you report that to his supervising probation
17 officer?

18 A. No.

19 Q. Okay. And were you aware that he would have been
20 back into the Probation Office three times in June of 2016,
21 June 5th, June 15th and June 23rd. After he was checked out
22 his house, it was just negative for the curfew check?

23 A. Sir, I think I misunderstood your last question. I
24 did not notify my supervisor or -- but I would have notified
25 the supervising officer to do that case note. He would have

Porter - cross

1 seen that.

2 Q. He would have seen that?

3 A. Yes, sir.

4 Q. Okay. So it's not as if that would -- that
5 information would have been known to Mr. Small's supervising
6 officer; is that correct?

7 A. Yes.

8 Q. Okay. So does the supervising officer have some
9 element of discretion regarding whether there is going to
10 be a violation based on a missed curfew check?

11 A. Yes, sir.

12 Q. Okay. And then your next curfew check would have
13 been the one that took place on September the 8th, 2016; is
14 that correct?

15 A. Yes, sir.

16 Q. You mentioned there were other times that you were
17 going by Mr. Small's home with negative results. Were they
18 recorded or reported in the Probation -- the system where
19 they have the contact notes? Were they things you were
20 doing on your own as part of your investigation along with
21 Officer Boesenberg?22 A. They were part of the drug investigation that I was
23 conducting. I did not make contact at the door. I did not
24 knock on the door. So I did not document those. No, sir, I
25 did not.

Porter - cross

1 Q. Okay. So basically between May of 2017 and September
2 of 2016, the two times that you were there for curfew checks
3 that were part of the probation system, were those the May
4 and September and they were negative the one time, no
5 answer, he said there was a male's voice in the door and the
6 car was there on 8th of September, 2016; is that fair?

7 A. That's correct.

8 Q. And to the best of your knowledge, both of these
9 incidents were made known to Mr. Small's
10 supervisor/probation officer at the time through the notes?

11 A. Yes, sir.

12 Q. And you are not aware of any violations that were
13 filed because of those; right?

14 A. No.

15 Q. Okay. Now, you mentioned there was a lot of contact
16 with the confidential informant. You indicated that you had
17 contact with the informant close to ten days prior to the
18 March 7th, 2017 incident?

19 A. Yes, sir.

20 Q. Okay. And were there any attempts to obtain a hard
21 warrant from the magistrate or Delaware judicial officer to
22 conduct a search of Mr. Small's person, car, or house?

23 A. No, sir.

24 Q. Okay. And then other than that one time, do you have
25 your notes in front of you?

Porter - cross

1 A. No, sir.

2 Q. Okay. You did mention the fact that Officer Hume who
3 is your -- he is your supervisor, right? Your boss?

4 A. That's correct, sir.

5 Q. As opposed to a supervising probation officer. He is
6 supervising Probation?

7 A. Yes, sir.

8 Q. So he is your boss, your supervising officer,
9 supervising you. He is authorized, pursuant to the Delaware
10 administrative regulations and administrative search of
11 Mr. Small's home on, that would have been September the 8th?

12 A. Yes, sir.

13 Q. Okay. And you say that he has -- (Cough in
14 background) -- lasts for one day?15 THE COURT REPORTER: I am sorry. Repeat that
16 question, please?

17 MR. MALIK: Sure.

18 BY MR. MALIK:

19 Q. The authorization by Supervisor Hume would only have
20 lasted for one day?

21 A. That's correct, sir.

22 Q. Were there any other follow-ups with Officer Hume to
23 have him reissue authorization for probation administrative
24 search?

25 A. Not that I recall, no.

Porter - cross

1 Q. Now, on the date in question when again you mentioned
2 in your report that on March 7th, 2017, you were on routine
3 patrol in the area of Bacon Avenue, was it routine or was it
4 specific to following up your drug investigation concerning
5 Mr. Small?

6 A. Initially, it was a routine patrol. We were in the
7 area, and once we got to the area of Mr. Small's residence,
8 then we focused on more of the drug investigation.

9 Q. Okay.

10 A. We paid attention to that residence with the intent,
11 after we saw Mr. Small, to contact him.

12 Q. Okay. And when you were in that area then, you
13 indicated in your report that you observed the Lincoln Town
14 Car that was parked at 805 Bacon Avenue; is that accurate?

15 A. Yes, sir.

16 Q. And did you drive past the vehicle?

17 A. No. The turn we made was actually before the
18 residence.

19 Q. Um-hmm. So you -- when you -- how were you
20 approaching it where you saw the vehicle and then you turned
21 around?

22 A. So we're approaching from west to east, and when we
23 saw it, we turned southbound on another road but we were
24 probably within a football field away, I could positively
25 identify that was the vehicle.

Porter - cross

1 Q. Were you able to get the license plate from that
2 distance or had you done the tag number from prior visits to
3 the home?

4 A. The position of the vehicle prevented us from seeing
5 the tag, so, no, I could not see the tag.

6 Q. That would have been from prior knowledge? If you
7 listed the tag number in the report, would that have been
8 from prior knowledge or from knowing it after the vehicle
9 was stopped and being conducted that day?

10 A. What I listed in the report was from the traffic
11 stop.

12 Q. From the traffic stop?

13 A. Yes, sir.

14 Q. Now, my understanding is that after the vehicle was
15 seen outside of Mr. Small's home parked -- let me ask you
16 this question. Did it appear to you whether or not the
17 vehicle was running?

18 A. It did, sir.

19 Q. And how were you able to discern that the vehicle was
20 running?

21 A. I don't remember, but I know it was March, so I'm
22 thinking it must -- I could see the exhaust. I just
23 remember that I thought the vehicle was running.

24 Q. Okay. And then a call was made either by you or
25 Detective Boesenberge or Corporal Richey to get backup from

Porter - cross

1 Dover PD to come in to keep an eye or conduct surveillance
2 on 805 Bacon Avenue?

3 A. Our partners that were undercover, we requested them
4 to come to the location.

5 Q. Okay. Were they back at Dover Police Station? Were
6 they out on the street on patrol? Do you know?

7 A. I think they were on patrol.

8 Q. Okay. And that was Detective DiGirolomo and some
9 other officers?

10 A. Yes, sir.

11 Q. Was your plan then to -- what was the game plan if
12 they were going to come in and watch the residence? What
13 was going to happen if they saw Mr. Small get into the
14 vehicle and drive away from the residence?

15 A. Contact Mr. Small. Once Mr. Small got far enough
16 from his door that I thought we could drive up and contact
17 him, that is what we were going to do. In this case, he got
18 in his vehicle and went mobile prior to that.

19 Q. Okay. And we saw -- there was a video that was
20 played, probably played very briefly here. And it appears
21 there was a vehicle that passed, and then the second vehicle
22 that passes the vehicle that Detective Boesenbergs was
23 driving was Mr. Small's vehicle.

24 Were you expecting to see Mr. Small's vehicle
25 pull up as you were heading I guess southbound on Nimitz

Porter - cross

1 **towards Bacon Avenue?**

2 A. I wasn't expecting it, but it was a possibility.

3 Q. Okay. It wasn't a surprise, but you didn't know that
4 it was mobile at that point in time?

5 A. I may have misunderstood your question. We were
6 going to park alongside of Nimitz where we could see Bacon.
7 Before we got parked, we saw Mr. Small traveling westbound
8 on Bacon and make the turn on to Nimitz. So once we saw
9 him, we said that is the Lincoln, and he drove past us.

10 Q. Okay. So you saw him as he was I guess going --
11 would that have been, would that have been like westbound on
12 Bacon, taking a left on to Nimitz, and then going I guess
13 southbound? I'm getting my directions mixed up.

14 A. Yes. I'm trying to --

15 Q. It looked like he was driving away from Bacon Avenue
16 and Detective Boesenbergs vehicle was driving towards Bacon
17 Avenue when the two vehicles passed?

18 A. Yes, I'm not sure if I could see Mr. Small until he
19 actually passed us, but I could see his vehicle when he made
20 the turn from Bacon.

21 Q. All right. And when the vehicle passed you, you
22 indicated you were able to see Mr. Small?

23 A. Yes, sir.

24 Q. Were you able to identify the passenger as to whether
25 the passenger was a male or female as the vehicle passed you?

Porter - cross

1 A. A female. I could identify her.

2 Q. You were able to identify a female --

3 A. Yes.

4 Q. -- as the vehicle passed. And you indicated that you
5 were able to see a broken windshield?

6 A. Yes, sir.

7 Q. Okay. And what was the -- how would you describe the
8 broken windshield that you observed?

9 A. Severely damaged.

10 Q. In what fashion?

11 A. It obstructed the vision of the driver.

12 Q. In what sense? Like one of those spider cracks or . . .

13 A. I would say it traveled directly in front of the view
14 of the driver which would impair his vision.

15 Q. So you thought the crack was so severe that it would
16 impair the vision of the operator of the vehicle?

17 A. Yes, sir.

18 Q. And at what point did you see the crack in the
19 windshield?

20 A. I saw it as it was passing us. I'm not sure if I
21 identified Mr. Small first, but I could see the crack
22 clearly, and then I positively identified Mr. Small.

23 MR. MALIK: Okay. Would we be able to play
24 briefly the first 15 seconds of the video, please.

25 BY MR. MALIK:

Porter - cross

1 Q. We're going to put up on the screen, Officer Porter
2 the first 15 seconds. You are going to see your vehicle
3 going towards Bacon. You are going to see another vehicle
4 come from Bacon and then a second vehicle. The first one is
5 not Mr. Small, the second is Mr. Small's.

6 (Video played.)

7 MR. MALIK: That's not his car. That is his car.
8 Can you stop?

9 BY MR. MALIK:

10 Q. We counted that to be roughly four seconds there.

11 When the vehicle comes into view, at what point
12 were you able to see -- maybe we could run it one more time.
13 At what point, were you able to see the crack in the
14 windshield?

15 A. I could clearly see it, sir. So probably as soon as
16 he made the turn. You can see in this video that once we
17 passed this car, we can see the intersection of Bacon.

18 Q. Okay.

19 A. So I could see it by now for sure.

20 Q. Okay. Now, was there anything --

21 MR. MALIK: If you could back it up one more
22 time. Let's play it, yes, please.

23 BY MR. MALIK:

24 Q. Was there anything that, in your opinion, that made
25 the cracks stand out to you that you were able to see it?

Porter - cross

1 A. It was a large crack.

2 MR. MALIK: Okay. And if we could just go from
3 the beginning one more time.

4 BY MR. MALIK:

5 Q. Are you able to see any sun glare or the position of
6 the sun in this video from the beginning? Do you agree the
7 sun is coming from the left upper corner of that?

8 A. It does appear that way, yes.

9 Q. And the vehicle turns around immediately. Did you
10 have to radio anything in when the vehicle was being stopped
11 to Probation that you are going to conduct the stop with
12 Mr. Small?

13 A. Could you repeat that?

14 Q. Yes. When you are on patrol with police officers,
15 you are a probation officer, do you have to do like a
16 separate radio transmission into your office saying we're
17 conducting a vehicle stop?

18 A. No, sir.

19 MR. MALIK: And if we could please see the still
20 photograph that would be still Photograph Number Exhibit 3,
21 please. Yes.

22 BY MR. MALIK:

23 Q. Okay. This was a photograph that was taken of the
24 vehicle by Detective Boesenber. Are you able to see, in
25 the photograph that appears on the screen, Government's

Porter - cross

1 **Exhibit 3, the crack, the severe crack in the windshield?**

2 A. I couldn't be sure, but I believe that is the crack
3 between the windshield wipers. That may be part of the
4 crack. It's difficult to see in the photograph, sir.

5 Q. Did we have a pointer up here?

6 A. Oh, there it is on your ...

7 Q. Okay. You were referring to a part of the photograph
8 that I was going to say if you need the pointer, if it
9 works, if you are able to point at the screen?

10 A. So here I can see what I believe is the crack. And
11 that possibly is part of the crack, but I knew the crack
12 traveled. I think in the photograph, it travels in front of
13 the driver there, but I don't see it in the photograph.

14 Q. Okay. Were you aware that photographs had been taken
15 of the vehicle?

16 A. Yes, sir.

17 Q. And did you look at any of the photographs on the
18 scene? I think we heard they were digital so you could at
19 least see, not this big but like in the camera screen or the
20 camera, I guess whatever you call it, the part that displays
21 the video photos. Did you have an opportunity to look at
22 the photos at the scene?

23 A. I don't think I looked at them at the scene, but I
24 have seen this photograph.

25 Q. You have seen that one before? Okay. You had

Porter - cross

1 nothing -- you are the probation officer. You had nothing
2 to do with taking the photographs or securing the evidence
3 or anything like that, I take it; right?

4 A. Evidence, evidence at the traffic stop I did not
5 collect. I did collect a piece of evidence from the female
6 that was in the vehicle.

7 Q. Okay. Do you recall which officer, whether yourself,
8 Detective Boesenberge or Corporal Richey detected the crack
9 first as you were driving past the vehicle?

10 A. I don't, but it was so simultaneous that everyone I
11 think just stated aloud there is a cracked windshield.

12 Q. It was almost said in unison?

13 A. Yes, sir.

14 Q. And at what point was it said? We saw the video.
15 There was the passing of the vehicle. There was a little
16 bit of a continuation down Nimitz, then there was the turn
17 around. Do you recall at what point?

18 A. As the vehicle was approaching us and we're getting
19 ready to pass it, we can see the cracked windshield. And
20 then as the vehicle passes we're going -- we're not going
21 very fast, neither one. He had just made the turn, and I
22 can clearly see in and see Mr. Small.

23 Q. As the vehicle went past you?

24 A. Yes, sir.

25 Q. So you indicated the crack in the windshield was

Porter - redirect

1 announced prior to turning around, and it was just prior to
2 turning around that you looked in and saw Mr. Small as well?

3 A. Did you say just prior to?

4 Q. Yes, to your vehicle turning around. Detective
5 Boesenbergs vehicle turning around.

6 A. Yes.

7 Q. Is it your testimony that the crack was so severe, it
8 was obvious to all three officers in the vehicle that the
9 window was severely cracked impeding the view of the driver
10 that you all said at the same time the windshield is cracked?

11 A. That is, yes.

12 MR. MALIK: Okay. Thank you. No further
13 questions.

14 THE COURT: Ms. Cloud.

15 MS. CLOUD: Thank you, Your Honor.

16 REDIRECT EXAMINATION

17 BY MS. CLOUD:

18 Q. Officer Porter, in your experience, does a video or a
19 photo ever fail to capture what you can see with the naked
20 eye?

21 A. Well, this is an example. I distinctly remember this
22 being a cracked window. I saw that cracked window, but I
23 cannot see it in the photograph, so yes.

24 Q. Officer Porter, you mentioned you have seen this
25 photograph before?

Porter - redirect

1 A. **Yes.**

2 Q. **Do you think this is a good photograph?**

3 A. **No.**

4 Q. **Did you take this photograph?**

5 A. **I did not.**

6 Q. **Okay. Now, Officer Porter, you testified before that**
7 **you saw the car turn from Bacon Avenue onto Nimitz Road,**
8 **Mr. Small's car turn on Bacon Avenue -- from Bacon Avenue on**
9 **to Nimitz Road; is that correct?**

10 A. **Yes.**

11 Q. **Could you observe more from your vantage of the front**
12 **passenger seat than what the video captures?**

13 A. **Yes. Absolutely.**

14 Q. **Officer Porter, is your role working with Safe**
15 **Streets the same as the role of the probation officers who**
16 **supervise Mr. Small directly?**

17 A. **No, completely different mission.**

18 Q. **Can you just elaborate a little bit on the difference**
19 **in that mission?**

20 A. **Well, one of my duties include focusing on high risk**
21 **offenders, drug dealers, and individuals that carry guns,**
22 **focusing on doing curfew checks, paying attention to more**
23 **violent offenders. Fatou Small had been identified by**
24 **myself as one of these individuals.**

25 MS. CLOUD: **Okay. Nothing further, Your Honor.**

Porter - Court examination

1 THE COURT: All right. Just a few questions.

2 EXAMINATION BY THE COURT

3 THE COURT: You say you could see the
4 defendant's vehicle as it turned from Bacon onto Nimitz;
5 correct?

6 THE WITNESS: Yes.

7 THE COURT: We don't see that in the video;
8 correct?

9 THE WITNESS: I don't think you could see that,
10 no.

11 THE COURT: When did you first see that there
12 was a crack in the windshield?

13 THE WITNESS: As the vehicle is approaching, I
14 could see the crack. It's a very short distance. So
15 probably right after the vehicle made the turn and he is
16 approaching us, so the vehicle is probably, I don't know,
17 less than 50 meters away I could see.

18 THE COURT: Could you see the crack in the
19 windshield before your vehicle passed the first vehicle that
20 we saw in the video?

21 THE WITNESS: No.

22 THE COURT: Now, you say you had developed a
23 plan some time after September 2016 to try to confront the
24 defendant somewhere away from his residence; is that correct?

25 THE WITNESS: That's correct.

Porter - Court examination

1 THE COURT: So on March 7th, 2017, was it still
2 your plan to confront the defendant at some point when he is
3 away from his residence?

4 THE WITNESS: That is correct, Your Honor.

5 THE COURT: So once you had positively
6 identified him as being in this vehicle, were you,
7 consistent with your plan, going to confront the defendant?

8 THE WITNESS: We were, yes.

12 THE WITNESS: Exactly. Once we positively
13 identified him, we would have stopped him. However, it was
14 a traffic violation, so the officer attended to that first.

15 THE COURT: But you were going to pull him over
16 either way?

17 THE WITNESS: Yes, Your Honor.

18 THE COURT: Thank you.

19 Any questions?

20 MS. CLOUD: No, Your Honor.

21 THE COURT: Any further questions?

22 MR. MALIK: No, Your Honor.

THE COURT: All right. You may step down.

24 ||| Thank you very much.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: Does the government intend to call
2 anybody else?

3 MS. CLOUD: No, Your Honor.

4 THE COURT: Does the defense to call anybody
5 else?

10 THE COURT: Well, so let's talk about how we're
11 going to proceed --

12 MR. MALIK: Yes, Your Honor.

13 THE COURT: -- and finish for today very soon
14 because I will take note I kept everyone here very late.

18 MS. CLOUD: Yes, Your Honor. I think we would
19 like to present, perhaps after having an opportunity to
20 review the transcript, present either argument or file a
21 brief.

22 THE COURT: All right. Mr. Malik, what is your
23 view?

24 MR. MALIK: I think it would be helpful, Your
25 Honor, so I don't object to that. I probably would prefer

1 to file a brief or memorandum, something along those lines.

2 THE COURT: Let's do this. You confer with one
3 another, and I'll have the government, by Friday, get back
4 to me with the proposed briefing schedule. I think briefing
5 would be helpful. If I need argument in person as well,
6 I'll let you know that after we review the briefs.

7 Anything further from the government?

8 MS. CLOUD: No, Your Honor. Thank you.

9 THE COURT: From defense?

10 MR. MALIK: No, Your Honor. Thank you.

11 THE COURT: Thank you all. And thank you to our
12 CSO and the marshals for staying late.

13 We will be in recess.

14 (Hearing ends at 5:51 p.m.)

15
16 I hereby certify the foregoing is a true and accurate
17 transcript from my stenographic notes in the proceeding.

18
19 /s/ Brian P. Gaffigan
20 Official Court Reporter
21 U.S. District Court
22
23
24
25



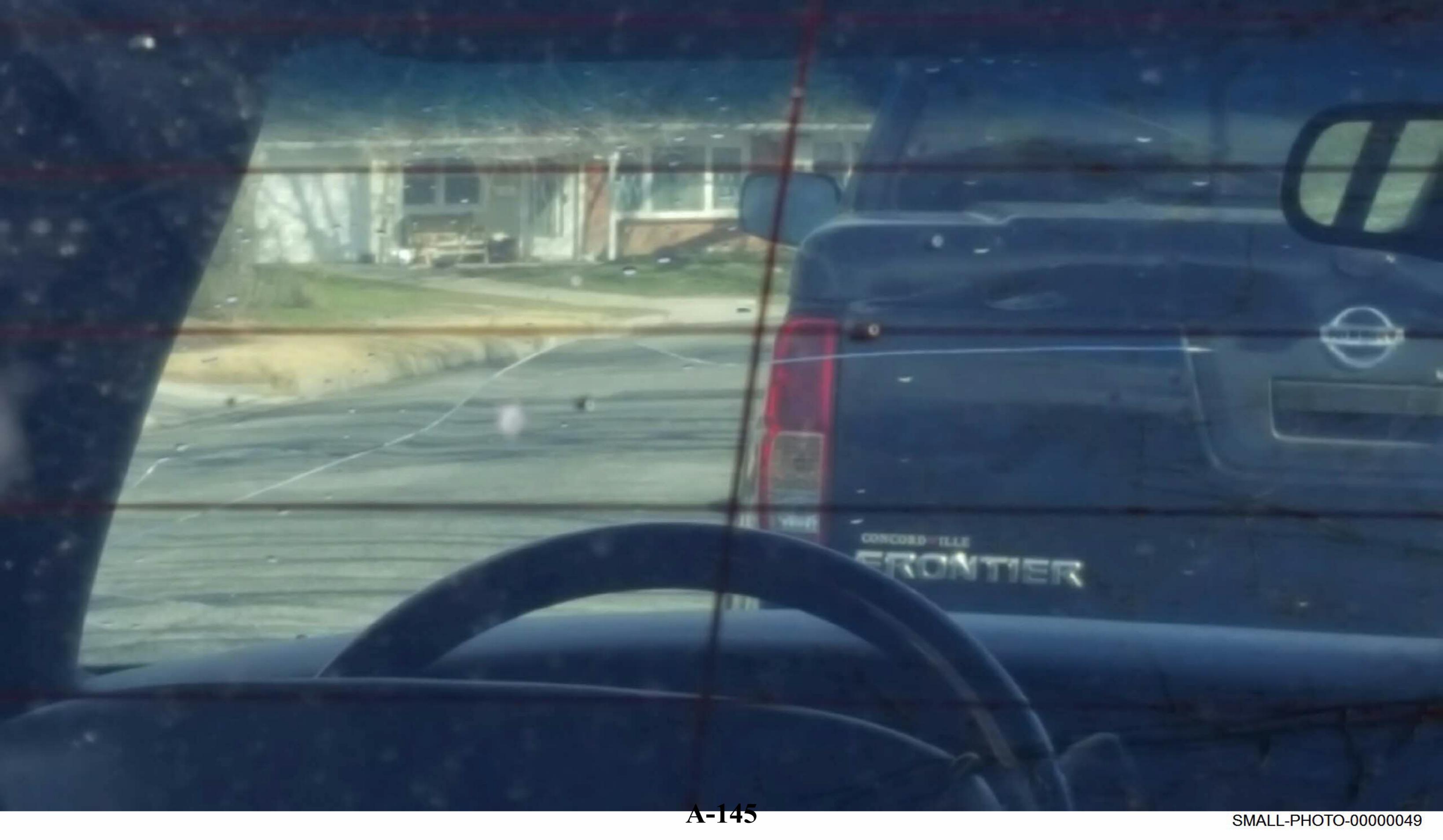
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filed in open court 8/6/18 *MW*
IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA)
v.)
FATOU SMALL,) Criminal Action No. 17-27-LPS
Defendant.)

MEMORANDUM OF PLEA AGREEMENT

Pursuant to discussions between the United States of America, by and through its attorneys, David C. Weiss, United States Attorney for the District of Delaware, and Whitney C. Cloud, Assistant United States Attorney, and the defendant, Fatou Small, by and through his attorney, John S. Malik, Esquire, the following agreement is hereby entered into by the respective parties:

1. The defendant shall plead guilty in the United States District Court for the District of Delaware to Counts One and Two of the Indictment, which respectively charge the defendant with possession of a firearm by a prohibited person in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2), and possession of a controlled substance, to wit, 3,4-Methylenedioxymethamphetamine/MDMA [ecstasy], with the intent to distribute in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C).

2. The defendant understands that the maximum penalties for Count One of the Indictment are: ten (10) years of imprisonment; a \$250,000 fine; three (3) years of supervised release; and a \$100 special assessment. The defendant understands that the maximum penalties for Count Two of the Indictment are: twenty (20) years of

imprisonment; a \$1,000,000 fine; up to a lifetime of supervised release; and a \$100 special assessment.

3. The defendant understands that if there were a trial, the government would have to prove the following elements of Counts One and Two of the Indictment beyond a reasonable doubt:

- a. Count One: (1) the defendant knowingly possessed a firearm; (2) at the time of possession, the defendant had previously been convicted of a crime punishable by a term of imprisonment exceeding one year; and (3) the possession of the firearm was in or affecting interstate commerce.
- b. Count Two: (1) the defendant possessed a mixture or substance containing a controlled substance; (2) the defendant possessed the controlled substance knowingly or intentionally; (3) the defendant possessed the substance with the intent to distribute it; and (4) the controlled substance was 3,4-Methylenedioxymethamphetamine/MDMA [ecstasy].

The defendant knowingly, voluntarily, and intelligently admits his guilt to each of the above-described elements of Counts One and Two of the Indictment.

4. Provided that the United States does not subsequently learn of conduct by the defendant inconsistent with acceptance of responsibility, the United States agrees that in consideration of the defendant's timely guilty plea, a three level reduction under

U.S.S.G. Sections 3E1.1(a) & 3E1.1(b) for the defendant's affirmative acceptance of responsibility is appropriate.

5. The United States retains the right to make whatever recommendations at the time of sentencing that it believes are appropriate and to defend the rulings of the District Court at any subsequent proceeding.

6. The defendant understands that the District Court must consider the United States Sentencing Guidelines, the applicable statutory maximum, and the factors set forth in 18 U.S.C. Section 3553(a) in determining an appropriate sentence. The defendant understands that the ultimate determination of an appropriate sentence will be up to the sentencing judge. The Court may impose a sentence that exceeds, falls below, or is contained within the sentencing range prescribed by the Sentencing Guidelines. The defendant expressly acknowledges that if the Court imposes a sentence outside the range set forth in the Sentencing Guidelines, is otherwise different than the defendant expected, or is contrary to the recommendation of his attorney or the United States, the defendant will not be allowed to withdraw his guilty plea on that basis.

7. Pursuant to Federal Rule of Criminal Procedure 11(a)(2), the defendant reserves the right to take an appeal from the District Court's opinion and order denying his Motion to Suppress Evidence, docket item 54 in this case. The defendant has been fully advised and understands that if he prevails on the appeal of the opinion and order denying his Motion to Suppress Evidence, he shall be allowed to withdraw his guilty

plea. If the defendant does not prevail, however, he has no right to withdraw his plea of guilty.

8. The defendant agrees to forfeit all interests in any property used, or intended to be used, in any manner or part to commit, or to facilitate the commission of, the violations charged in Counts One and Two of the Indictment, including, but not limited to: 1) a Smith & Wesson .357 Magnum Revolver bearing serial number AYS3896, and 2) \$1,131.00 in U.S. currency. The defendant further agrees to waive all interest in any such assets in any administrative or judicial forfeiture proceeding, whether criminal or civil, state or federal. The defendant agrees to consent to the entry of orders of forfeiture for such property and waives the requirements of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. The defendant acknowledges that he understands that the forfeiture of assets is part of the sentence that may be imposed in this case and waives any failure by the Court to advise him of this, pursuant to Rule 11(b)(1)(J), at the time his guilty plea is accepted. Pursuant to Rule 32.2(b)(3), the defendant will promptly consent to the preliminary order of forfeiture becoming final as to the Defendant before sentencing if requested by the government to do so.

9. The defendant further agrees to waive all constitutional and statutory challenges in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds,

including that the forfeiture constitutes an excessive fine or punishment. The defendant agrees to take all steps as requested by the United States to pass clear title to forfeitable assets to the United States, and to testify truthfully in any judicial forfeiture proceeding. The defendant acknowledges that all property covered by this agreement is subject to forfeiture as proceeds of illegal conduct, property facilitating illegal conduct, and/or property involved in illegal conduct giving rise to forfeiture.

10. The defendant knows that he has, and voluntarily and expressly waives, the right to file any appeal, any collateral attack, or any other writ or motion after sentencing – including, but not limited to, an appeal under 18 U.S.C. § 3742 or 28 U.S.C. § 1291, or a motion under 28 U.S.C. § 2255. Notwithstanding the foregoing, the defendant reserves the right to do the following: (1) file the aforementioned appeal of the opinion and order denying his Motion to Suppress Evidence; (2) file an appeal or other collateral motion on the grounds that he received ineffective assistance of counsel, and (3) appeal his sentence if: (a) the government appeals from the sentence; (b) the defendant's sentence exceeds the statutory maximum for the offense set forth in the United States Code; or (c) the sentence unreasonably exceeds the Sentencing Guidelines range determined by the District Court in applying the United States Sentencing Guidelines.

11. The defendant agrees to pay the \$200 special assessment the day of sentencing. Should he fail to do so, or should he have other outstanding financial responsibilities as a result of his plea of guilty to Counts One and Two of the Indictment,

the defendant agrees to voluntarily enter the United States Bureau of Prisons' Inmate Financial Responsibility Program, through which the Bureau of Prisons will collect a portion of defendant's prison salary and apply it on defendant's behalf to the payment of the outstanding debt ordered.

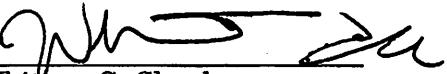
12. This Memorandum expressly incorporates Attachment A, which is attached hereto and filed under seal. The government routinely files such an attachment, even though it may or may not contain additional terms. To the extent, however, that Attachment A contains additional terms, the parties acknowledge and agree to be bound by those terms.

13. It is further agreed by the undersigned parties that this Memorandum – together with Attachment A – supersedes all prior promises, representations, and statements of the parties; that this Memorandum may be modified only in writing signed by all the parties; and that any and all promises, representations, and statements made prior to or after this Memorandum are null and void and have no

effect whatsoever, unless they comport with the subsequent written modification provisions of this paragraph.

DAVID C. WEISS
United States Attorney

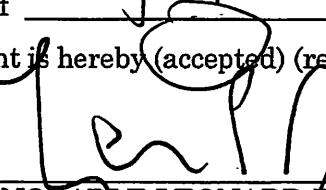

John S. Malik, Esquire
Attorney for Defendant

By: 
Whitney C. Cloud
Assistant United States Attorney

Fatou Small 6/18/18
Fatou Small, Defendant

Dated: 6/18/18

AND NOW, this 6th day of August, 2018, the foregoing Memorandum of Plea Agreement is hereby (accepted) (rejected) by this Court.


THE HONORABLE LEONARD P. STARK
CHIEF UNITED STATES DISTRICT JUDGE

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1344

UNITED STATES OF AMERICA

v.

FATOU SMALL,
Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1:17-cr-00027-001)
District Judge: Honorable Leonard P. Stark

Submitted Under Third Circuit L.A.R. 34.1(a)
On November 15, 2019

Before: AMBRO, KRAUSE, and BIBAS, *Circuit Judges*

(Filed: January 6, 2020)

OPINION*

* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

BIBAS, *Circuit Judge*.

Specific, corroborated tips about drug dealing can give officers reasonable suspicion to stop a car and search it. A reliable informant told officers that Fatou Small was using a black Lincoln Town Car to transport large amounts of ecstasy and that he was a major drug dealer. The officers corroborated part of this tip when they confirmed that the black Town Car they saw in Small's driveway belonged to him. They also knew that Small was on probation after a felony drug conviction and that he had twice failed curfew checks.

So when they later saw him driving that car, they could reasonably suspect a crime and thus could pull him over. And because Small was on probation, this reasonable suspicion justified searching not only his car, but also his house. Because the stop of his car and both searches were constitutional, we will affirm the District Court's denial of his motion to suppress.

I. BACKGROUND

A. Small's suspicious history on probation

After serving time in Delaware state prison for a drug felony, Small was released on probation. As a probationer, he had to comply with court-ordered conditions, including a curfew. Yet within months of his release, he began missing curfew checks. In May 2016, when Dover Probation Officer Ricky Porter visited Small's home, Small did not answer the door.

In September 2016, Officer Porter, along with Dover Police Officers Joshua Boesenberg and Justin Richey, tried again. When they got to Small's house, they saw another man

leave the house and get into a car. As Officer Porter approached the car, the man sped away. The officers pursued the man and arrested him after he crashed his car.

After the chase, Officer Porter returned to Small's house. He heard a male voice inside. But when he knocked, no one answered. He also saw a black Lincoln Town Car parked in the driveway and later learned that it belonged to Small.

So the officers began surveilling Small's house and investigating his behavior. As part of that investigation, they developed a relationship with a confidential informant. The informant, who later gave the police reliable information in other cases, said that Small was a major supplier of ecstasy around Dover. Speaking from personal knowledge, the informant explained that Small would bring ecstasy from New York City to Dover in his black Lincoln Town Car and then sell it from his home. The officers also spoke with others who corroborated Small's ecstasy dealing.

Over the next six months, the officers spoke to the confidential informant four or five times. They repeatedly tried to contact Small but could not.

B. The stop and search

One afternoon in March 2017, Officers Boesenber, Porter, and Richey were on routine patrol through Small's neighborhood. They decided to drive past Small's house to see if he was home. As they approached, they saw Small's black Lincoln Town Car idling in the driveway with someone sitting in the passenger seat. So they called in backup to keep an eye on the house and the car.

The officers then drove away. But when they realized that Small might leave before surveillance arrived, they turned around. Sure enough, on the way back, they passed the

black Lincoln Town Car driving away from the house. They saw that Small was driving and, they later testified, noticed a crack in the front windshield. So they decided to pull him over.

When Officer Boesenbergs approached the driver's side, he smelled marijuana. Small's passenger admitted that she had been smoking it before the officers pulled them over. She also said that, after the officers started following them and turned on their patrol car's emergency lights, Small gave her a bag of pills to hide.

The officers arrested both Small and the passenger, searched the car, and found marijuana and ecstasy pills. They then got an administrative warrant for a probationer search of Small's home, where they found more marijuana and ecstasy pills, along with digital scales and a pistol.

C. Small's motion to suppress

Small was charged with being a felon in possession of a gun and possession with intent to distribute a controlled substance. He moved to suppress the evidence from the searches and the statements he made to police after they stopped his car. *United States v. Small*, No. 1:17-cr-00027-001, 2018 WL 2049821, at *2 (D. Del. May 2, 2018) He argued that the traffic stop was illegal because "the officers could not have seen the windshield crack as they drove past" his car. *Id.* After a suppression hearing, the District Court denied Small's motion. *Id.* at *1. It found the officers' testimony credible and explained that the government had "specific, articulable facts to justify a belief that Small was violating a traffic law at the time of the stop" because his windshield was cracked. *Id.* at *2.

Small conditionally pleaded guilty, reserving his right to challenge the denial of his motion to suppress. On appeal, he again argues that the officers could not have seen the windshield crack when driving by, so they lacked reasonable suspicion of a traffic violation. We review the District Court's finding of reasonable suspicion *de novo*. *Ornelas v. United States*, 517 U.S. 690, 691 (1996).

II. THE OFFICERS COULD HAVE REASONABLY SUSPECTED THAT SMALL WAS TRANSPORTING DRUGS

The traffic stop, the search of Small's car, and the administrative search of his house are three separate actions, so "each requires its own justification." *United States v. Gatlin*, 613 F.3d 374, 378 (3d Cir. 2010). Because Small was on probation, the officers needed only reasonable suspicion for each of those actions. *See United States v. Henley*, 941 F.3d 646, 651 (3d Cir. 2019); *United States v. Hill*, 967 F.2d 902, 909 (3d Cir. 1992). And because the officers could have reasonably suspected that Small was using his car to transport ecstasy, the traffic stop and two searches were constitutionally valid. This is true even if the officers could not have seen the crack in Small's windshield. *See Whren v. United States*, 517 U.S. 806, 813 (1996).

A. The stop of Small's car was valid

The Fourth Amendment lets "an officer ... conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The reasonable-suspicion standard applies whether the suspect is traveling on foot or by car. *United States v. Delfin-Colina*, 464 F.3d 392, 397 (3d Cir. 2006).

Reasonable suspicion “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.” *Wardlow*, 528 U.S. at 123. The officer need articulate only a “‘particularized and objective basis’ for suspecting legal wrongdoing.” *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). To decide whether an officer could have reasonably suspected wrongdoing, we look at the totality of the circumstances. *Id.*

The government argues that the officers reasonably suspected a traffic violation because they saw a crack in Small’s windshield. The District Court agreed. 2018 WL 2049821, at *2. On appeal, Small marshals considerable evidence to the contrary. He shows that the officers’ reported sighting of a “large” and “clearly visible” crack in Small’s “[s]everely damaged” windshield that “obstructed [Small’s] vision” does not square with the photographs taken of his windshield later that day. *Compare* JA 67, 132, 134 (officers’ testimony), *with* JA 143–45 (photographs of Small’s car). Nor was the crack visible in the video footage of the traffic stop.

But we need not question the District Court’s credibility finding because “[w]e may affirm on any ground supported by the record.” *United States v. Agnew*, 407 F.3d 193, 196 (3d Cir. 2005). Here, the officers had an alternative basis for the stop: reasonable suspicion that Small was using his car to traffic drugs.

When the officers saw Small driving by them, they had an articulable basis to suspect that he had ecstasy in the car. Based on tips from a reliable informant, they knew that he used his black Lincoln Town Car to transport ecstasy. This tip alone could arguably support reasonable suspicion. *See Gatlin*, 613 F.3d at 378.

Plus, the officers' personal observations partially corroborated the tip. At the September 2016 curfew check, Officer Porter saw a black Lincoln Town Car parked in Small's driveway. Afterwards, he ran the car's registration and found that it was Small's. On top of this, the officers knew that Small had been behaving suspiciously for months: he had failed two curfew checks, one of which had led to a hot pursuit of a man who had just come out of Small's home.

These particularized facts, coupled with Small's prior drug conviction, could lead the officers to reasonably suspect that Small used his car to transport drugs. *See United States v. Green*, 897 F.3d 173, 187 (3d Cir. 2018) ("Though a criminal record ... is not sufficient to establish reasonable suspicion, it is a valid factor."). So as soon as the officers saw the black Lincoln Town Car pass them with Small at the wheel, they had reason to suspect a crime.

Small argues that because the informant's tips date to September 2016, they had gone stale by the March 2017 stop. But Officers Boesenber and Porter had spoken to the informant four or five more times in the intervening six months. The last of these was only one-and-a-half to two weeks before the stop. In any event, the passage of time "loses significance" when tips relate to ongoing crimes. *Henley*, 941 F.3d at 653 (quoting *United States v. Urban*, 404 F.3d 754, 774 (3d Cir. 2005)). So the tips were not stale. The officers still had reasonable suspicion and could make the stop.

B. The searches of Small's car and home were also valid

After stopping Small's car, the officers searched it. They also later searched his home.

We hold that these searches were valid for three reasons.

First, the same reasonable suspicion that justified the traffic stop likewise justified the search of the car. Ordinarily, the automobile exception to the warrant requirement lets officers search a car without a warrant if there is probable cause to believe that the car holds evidence of a crime. *United States v. Donahue*, 764 F.3d 293, 299–300 (3d Cir. 2014). But because of the “special needs” of the probation system, searches of probationers’ property require not probable cause, but only reasonable suspicion. *Hill*, 967 F.2d at 907–09 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 875–76 (1987)). As discussed, the officers reasonably suspected that Small was transporting drugs in his car. So they could search the car without a warrant.

Second, after the lawful stop began, the officers gathered more evidence that corroborated and heightened their suspicion. After stopping Small's car, Officer Boesenbergs approached the car and smelled marijuana coming from it. Then Officer Porter questioned the passenger, who admitted that she had been smoking marijuana before the stop. She also said that once the stop began, Small gave her a bag of pills to hide. Only after these admissions did the officers search the vehicle. By that point, the officers had “not merely reasonable suspicion, but probable cause” to search the car for drugs. *United States v. Ramos*, 443 F.3d 304, 308 (3d Cir. 2006).

Finally, the officers’ reasonable suspicion that Small was dealing ecstasy also justified the probationer search of his house. Small argues that the administrative search warrant

rested on the evidence gathered from the allegedly illegal search of his car. But the stop and search of his car were both lawful.

In any case, the officers had reason to suspect Small of drug dealing *before* they pulled him over in March 2017. Because Small is a probationer, this reasonable suspicion was all the officers needed to search his house. *Henley*, 941 F.3d at 651; *Hill*, 967 F.2d at 909. The evidence gathered from the car search only bolstered the officers' grounds for searching his house. Thus, that search was also valid under the Fourth Amendment.

* * * * *

Even if the officers could not have seen the crack in Small's windshield before they pulled him over, they saw that he was driving his black Lincoln Town Car. That was enough. Based on tips from a reliable informant, the officers' own observations, and Small's criminal record, they could have reasonably suspected that he had ecstasy in his car. With that reasonable suspicion, they could pull him over and search both his car and his house. So the stop and both searches were constitutionally valid. We will thus affirm.