UNITED STATES OF AMERICA v. MALIK NASIR, Appellant
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
2020 U.S. App. LEXIS 37489
No. 18-2888
November 12, 2019, Argued before Merits Panel Argued En Banc on June 24, 2020
December 1, 2020, Filed

Editorial Information: Prior History

{2020 U.S. App. LEXIS 1}On Appeal from the **United States** District Court for the District of Delaware. (D.C. No. 1-16-cr-00015-001). District Judge: Hon. Leonard P. Stark.United **States v. Nasir**, 2017 U.S. Dist. LEXIS 36813, 2017 WL 995206 (D. Del., Mar. 15, 2017)

Counsel Leigh M. Skipper, Brett G. Sweitzer, Keith M. Donoghue [ARGUED], Federal Community Defender Office, For the Eastern District of Pennsylvania, Philadelphia, PA, Counsel for Appellant.

Ilya Shapiro, Cato Institute, Washington, DC, Counsel for Amicus Cato Institute.

Jared McClain, New Civil Liberties Alliance, Washington, DC, Counsel for Amicus New Civil Liberties Alliance.

Evan A. Young, Baker Botts, Austin, TX, Counsel for National Association of Home Builders, American Farm Bureau Federation, National Cattlemens Beef Association, and National Mining Association.

David C. Weiss, Robert F. Kravetz [ARGUED], Whitney C. Cloud [ARGUED], Daniel E. Logan, Jr., Office of **United States** Attorney, Wilmington, DE, Counsel for Appellee.

Judges: Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, SCIRICA,* and RENDELL,* Circuit Judges.

CASE SUMMARY Under plain error review, defendant's conviction for possession of firearm by felon under 18 U.S.C.S. § 922(g) could not stand and a new trial on that charge was required because, at trial prior to the U.S. Supreme Court's opinion in Rehaif v. United States, literally no evidence was presented as to defendant's knowledge of his status as felon.

OVERVIEW: HOLDINGS: [1]-There was a legitimate basis for defendant's conviction under 21 U.S.C.S. § 856(a)(1) because subsection (a)(1) expressly prohibited "distributing" a controlled substance from any rented place, and the jury was presented with more than ample evidence that defendant was doing just that; [2]-Because inchoate crimes were not included in the definition of controlled substance offenses given in USSG § 4B1.2(b), United States v. Hightower was overruled; [3]-Defendant's conviction under 18 U.S.C.S. § 922(g) could not stand because literally no evidence was presented as to defendant's knowledge of his status as a felon. Whether viewed as a matter of the Fifth Amendment's guarantee of due process or the Sixth Amendment's promise of trial by jury, or both, a deprivation of those essential rights seriously impugned the fairness, integrity and public reputation of judicial proceedings.

OUTCOME: Affirmed in part. Conviction as a felon in possession of a firearm and sentence vacated.

Appendix A

Case remanded.

{982 F.3d 149} OPINION OF THE COURT**

JORDAN, *Circuit Judge*.

On a tip, Malik **Nasir** was arrested near a storage unit in which he kept the marijuana **{982 F.3d 150}** he was selling.**{2020 U.S. App. LEXIS 2}** He was subsequently charged with, and convicted of, two drug offenses and a firearm offense. At sentencing, the District Court applied a career offender enhancement. **Nasir** now appeals his convictions and challenges the application of that enhancement. We will affirm Nasir's convictions in part but, in light of the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019), we will vacate his conviction as a felon in possession of a firearm and remand for a new trial on that charge, as well as for resentencing on the remaining counts of conviction.

I. BACKGROUND

On December 21, 2015, the owner of a storage facility in Dover, Delaware reported to the police suspicious activity at one of the storage units, number C69. The owner asked the police to visit the storage facility to discuss what he believed to be "drug occurrences" on his property. (App. at 90.) When the police arrived, he told them that, over the past several months, someone had visited that unit frequently, as often as five times a day. Each time, the man - whom he identified as **Nasir** - would enter the storage unit and close the door behind him. Shortly thereafter, he would reemerge and leave the facility. Concerned about illegal activity, the owner had taken a photograph**{2020 U.S. App. LEXIS 3}** of the inside of the unit, which he showed the officers. It revealed two large coolers, two closed buckets, a box of baggies, a large bag, and an aerosol spray can. The owner provided a copy of a rental agreement signed by **Nasir** and a photocopy of Nasir's driver's license. The rental agreement listed Nasir's storage unit as C43, not C69, but the police apparently did not notice that discrepancy.1

Following up on the information provided by the facility owner, the police ran a criminal history check on **Nasir** and learned that he had a criminal record that included felony drug convictions. They visited unit C69 with a drug detection dog, and the dog positively alerted to the presence of drugs there. Based on the accumulated evidence, the detectives applied for a search warrant for that unit.

While awaiting the warrant, several police officers remained at the storage unit, and one surveilled Nasir's home. The officer at the home saw **Nasir** place a large black bag in the back of a Mercury Mariner SUV and drive in the direction of the storage facility. **Nasir** in fact went to the facility, and, when he arrived, the officers stopped him as he entered the row of units including numbers C69 and C43.**{2020 U.S. App. LEXIS 4}** After handcuffing him and putting him in the back of a patrol car, they searched his SUV, where they found a black duffle bag and a key to unit C69.

That same night, a search warrant issued and was executed. In unit C69, the police found more than three kilograms of marijuana, as well as scales and packaging materials. The next day, they applied for and received a search warrant for Nasir's home and any vehicles on the property. While executing the warrant, the officers found $5,000 in cash in a grocery bag in the house and several handguns with ammunition in a Dodge Charger parked on the property.

{982 F.3d 151} **Nasir** was indicted for violating 21 U.S.C. § 856(a)(1), part of what is commonly known as the crack house statute (Count One), and was also charged under 21 U.S.C. §§ 841(a)(1) and (b)(1)(D) for possession of marijuana with intent to distribute (Count Two), and under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) as a felon in possession of a firearm (Count Three). He moved to suppress the evidence obtained from the searches of the storage unit, his house, and his vehicles. The District Court held hearings on that motion and denied it.

Appendix A

At trial, and of particular relevance now, **Nasir** entered a stipulation with the government as to the charge that he illegally possessed a firearm. Pursuant**{2020 U.S. App. LEXIS 5}** to *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997),2 he stipulated that, prior to the date when he allegedly possessed the firearm, he had been "convicted of a felony crime punishable by imprisonment for a term exceeding one year, in the United States District Court for the Eastern District of Virginia."3 (Supp. App. at 21.) The jury convicted him on all three counts of the indictment.

After the trial, **Nasir** filed a motion to set aside the verdict and a motion for a new trial, both of which were denied. The District Court sentenced him to 210 months of imprisonment and three years of supervised release, having determined that he qualified as a career offender under the United States Sentencing Guidelines (the "guidelines") because of two earlier convictions in Virginia, one from the year 2000 for attempting to possess**{2020 U.S. App. LEXIS 6}** cocaine with intent to distribute and one from 2001 for possession of cocaine and marijuana. This timely appeal followed.

II. DISCUSSION4

Nasir raises five arguments. First, he says that there was insufficient evidence to sustain his conviction under the crack house statute because the section of the statute under which he was convicted does not make it unlawful to store drugs. Second, he argues that the officer who searched the Mercury Mariner did not have probable cause to justify that search, so the evidence found there should have been suppressed. Third, he contends that a member of his jury was avowedly partial, so seating her deprived him of a fair trial. Fourth, he asserts that the career offender enhancement under the guidelines should not have factored into his sentencing because one of his prior felony convictions does not qualify as a "controlled substance offense," as that term is defined in the guidelines. Finally, he argues that the government did not prove that he knew he was a felon, as is now required by *Rehaif* **{982 F.3d 152}** in a prosecution under 18 U.S.C. § 922(g), 139 S. Ct. at 2194, so his conviction under that statute for being a felon in possession of a firearm cannot stand.

We will affirm the District Court's**{2020 U.S. App. LEXIS 7}** denial of Nasir's motion for acquittal as to Counts 1 and 2 and accordingly affirm those convictions. In doing so, we reject Nasir's first three arguments. However, we agree that he does not qualify for the career offender enhancement and must be resentenced. We also hold that his conviction for being a felon in possession of a firearm must be vacated and remanded for a new trial on that count of the indictment.

A. The Crack House Conviction

Nasir first challenges his conviction under the crack house statute, specifically 21 U.S.C. § 856(a)(1), which makes it unlawful to "knowingly ... lease, rent, use, or maintain any place ... for the purpose of manufacturing, distributing, or using any controlled substance." Despite the breadth of that language, **Nasir** argues that his conviction should be reversed because, he says, that subsection was not meant to cover storage.5 **Nasir** did not preserve that argument in the District Court, so we review the denial of his motion for judgment of acquittal for plain error.6 *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). We will reverse for plain error only if there was an actual error that is plain, that affects "the outcome of the district court proceedings," and that "seriously affect[s] the fairness, integrity or public**{2020 U.S. App. LEXIS 8}** reputation of judicial proceedings." *Id.* at 734-36 (citations and internal quotation marks omitted) (alteration in original).

Nasir's argument rests on the contrast between subsection (a)(1) of the crack house statute, which he was convicted of violating, and subsection (a)(2), under which he was not charged. That latter subsection declares it unlawful to "manage or control any place, whether permanently or temporarily, ... and knowingly and intentionally rent, lease, profit from, or make available for use, with or without

compensation, the place for the purpose of unlawfully manufacturing, *storing*, distributing, or using a controlled substance." 21 U.S.C. § 856(a)(2) (emphasis added).

According to **Nasir**, because "storing" is listed as a prohibited activity in subsection (a)(2) but is not mentioned in subsection (a)(1), it was intentionally excluded from (a)(1). By his lights, since he was storing illegal drugs, he should be safe from conviction under (a)(1). But even if we were inclined to accept that subsection (a)(1) does not cover storage, that does not help **Nasir**. No sensible reading of the statute allows one to distribute drugs just because one is also storing them. Within unit C69, besides the drugs themselves, there was drug distribution paraphernalia, namely scales and packaging materials such**{2020 U.S. App. LEXIS 9}** as food storage bags. In addition to that evidence, there was the testimony of the facility owner about Nasir's frequent and suspicious **{982 F.3d 153}** trips to the unit. Subsection (a)(1) expressly prohibits "distributing" a controlled substance from any rented place, and the jury was presented with more than ample evidence that **Nasir** was doing just that. The District Court properly instructed the jury that it could find **Nasir** guilty of violating section 856(a)(1) if he used a "place for the purpose of manufacturing, *distributing*, or using any controlled substance." (App. at 615 (emphasis added).) There was thus an obvious and legitimate basis for his conviction under the crack house statute, and the District Court's denial of Nasir's motion for a judgment of acquittal was not error at all, let alone plain error.

B. The Motion to Suppress Evidence from the SUV

Nasir also appeals the denial of his motion to suppress the evidence retrieved in the search of his Mercury Mariner SUV. He repeats the argument he made in the District Court, saying that the officer who searched the SUV lacked probable cause. We review *de novo* whether there was probable cause to justify police action. *United States v. Vasquez-Algarin*, 821 F.3d 467, 471 (3d Cir. 2016).

The legal theories offered in opposition to and support of the SUV**{2020 U.S. App. LEXIS 10}** search have morphed over time. They began with **Nasir** objecting to the search as the proverbial fruit of the poisonous tree. He said the "[p]olice did not have cause to arrest [him] at the time he arrived at the storage facility parking lot and accordingly all statements made by him and any evidence found subsequent to his arrest should be suppressed." (App. at 47.) In responding to that motion, the government said that the search of the SUV "was a lawful search incident to a valid arrest pursuant to *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)." (App. at 60 n.21.) The government also stated that, at the suppression hearing, it "would present evidence that the search ... was a valid inventory search[,]" although apparently it did not do so. (App. at 60 n.21.) In his post-hearing rebuttal briefing before the District Court, **Nasir** argued that the search of the SUV was unlawful as a search incident to arrest and as an inventory search. The District Court ultimately classified the search as being incident to Nasir's arrest but noted that, even if the search had occurred prior to the arrest, "the search of the vehicle appears to have been within the scope of the automobile exception" to the warrant requirement of the Fourth Amendment. (App. at 21 n.4 (citations omitted).)

On appeal, **Nasir** simply asserts**{2020 U.S. App. LEXIS 11}** that there was no probable cause to search the SUV, without specifying the legal framework for analysis.7 We conclude that the District Court correctly approached the issue as being a search incident to arrest. Even when, like **Nasir**, an arrestee is detained and not within reach of his vehicle, the police may conduct "a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 343 (citation and internal quotation marks omitted). Whether viewed as a question of probable cause to arrest **Nasir** or probable cause to search the SUV under the automobile exception, however, the pertinent facts and the outcome are the same.

{982 F.3d 154} In challenging the search of the SUV, **Nasir** says that the evidence uncovered in that vehicle - a black duffle bag and the key to unit C69 - should have been suppressed because the investigating officers did not corroborate the tip from the storage facility owner. **Nasir** characterizes the owner as an unknown and unreliable informant, and he lays particular emphasis on the incorrect unit number on the rental agreement the owner provided to the police. **Nasir** also argues that the District Court impermissibly**{2020 U.S. App. LEXIS 12}** attributed information known only to officers not present at the search to the officer who actually conducted the search. His arguments are unpersuasive.

When the police receive information from an informant for the first time, they have a duty to independently corroborate at least some of the information the informant provides. *See Illinois v. Gates*, 462 U.S. 213, 242, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ("[A]n officer may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." (citation and internal quotation marks omitted)). They discharged that duty in this case. The arresting officers personally knew the following at the time of the arrest and related search of the vehicle: according to a background check, **Nasir** had a history of drug dealing; the owner of the storage facility had reported **Nasir** engaged in suspicious activity at unit C69, including making numerous trips to the storage unit, sometimes several in a day; the owner had taken a photograph that showed items in the unit consistent with drug distribution; an officer had seen **Nasir** put a bag in the back of his car and drive toward the storage**{2020 U.S. App. LEXIS 13}** facility; and a narcotics dog had positively alerted to drugs at unit C69.

Given the totality of those circumstances known to the officers who arrested **Nasir**, there was certainly probable cause, reasonably corroborated, for Nasir's arrest, and it was reasonable to believe that evidence of his drug dealing would be found in the SUV.8 We will therefore affirm the District Court's denial of Nasir's motion to suppress.

C. The Ruling on Alleged Juror Bias

Nasir next claims that he was deprived of a fair and impartial jury because one of the jurors at his trial, Juror 27, did not unequivocally affirm that she would be impartial. Our review of a ruling on a motion to strike a juror for cause is for manifest error - a most deferential standard. *Skilling v. United States*, 561 U.S. 358, 396, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). The Supreme Court has emphasized that jury selection is "particularly within the province of the trial judge" and cautioned against "second-guessing the trial judge's estimation of a juror's impartiality[.]" *Id.* at 386 (citation and internal quotation marks omitted).

During voir dire, one of the questions the District Court asked to determine juror partiality was, "Would you give more **{982 F.3d 155}** or less weight to the testimony of a law enforcement agent or police officer than**{2020 U.S. App. LEXIS 14}** you would give to that of a civilian witness, simply because he or she is employed as a law enforcement agent or police officer?" (App. at 237-38.) Because Juror 27 answered "yes" to that question, the following colloquy ensued:

> A JUROR: [...] But the other thing that I kind of answered "yes" to was police officer and a person on the street. I would like to think I would be partial (sic), but I don't know.
>
> THE COURT: You would like to think you would be impartial and fair to both sides?
>
> A JUROR: Yes, impartial that is what I would like to say.
>
> THE COURT: What is your concern you wouldn't be?

A JUROR: Well, my daughter dates a state police officer. And I really have a lot of respect for them, you know, and I feel that for the most part they all do a good job, and they try to be fair. I think I might tend to believe what they say. I don't know.

THE COURT: Do you think if I instruct you that you have to be fair and impartial and assess everybody's credibility as best as you can that you would be able to do that?

A JUROR: I would think I would. I would hope I would.(App. at 305.) Then, outside the juror's presence the Court and counsel had this further conversation:

[NASIR'S ATTORNEY]: Your Honor, I move to strike on**{2020 U.S. App. LEXIS 15}** the basis that she -- her daughter is dating a state police officer and she would tend to believe the officer and police testimony.

THE COURT: What is the government's position?

[GOVERNMENT'S ATTORNEY]: Your Honor, I don't have a real strong one. That she would answer any questions that she was instructed [sic]. She could stay impartial. She confronted all those issues. I certainly understand why [Defense counsel] is objecting.

THE COURT: Any response?

[NASIR'S ATTORNEY]: No response, Your Honor.

THE COURT: I'm going to deny the motion. I felt sufficient confidence that she would work as hard as anyone could to be fair and impartial, and I think she would follow the instructions. So I'm denying the motion to strike.(App. at 306-07). **Nasir** argues that the statements "I would think I would" and "I would hope I would" are not sufficiently strong affirmations of impartiality.

Because the juror admitted to her concern about partiality, the District Court quite rightly asked follow-up questions to determine whether she was actually biased. *Cf. United States v. Mitchell*, 690 F.3d 137, 142, 57 V.I. 856 (3d Cir. 2012) (holding that actual bias is "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality[,]" unlike implied bias,**{2020 U.S. App. LEXIS 16}** which is "presumed as [a] matter of law" (citations and internal quotation marks omitted)). Here, Juror 27's acknowledgement that she "ha[s] a lot of respect for" police officers and "might tend to believe what they say" prompted the District Court to emphasize her obligation to be fair and impartial and to weigh the evidence equally. (App. at 305.) She responded with assurances that she would follow the Court's instructions. Her declaration that she "would think" and "would hope" (App. at 305) that she could be impartial - combined, it seems, with the way in which she said it - allowed the District Court, observing her behavior and mannerisms first hand, to have "sufficient **{982 F.3d 156}** confidence that she would work as hard as anyone could to be fair and impartial." (App. at 306-07.) That decision, on this record, is not manifestly erroneous.

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

UNITED STATES DISTRICT COURT

District of Delaware

UNITED STATES OF AMERICA
v.
MALIK NASIR

JUDGMENT IN A CRIMINAL CASE

Case Number: 16-CR-15-LPS

USM Number: 33547-183

KENNETH C. EDELIN, ESQUIRE
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☑ was found guilty on count(s) 1, 2, AND 3 OF THE INDICTMENT
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 856(a)(1) and (b)	MAINTAINING A PREMISES FOR MANUFACTURING, DISTRIBUTING OR USING MARIJUANA	12/21/2015	1
21 U.S.C. § 841(a)(1) and (b)(1)(D)	POSSESS WITH INTENT TO DISTRIBUTE MARIJUANA	12/21/2015	2
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	POSSESSION OF A FIREARM BY A PROHIBITED PERSON	12/21/2015	3

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.

8/24/2018
Date of Imposition of Judgment

Signature of Judge

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

August 27, 2018
Date

Appendix B

DEFENDANT: MALIK NASIR
CASE NUMBER: 16-CR-15-LPS

IMPRISONMENT

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

210 MONTHS ON COUNT 1, 60 MONTHS ON COUNT 2, AND 120 MONTHS ON COUNT 3, ALL OF WHICH SHALL RUN CONCURRENTLY.

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

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MALIK NASIR
CASE NUMBER: 16-CR-15-LPS

SUPERVISED RELEASE

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

3 YEARS ON EACH OF COUNTS 1, 2, AND 3, ALL SUCH TERMS SHALL 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: MALIK NASIR
CASE NUMBER: 16-CR-15-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: MALIK NASIR
CASE NUMBER: 16-CR-15-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 THE U.S. PROBATION OFFICE'S WORKFORCE DEVELOPMENT PROGRAM AS DIRECTED BY THE PROBATION OFFICER.

DEFENDANT: MALIK NASIR
CASE NUMBER: 16-CR-15-LPS

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 300.00	$ 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.

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

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: MALIK NASIR
CASE NUMBER: 16-CR-15-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 $ 300.00 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:
THE DEFENDANT IS SUBJECT TO FORFEITURE AS DETAILED IN THE INDICTMENT.

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.

INDEX OF EXHIBITS

ITEM	EXHIBIT #
District Court's denial of Suppression Motion	1
Transcripts of Rule 29 Motion for judgment of acquittal	2
Transcripts of motion to strike bias juror	3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, Plaintiff, v. MALIK NASIR, Defendant.	Crim. No. 16-15-LPS

ORDER

At Wilmington this 15th day of March, 2017, consistent with the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that defendant Malik Nasir's motion to suppress evidence (D.I. 28) is **DENIED**.

IT IS FURTHER ORDERED that the parties shall submit a joint status report no later than March 22nd, 2017.

HON. LEONARD P. STARK
UNITED STATES DISTRICT JUDGE

Exhibit #1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, Plaintiff, v. MALIK NASIR, Defendant.	Crim. No. 16-15-LPS

David C. Weiss, Acting United States Attorney, and Daniel E. Logan, Jr., Assistant United States Attorney, U.S. DEPARTMENT OF JUSTICE, Wilmington, DE

Attorneys for Plaintiff

James F. Brose, BROSE LAW FIRM, Media, PA

Attorney for Defendant

MEMORANDUM OPINION

March 15, 2017
Wilmington, Delaware

STARK, U.S. District Judge:

On February 23, 2016, a federal grand jury indicted defendant Malik Nasir ("Defendant" or "Nasir") on three counts, relating to drug distribution and unlawful possession of a firearm. (D.I. 1) On July 21, 2016, Nasir filed a motion to suppress evidence. (D.I. 28) The Court held an evidentiary hearing on September 7, 2016. (*See* D.I. 38 ("Tr.")) Nasir then filed a motion for a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). (D.I. 35) The Court denied Nasir's *Franks* motion (D.I. 46) and allowed the government to supplement the evidentiary record at a second hearing, held on December 21, 2016 (*see* D.I. 52 ("Dec. Tr.")). The parties then briefed Nasir's suppression motion (*see* D.I. 51, D.I. 53, D.I. 54), which the Court now resolves.

I. BACKGROUND

On March 10, 2015, defendant Malik Nasir leased a 5x5 foot unit at Liberto Mini Storage in Dover, Delaware. (*See* D.I. 35 at 7 of 7 ("Rental Agreement")) The Rental Agreement gave Nasir use of "Space No. C43," subject to certain terms and conditions. (*Id.*)

Around nine months later, on December 21, 2015, the Liberto facility's owner made a phone call to Delaware State Police (DSP) Troop Number 3. During over-the-phone and in-person conversations with DSP Sergeant Lance Skinner, the facility owner complained of possibly suspicious and potentially illegal activity being carried out of unit C69, prompting DSP to investigate. (*See, e.g.*, Tr. at 5, 7) The tenant leasing unit C69 was apparently accessing his space up to five times daily, in different vehicles, and would enter his small 5x5 unit, close the door behind him for a short time, reemerge, and leave the facility. (*Id.* at 8, 66) The facility owner had taken a photo showing that inside the unit were two large coolers, two closed buckets, a box of baggies, something that looked like a duffel bag, and a can of something. (*Id.* at 10)

The facility owner told Skinner that unit C69 belonged to Malik Nasir, and provided Skinner with the Rental Agreement and a photocopy of Nasir's driver's license. (*Id.* at 11) DSP officers did not notice the discrepancy between the unit number on the Rental Agreement, C43, and the storage owner's statements about unit C69, and so did not press for an explanation. (*See* Dec. Tr. at 8-9)

DSP then ran a criminal history check and learned that Nasir had felony drug convictions on his record. (Tr. at 13) Later that evening, DSP officers returned to the facility with Detective Donaldson and a trained and certified narcotics detection dog named Ripper. (*Id.* at 15; *see also* D.I. 30-1 ("Warrant Affidavit") at 5-6) Ripper "positively alerted to the odor of narcotics emanating from" unit C69. (Warrant Aff. at 6; *see also* Tr. at 16)

Next, DSP detectives applied for a search warrant for unit C69 from the Justice of the Peace Court. (*See generally* Warrant Aff.) In the meantime, while other DSP officers remained at the storage facility "holding" the unit, a DSP detective monitoring Nasir's home saw Nasir place a large black bag in the cargo area of a Mercury Mariner SUV. (Tr. at 26) Nasir then got into the Mariner SUV, which was registered in Nasir's name, and drove it directly to the storage facility. (*Id.*) As Nasir drove into the lane in which unit C69 was located, DSP officers stopped his vehicle, handcuffed him, and put him in the back of a patrol car. (*See id.* at 29-30) Skinner testified this was done "as soon as [the driver] committed to the area of where it would lead [the driver] to C69" (*id.* at 28), and that it was done for the purpose of preventing Nasir from "compromis[ing]" execution of the search warrant (*id.* at 30), the application for which was then pending before a judge. A search of the Mariner recovered a key to unit C69 and a "duffle bag" with "marijuana residue." (*Id.* at 32)

When the search warrant was issued and executed that same night, officers found that unit C69 contained in excess of 3 kilograms of marijuana, as well as scales and packaging materials. After a separate search warrant was issued, officers searched a Dodge Charger registered in Nasir's name and parked outside his home; they found that this vehicle contained $5,000 in a grocery bag and several handguns with ammunition. (*Id.* at 37, 39)

With his motion to suppress, Nasir urges the Court to "exclude all evidence gathered in this case." (D.I. 51 at 9)

II. LEGAL STANDARDS

The United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This Fourth Amendment right "shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.* Accordingly, probable cause is the "threshold requirement for issuance of a warrant." *United States v. Ritter*, 416 F.3d 256, 262 (3d Cir. 2005). A search and seizure made pursuant to a warrant based on probable cause is generally reasonable. *See Katz v. United States*, 389 U.S. 347, 356-57 (1967).

In contrast, "[s]earches conducted absent a warrant are *per se* unreasonable under the Fourth Amendment, subject to certain exceptions." *Free Speech Coal., Inc. v. Attorney Gen. United States*, 825 F.3d 149, 168-69 (3d Cir. 2016) (internal quotation marks omitted). "The few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and the burden is on those seeking the exemption to show the need for it." *Id.*

The exclusionary rule provides that evidence collected in violation of a defendant's

constitutional rights may be inadmissible in a criminal prosecution. *See Weeks v. United States*, 232 U.S. 383, 388 (1914). Thus, "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States v. Leon*, 468 U.S. 897, 916 (1984). "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, . . . the deterrence rationale loses much of its force." *Davis v. United States*, 564 U.S. 229, 238 (2011) (internal citations and quotation marks omitted).

III. DISCUSSION

Nasir identifies five grounds for suppressing the government's evidence against him. (*See* D.I. 51 at 5-6) The Court addresses each in turn.

A. Canine "Sniff Test"

Nasir contends that DSP's use of a drug-sniffing dog outside the storage unit violated his reasonable "expectation of privacy in the locker unit as evidenced by the contents being locked behind closed doors." (D.I. 51 at 7) Nasir argues that the search was improper regardless of whether the probable cause or reasonable suspicion standard applies. (*Id.* at 8-9) The government responds that the dog sniff was not a Fourth Amendment "search" because it involved neither "trespass onto a constitutionally-protected area" nor "infringe[ment] of [Nasir's] reasonable expectation of privacy." (D.I. 53 at 6-7)

Nasir relies on *Florida v. Jardines*, 133 S. Ct. 1409 (2013), in which the Supreme Court held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Id.* at 1417-18. The Court's conclusions were based on the facts there, including that "[t]he officers were gathering information in an area belonging to Jardines and immediately surrounding his

house . . . by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* at 1414. Nasir, quoting the Fourth Amendment's safeguard of "persons, houses, papers, and effects," argues that "the content of [his] personal storage locker kept under lock and key" is similarly protected. (D.I. 51 at 7)

Nasir's *Jardines* argument is unavailing. The "curtilage of [a] house . . . enjoys protection as part of the home itself." *Id.* By contrast, Nasir had no expectation of privacy in the area immediately outside of his storage unit. The Liberto facility is located along a state highway and does not have a gate or other barrier at its entrance. (*See* Tr. at 5-6) It is in a commercial area, near a pizza restaurant and other commercial establishments, and is not surrounded by a fence or gate. (*Id.* at 5-6) The Court agrees with the government that Nasir "did not have a reasonable expectation of privacy in the common area of the outside, commercial storage unit." (D.I. 53 at 8; *see also United States v. Parrilla*, 2014 WL 2111680, at *4 (S.D.N.Y. May 13, 2014) (finding canine sniff of defendant's commercial garage did not implicate reasonable expectations of privacy))

In addition, the storage facility's owner invited DSP onto the property. (*See* Tr. at 5, 59) Far from intruding without invitation onto the curtilage of Nasir's home, Ripper detected the scent of marijuana from a place where DSP had "a legal right to be." *United States v. Taylor*, 979 F. Supp. 2d 865, 881 (S.D. Ind. 2013), *aff'd*, 776 F.3d 513 (7th Cir. 2015).

Nor can Nasir rely on his expectation of privacy with respect to the locker's contents. The Supreme Court has held that "any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that ***only*** reveals the possession of contraband compromises no legitimate privacy interest." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)

(internal quotation marks omitted). "Accordingly, the use of a well-trained narcotics-detection dog . . . generally does not implicate legitimate privacy interests." *Id.* at 409; *see also United States v. Lopez*, 2011 WL 2636890, at *6 n.7 (D. Del. July 6, 2011). Nasir has not demonstrated he had a reasonable expectation of keeping the contents of his rented storage unit private from a canine search. *See generally United States v. Place*, 462 U.S. 696, 707 (1983) ("[T]he canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."). This conclusion is bolstered by the fact that in the Rental Agreement, Nasir gave the storage facility's owner the right to "enter to inspect" his rented unit at "any reasonable time." (Tr. at 63; *see also* Rental Agreement at ¶ 8)

In sum, the Court agrees with the government that the dog sniff was not a "search" under the Fourth Amendment, and so Nasir's argument for exclusion of "[a]ll the evidence gathered in this case," which he says "flows from the initial unlawful search by the canine" (D.I. 51 at 9), lacks merit.

B. Storage Unit Number Disparity

Nasir's brief essentially renews his *Franks* motion, which was based on the inconsistency between the locker number identified in the Rental Agreement, C43, and that specified in the Warrant Affidavit and ultimately searched, C69. Nasir argues that "[t]his discrepancy would have required additional investigation, explanation, and proof in the affidavit to show a connection between Mr. Nasir and C-69." (D.I. 51 at 11) Nasir contends that DSP's failure to notice and account for the discrepancy "was reckless and resulted in misinformation" in the Warrant Affidavit. (*Id.*)

In response to Nasir's *Franks* motion, the government produced a "Transfer Receipt," dated March 27, 2015, which shows that Nasir relocated from unit C43 to unit C69 about two weeks after he signed the Rental Agreement. (*See* D.I. 39 at 4 of 4) Skinner's testimony at the supplemental evidentiary hearing detailed how that Transfer Receipt came into the government's possession. (*See generally* Dec. Tr. at 8-11) The Court previously denied Nasir's motion for a *Franks* hearing, based on its finding that Nasir had not "made the required 'substantial preliminary showing' of any falsehood – intentional or otherwise – in the affidavit supporting the warrant application." (D.I. 46 at 4) The supplemented evidentiary record similarly fails to contain proof by a preponderance of the evidence of any such falsehood, which is what Nasir would have had to show at a *Franks* hearing. *See Franks*, 438 U.S. at 156.

The record does not support Nasir's contention that the discrepancy in unit numbers led to "misinformation" in the affidavit. As the Court observed in denying Nasir's *Franks* motion, the Warrant Affidavit does not appear to have relied on the Rental Agreement in specifying the unit to be searched. Instead, the affidavit states that "the [facility] owner advised that he had a tenant who was renting storage unit C69" and only thereafter does the affidavit go on to mention the Rental Agreement (in the next sentence). (Warrant Aff. at 4) The affidavit later mentions the Rental Agreement's content for the purpose of providing the basis for the facility owner's right to inspect (and photograph the contents of) leased units. (*See* Warrant Aff. at 5; *see also* Tr. at 62-63 ("He was basically showing us [the Rental Agreement] to show us that in the contract, when people agree to rent from his facility, he has a right to go in and search them.")) In other words, the Warrant Affidavit is better characterized as establishing that "Nasir rents unit C69," ***not*** "according to the Rental Agreement, Nasir rents unit C69." Only the latter statement would have

been untrue. The former statement was supported by evidence on which DSP officers relied in good faith.

Even if the Court found the Warrant Affidavit to contain a misrepresentation, relief would be warranted under *Franks* only upon a showing of either "knowing[] and intentional[]" falsehood or "reckless disregard for the truth." *Franks*, 438 U.S. at 155. Nasir charges DSP detectives with the latter. (D.I. 51 at 11) But the "reckless disregard" standard is only satisfied if "viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." *United States v. Brown*, 631 F.3d 638, 645 (3d Cir. 2011) (internal quotation marks omitted). "[I]n general, the failure to investigate fully is not evidence of an affiant's reckless disregard for the truth." *Id.* at 648 (internal quotation marks omitted). As Nasir himself argues, the evidentiary record suggests that DSP failed to notice and follow up on the discrepancy between the storage unit owner's claim and the unit specified in the Rental Agreement. (*See* D.I. 51 at 10) This oversight was not "reckless" under the circumstances. The focus, understandably, was on the location of the potential illegal drugs – based on complaints from other storage unit renters and the facility's owner – and not as much on when and how Nasir came to occupy that particular unit.[1]

In sum, the Court agrees with the government that the unit number discrepancy is not a

[1]Thus, the Court disagrees with Nasir's argument that "[e]ven if the storage facility owner told the police that the lease was inaccurate and that Mr. Nasir did in fact rent C-69, the police would have been left with a lease agreement saying one thing and the owner saying another, which would hardly support probable cause." (D.I. 51 at 11) Probable cause does not require a certainty, nor even that all evidence in law enforcement's possession uniformly point to guilt. *See generally Illinois v. Gates*, 462 U.S. 213, 238 (stating that probable cause requires "a fair probability that contraband or evidence of a crime will be found in a particular place").

grounds for suppression of evidence in this case.[2]

C. Warrantless Arrest & Vehicle Search

Nasir contends that DSP officers lacked probable cause to arrest him without a warrant upon his arrival at the storage facility. He further contends that the search of his Mercury Mariner SUV was improper. The government responds that the facts contained in the Warrant Affidavit and a "series of suspicious behavior" made Nasir's arrest proper, and that DSP reasonably believed that the Mariner would contain evidence of illegal activity. (D.I. 53 at 14)

Generally, when a defendant challenges a warrantless search and seizure, the burden is on the government to demonstrate by a preponderance of the evidence that the acts were constitutional. *See United States v. Williams*, 400 F. Supp. 2d 673, 677 (D. Del. 2005). Nasir cites the Third Circuit's opinion in *United States v. Massac*, 867 F.2d 174 (1989), for the proposition that a "canine alert can support probable cause to arrest [only] if other factors are present." (D.I. 51 at 14) Nasir argues that "there were no other factors" besides the dog sniff, and while the sniff test "might establish probable cause to search the locker," the "only proof" connecting Nasir to that locker was the storage facility owner's assertion, which was contradicted by the Rental Agreement. (*Id.*)

The Court disagrees. By the time DSP officers stopped Nasir in his Mercury SUV and detained him, another officer had observed him leave his home, place a large black object in the cargo area of his vehicle, and drive directly to the storage facility. (*See* Tr. at 26) DSP officers were aware of Nasir's criminal record, and stopped his vehicle only once he had turned his

[2]The Court need not reach the government's alternative argument based on the "good faith exception" to the exclusionary rule. (*See* D.I. 53 at 12)

vehicle into the lane containing until C69, at which the canine had already alerted to the likely presence of illegal drugs. Even with the discrepancy in unit numbers between the facility owner's statements and the Rental Agreement, probable cause existed at that point to arrest Nasir, as the officers had a reasonable belief Nasir had committed (and may again be in the process of committing) a drug-related crime. The totality of the circumstances known to DSP officers at that point was "sufficient to warrant a prudent man in believing that [Nasir] had committed or was committing an offense." *United States v. Glasser*, 750 F.2d 1197, 1205 (3d Cir. 1984) (internal quotation marks omitted); *see also United States v. Meyers*, 308 F.3d 251, 255 (3d Cir. 2002) ("Probable cause exists whenever reasonably trustworthy information or circumstances within a police officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been committed by the person being arrested.").[3]

Probable cause also existed to search Nasir's Mariner SUV. Under *Arizona v. Gant,* 556 U.S. 332 (2009), police may search a vehicle incident to arrest "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Id.* at 335. Here, by the time DSP officers searched the Mariner, they knew at least the following: Nasir had been observed arriving at the storage unit several times a day, accessing the unit for only a few

[3]Nasir points to inconsistencies in the record regarding whether he was arrested based on probable cause by the time he turned his vehicle down the lane toward unit C69, or instead if the basis for his detention was to prevent him from interfering with the investigation and search of the unit's contents. (*See* D.I. 54 at 1-2 (describing sequence of events as "murky"); *see also* Tr. at 53-54 (Skinner testifying Nasir was briefly detained to avoid interference with search, before being arrested, which did not occur until after marijuana was found in until C69)). Because the Court finds there was sufficient evidence to support probable cause, Nasir's arrest or detention was lawful in either event.

minutes, and then leaving; Nasir had been observed placing a large object in the cargo area of the Mariner and then driving directly from his home to the storage facility; Nasir had a felony conviction for a drug-related offense; a canine had alerted to the odor of narcotics in the storage until associated with Nasir; and Nasir had been observed driving the same Mariner earlier that day. (*See* Tr. at 8-9, 12-13, 21, 26-28; D.I. 30-2 at 6 of 10 ¶ 7) Based on all this evidence, it was reasonable for DSP officers to believe that evidence of illegal narcotics activity may be found in the Mariner. Nasir is simply incorrect when he contends that the "[t]he only fact the government points to [to] support its case is that [Nasir] placed a large, black object in the trunk of his car before driving to the storage facility." (D.I. 54 at 2-3; *see also generally United States v. Burton*, 288 F.3d 91, 100 (3d Cir. 2002) ("Because the Task Force observed Burton leave what they thought to be a drug deal and place the results of that transaction in his trunk, probable cause existed to conclude that the Maxima itself was involved in an illegality, regardless of Burton's seizure."))[4]

[4]Again, Nasir points to arguable inconsistencies in the record, specifically whether the search of the Mariner occurred "incident to his arrest," or if it instead occurred prior to his arrest, when he was being held only for the purpose of preventing his interference with the search of unit C69. Nasir only raises this particular point in his reply brief. (*Compare* D.I. 51 at 14 (seeking to suppress items recovered from Mariner because Nasir's "arrest was unlawful") *with* D.I. 54 (focusing on *Gant*, vagueness of record as to timing of search of Mariner, and questioning whether search of Mariner was incident to arrest) Litigants "are not permitted to reserve material for a reply brief that could and should have been included in their opening brief." *Fed. Election Comm'n v. O'Donnell*, 2016 WL 5219452, at *8 (D. Del. Sept. 21, 2016) (citing D. Del. L. Civ. R. 7.1.3(c)(2)); *see also United States v. Heilman*, 377 F. App'x 157, 198 (3d Cir. 2010) ("A party's argument is waived if it is raised for the first time in a reply brief."). In any case, even assuming the Mariner was searched before DSP officers intended to place Nasir under arrest, the search of the vehicle appears to have been within the scope of the automobile exception. *See United States v. Ross*, 456 U.S. 798 (1982); *United States v. Andrew*, 417 F. App'x 158, 163 (3d Cir. 2011); *United States v. Lindsey*, 2009 WL 1616121, at *2 (D. Del. June 9, 2009) ("The Supreme Court's decision in *Gant* has no effect on the automobile exception, which allows police to search a vehicle where probable cause exists to believe that the vehicle contains

The Court is not persuaded that DSP's seizure of Nasir and search of the Mariner were "unreasonable" under the Fourth Amendment.

D. Nasir's Post-Arrest Statements

Citing *Miranda v. Arizona*, 384 U.S. 436 (1966), Nasir argues for the suppression of any statements he made while in DSP's custody and before being advised of his rights. The government, citing *Harris v. New York*, 401 U.S. 222 (1971), responds that it "will not seek admission of these pre-*Miranda* statements in its case-in-chief," but will seek to use the statements should Nasir testify at trial "in an inconsistent manner." (D.I. 53 at 16) Nasir's motion, therefore, is moot. The Court will rule on use of the statements for impeachment purposes should the government seek permission to introduce the statements at trial.

E. Probable Cause to Search Nasir's Home and Car

Nasir seeks to exclude evidence found during searches of his home and Dodge Charger. Nasir does not challenge the legal sufficiency of the warrant underlying these searches, but rather contends that the "information underlying the application for the search warrant . . . was fruit of the poisonous tree." (D.I. 51 at 15) Given that the Court has not found any violation of Nasir's Fourth Amendment rights, it follows that there is no reason to exclude the evidence found at these locations.

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evidence of criminal activity, regardless of whether that criminal activity is related to the offense of arrest.") (citing *Ross*, 456 U.S. at 820-21). Moreover, it is Nasir's contention that he was under arrest at the time the Mercury was searched (*see* D.I. 51 at 12 ("When Mr. Nasir pulled into the parking lot of the storage facility, he was stopped by police, handcuffed, and placed in the back of a patrol vehicle. Mr. Nasir argues that ***these acts amount to an arrest*** and that the information the police had when he was arrested was not enough to support probable cause.") (emphasis added)), from which (if accepted) it follows that the applicable standard is supplied by the "search incident to arrest" standard.

IV. CONCLUSION

For the reasons given, Defendant Malik Nasir's motion to suppress will be denied. An appropriate order follows.

EXHIBIT 2

THE COURT: All right. Let's go ahead and bring the jury back in.

MR. BROSE: Your Honor?

THE COURT: Yes.

MR. BROSE: At some point, perhaps now, we would like to move under Rule 29 for a motion for an acquittal, Your Honor. I guess we can do that now.

THE COURT: Let's say you've now moved.

MR. BROSE: Right.

THE COURT: If you want to argue it, let's do it after the jury steps out.

MR. BROSE: Okay.

THE COURT: Because we're not going to move forward substantively with the trial at this point.

MR. BROSE: Okay.

THE COURT: Okay.

(Jury returned.)

THE COURT: All right. Ladies and gentlemen, I hope you enjoyed the break. I called you back to tell you we're actually going to give you an early lunch break. Lunch has arrived, and it's a good point for me to take a longer break.

So I did want to remind you that during lunch you are not to talk about the case and tell you that as best as I can tell, we are going to complete the evidentiary

portion of the trial this afternoon. And I expect that I will probably be reading you those final jury instructions some time this afternoon as well.

But at this point, lunch is here, so we're going to have you enjoy your lunch. And I'll get you back here and we'll get started again.

Thank you all.

(Jury left courtroom.)

THE COURT: You can have a seat.

Mr. Brose, if you want to argue your Rule 29 motion you can do so.

MR. BROSE: Thank you, Your Honor.

Succinctly, it's our position that the government has not proved Mr. Nasir in possession of either the firearms or the marijuana. And it's our contention that for that reason, he should be acquitted.

THE COURT: Okay. Mr. Logan, do you want to respond.

MR. LOGAN: Just briefly, Your Honor. I think there is sufficient evidence of constructive possession of both the marijuana and the guns for a jury to determine. So we would oppose that motion.

THE COURT: Okay. I agree that there is sufficient evidence, so I'm going to deny the motion and

MR. LOGAN: Your Honor, I guess the evidence in sending it down to the clerk, if it's an exhibit.

THE COURT: I'm not quite sure how that will be done, but I will have Ms. Ghione confer with you.

MR. LOGAN: We'll make arrangements with the appropriate court official. Thank you, Your Honor.

THE COURT: Thank you for that. Is there anything else from the government?

MR. LOGAN: No, Your Honor.

THE COURT: Is there anything from the defendant?

MR. BROSE: Your Honor, now that the verdict has been rendered, we would renew our motion for acquittal under the same basis that we argued before since there was not enough evidence for the possession in this case.

THE COURT: Mr. Logan.

MR. LOGAN: Your Honor, as before, there is sufficient evidence here to support the jury's verdict in this case.

THE COURT: And I agree with the government that there is sufficient evidence to support the verdict and deny the motion.

We will set a call to talk to you all about when to schedule sentencing or anything further in this matter.

EXHIBIT 3

THE COURT: Okay. Is there anything else you answered "yes" to?

A JUROR: That's the only two that really come to mind.

THE COURT: Any questions?

MR. LOGAN: No questions.

MR. BROSE: No questions.

THE COURT: Okay. You can have a seat. Thank you.

(Juror left sidebar.)

THE COURT: Any motion?

MR. BROSE: Your Honor, I move to strike on the basis that she -- her daughter is dating a state police officer and she would tend to believe the officer and police testimony.

THE COURT: What is the government's position?

MR. LOGAN: Your Honor, I don't have a real strong one. That she would answer any questions that she was instructed. She could stay impartial. She confronted all those issues. I certainly understand why Mr. Brose is objecting.

THE COURT: Any response?

MR. BROSE: No response, Your Honor.

THE COURT: I'm going to deny the motion. I

anyone could to be fair and impartial, and I think she would follow the instructions. So I'm denying the motion to strike.

(Juror comes to sidebar.)

THE COURT: Good morning.

A JUROR: Good morning.

THE COURT: Do you know your juror number?

A JUROR: 36.

THE COURT: George Robertson?

A JUROR: Yes.

THE COURT: What did you answer "yes" to?

A JUROR: First of all, I don't think I would be a good juror for this case as being it's a drug related case. My daughter is a heroin addict. My wife and I have had her in several rehabs and each time she come out, the drug dealers preyed on her. And right now she is incarcerated over at Third Street at one of the women's correctional facilities for some actions she did while she was out on drugs.

THE COURT: I'm sorry to hear all about that. So if this case involves allegations of possession and distribution of marijuana, do you think that given your experience you wouldn't be able to be fair and impartial and assess the evidence that was brought here to court in this case?

that each side gets to make for no reason at all.

The way we do that in this court is through the silent passing of the clipboard back and forth between the government and the defense, so we'll need to maintain some quiet and some patience during that process. Ultimately, the parties will strike through their peremptories 18 of the 32 individuals who are seated and that will leave the 14 that remain as our actual jury.

So we will begin with that process just as soon as Mr. Looby is ready.

THE DEPUTY CLERK: Juror No. 38, please come forward and take the first seat in the first row of the jury box. All the way down.

Juror No. 20, second seat in the first row.

Juror No. 2, third seat in the first row.

Juror No. 45.

Juror No. 4.

Juror No. 57.

Juror No. 8.

Juror No. 53, first seat in the second row, please.

Juror No. 28.

Juror No. 43.

Juror No. 3.

Juror No. 55.

Juror No. 31.

Juror No. 14, please take a seat in the front bench all the way against the wall.

Juror No. 29.

Juror No. 49.

Juror No. 15.

Juror No. 27.

Juror No. 44.

Juror No. 26.

Juror No. 22, you can take a seat in one of the black chairs.

Juror No. 17.

Juror No. 30, please take a seat in the black chair closest to the aisle.

Juror No. 33.

Juror No. 21.

Juror No. 47.

Juror No. 12.

Juror No. 37.

Juror No. 41.

Juror No. 50.

Juror No. 32.

THE COURT: All right. We'll begin the silent preemptory strike period.

(Silent striking takes place. When completed, deputy clerk takes the clipboard back to the Court for review.)

THE COURT: Is there any objections from the government to the striking process?

MR. LOGAN: No, Your Honor.

THE COURT: And from the defense?

MR. BROSE: No, Your Honor.

THE COURT: Mr. Looby.

THE DEPUTY CLERK: The following jurors, return to the back of the courtroom.

Juror No. 38.

Juror No. 2.

Juror No. 45.

Juror No. 4.

Juror No. 57.

Juror No. 53.

Juror No. 28.

Juror No. 31.

Juror No. 44.

Juror No. 26.

Juror No. 30.

Juror No. 21.

Juror No. 47.