

# **APPENDIX**

## APPENDIX INDEX

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 15 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVADOR VASQUEZ, AKA Clumsy,  
AKA Junior, AKA Lilone, AKA Vasquez  
Salvador, AKA Vasquez Salvador, AKA  
Vazquez Salvador, AKA Clumsy Vasquez,  
AKA Junior Vasquez, AKA Lil One  
Vasquez, AKA Lilone Vasquez, AKA  
Salvador Vazquez,

Defendant-Appellant.

No. 19-50275

D.C. No.  
2:18-cr-00247-DOC-1

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
David O. Carter, District Judge, Presiding

Submitted May 14, 2021\*\*  
Pasadena, California

Before: R. NELSON and LEE, Circuit Judges, and STEIN,\*\*\* District Judge.

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

Defendant Salvador Vasquez appeals the denial of his motion to suppress evidence and statements following his conditional guilty plea to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). He argues that officers did not have reasonable suspicion to stop his vehicle, lacked probable cause to search the vehicle, and did not read him *Miranda* warnings prior to questioning him. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review the district court’s reasonable suspicion and probable cause determinations de novo, “reviewing findings of historical fact for clear error and giving due weight to inferences drawn from those facts by resident judges and local law enforcement officers.” *United States v. Valdes-Vega*, 738 F.3d 1074, 1077 (9th Cir. 2013) (en banc) (cleaned up). And when reviewing factual findings for clear error, we affirm unless the findings are “illogical, implausible, or without support in the record.” *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010).

1. The officers had reasonable suspicion for the traffic stop based on a possible violation of California Vehicle Code § 22502. *See United States v. Lopez-Soto*, 205 F.3d 1101, 1104–05 (9th Cir. 2000) (holding that only reasonable suspicion is required for a traffic stop). Section 22502 provides that vehicles stopped on a roadway “shall be stopped or parked with the right-hand wheels of the vehicle parallel to, and within 18 inches of, the right-hand curb.” Cal. Veh. Code § 22502(a). It also states that vehicles may not “stop or park upon a roadway in a direction

opposite to that in which traffic normally moves.” *Id.* § 22502(b)(2).

Several factors supported the officers’ reasonable suspicion to stop the van. Photographs show that the van was protruding out into the road, did not have its wheels adjacent to the curb, and had its front end angled towards oncoming traffic. A gate blocked the van from pulling any further off the road, so it continued to obstruct traffic. The officers observed the van for twenty to thirty seconds but never saw anyone try to open the gate or reposition the van. Based on these factors, the officers believed that a violation of § 22502 had occurred, and they initiated a stop to warn or cite the driver. Considering the totality of the circumstances, the district court did not clearly err in finding that the van was obstructing the roadway, and that thus there was reasonable suspicion to support the traffic stop. *See Valdes-Vega*, 738 F.3d at 1077–78.

2. The officers had probable cause to search the van based on “the totality of the circumstances known to [them] at the time of the search.” *United States v. Ped*, 943 F.3d 427, 431 (9th Cir. 2019) (cleaned up). Probable cause exists “where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (citations omitted). Here, the district court’s finding that the officers smelled burnt marijuana, combined with other factors, supports probable cause for the vehicle search.

First, the district court’s finding that the officers smelled burnt marijuana was not “illogical, implausible, or without support in the record.” *Spangle*, 626 F.3d at 497. Rather, it was based on an assessment of the witnesses’ credibility — to which this court gives deference, *see United States v. Bontemps*, 977 F.3d 909, 917 (9th Cir. 2020) — and corroborating evidence. The officers consistently reported smelling a strong odor of burnt marijuana emanating from the van. Evidence found during the search of the van corroborates the officers’ testimony. This included 20-30 vape pens, a text regarding marijuana vape cartridges, a vape charger, and \$6,680 in cash that suggested possible drug transactions. The female passengers also reported that another passenger had been vaping earlier that day. The district court considered the defense’s opposing testimony but rejected it as “false” due to various inconsistencies. Considering the evidence as a whole, the district court did not clearly err in finding that the officers smelled burnt marijuana.

Second, Vasquez argues that, even if officers smelled burnt marijuana, that cannot support probable cause due to California’s Proposition 64, which legalizes some marijuana use. *See* Cal. Health & Safety Code § 11362.1(a)(1). It is true that the smell of marijuana alone no longer provides a basis for probable cause. *See People v. Johnson*, 50 Cal. App. 5th 620, 634 (Cal. Ct. App. 2020). But, when combined with other factors, the smell of marijuana may still support probable cause that a vehicle contains evidence of marijuana activity that remains unlawful under

California law.<sup>1</sup> *See, e.g.*, Cal. Veh. Code § 23152(f) (stating that it is unlawful to drive under the influence of any drug); Cal. Health & Safety Code § 11054(d)(13) (classifying marijuana as a controlled substance). Driving under the influence of marijuana is a misdemeanor in California, *see* Cal. Veh. Code § 23536, and thus an officer's reasonable belief that a vehicle contains evidence of that offense will support probable cause for a warrantless search, *see Ornelas*, 517 U.S. at 696.<sup>2</sup>

Here, several factors supported probable cause. The officers smelled burnt marijuana coming from the van; the van was stopped in front of a building known to be controlled by a gang, in an area known for drug use and drug trafficking; the van was only partially pulled into a driveway, with its headlights and taillights on, and all four occupants still inside; and the people surrounding the van dispersed when the officers approached. From these facts, it was reasonable for the officers to infer that a violation of California's marijuana laws might have taken place, and that evidence of such a violation would be found in the van. *See United States v. Scott*,

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<sup>1</sup> The government did not waive its argument on this issue, as it presented the argument to the district court in its opposition to Vasquez's motion to suppress. *See United States v. Scott*, 705 F.3d 410, 415 (9th Cir. 2012).

<sup>2</sup> Vasquez argues that an infraction, such as possessing an open container of marijuana in a moving vehicle, *see* Cal Veh. Code § 23222, cannot support a warrantless search under the automobile exception. We need not address this argument, as driving under the influence of marijuana is a misdemeanor rather than a civil infraction.

705 F.3d 410, 417 (9th Cir. 2012). The van’s position suggested that it had recently been in transit, and the smell of burnt — rather than fresh — marijuana supports an inference that Vasquez may have been driving under the influence of marijuana. Thus, under the totality of the circumstances, probable cause supported the search of the van.

3. The district court did not clearly err in finding that Vasquez received *Miranda* warnings prior to being questioned about the gun found in the van. The district court specifically noted that this issue came “down to credibility,” and when credibility is at issue, “we give special deference to the district court[] . . . and generally cannot substitute our own judgment of the credibility of a witness for that of the fact-finder.” *Bontemps*, 977 F.3d at 917 (cleaned up).

Vasquez and the officers dispute whether *Miranda* warnings were given, and the only evidence before the district court was the testimony and declarations presented at the suppression hearing. The officers testified, consistent with their reports, that they read Vasquez and his companions *Miranda* warnings from a department-issued card, whereas Vasquez and the van’s other occupants denied receiving such warnings. The district court noted numerous inconsistencies and implausible statements in the testimony of Karma Benward — the defense’s main witness. Similar issues were not present in the officers’ statements; faced with opposing accounts of the incident, the district court credited the officers’ testimony.



Given the concerns about Benward's testimony and the lack of evidence contradicting the officers' accounts, the district court did not clearly err in finding that *Miranda* warnings were given.

**AFFIRMED.**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

AUG 23 2021

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVADOR VASQUEZ, AKA Clumsy,  
AKA Junior, AKA Lilone, AKA Vasquez  
Salvador, AKA Vaszquez Salvador, AKA  
Vazquez Salvador, AKA Clumsy Vasquez,  
AKA Junior Vasquez, AKA Lil One  
Vasquez, AKA Lilone Vasquez, AKA  
Salvador Vazquez,

Defendant-Appellant.

No. 19-50275

D.C. No.  
2:18-cr-00247-DOC-1  
Central District of California,  
Los Angeles

ORDER

Before: R. NELSON and LEE, Circuit Judges, and STEIN,\* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Nelson and Lee have voted to deny the petition for rehearing en banc, and Judge Stein has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

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\* The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

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4 UNITED STATES DISTRICT COURT  
5 CENTRAL DISTRICT OF CALIFORNIA  
6 WESTERN DIVISION

7 UNITED STATES OF AMERICA, )  
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PLAINTIFF, )  
V. ) CR 18-00247-DOC  
SALVADOR VASQUEZ, ) SANTA ANA, CALIFORNIA  
FEBRUARY 20, 2019  
(9:46 A.M. TO 10:39 A.M.)  
DEFENDANT. ) (11:28 A.M. TO 11:48 A.M.)

VOLUME II

MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

BEFORE THE HONORABLE DAVID O. CARTER  
UNITED STATES DISTRICT JUDGE

18 APPEARANCES: SEE NEXT PAGE  
19 COURT REPORTER: RECORDED; COURT SMART  
20 COURTROOM DEPUTY: DEBORAH LEWMAN  
21 TRANSCRIBER: DOROTHY BABYKIN  
22 COURTHOUSE SERVICES  
23 1218 VALEBROOK PLACE  
24 GLENDORA, CALIFORNIA 91740  
25 (626) 963-0566

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;  
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

App. 9a

1                   AND WE'RE GOING TO TAKE YOU DOWN, MR. VASQUEZ. HAVE  
2 A RECESS FOR ABOUT 20 OR 30 MINUTES.

3                   I WANT TO SPEAK TO COUNSEL ON ANOTHER CASE. AND THEN  
4 WE'LL BRING YOU BACK UP. OKAY.

5                   THE DEFENDANT: OKAY.

6                   THE COURT: ALL RIGHT.

7                   AND, COUNSEL, SO, WHY DON'T EACH OF YOU GO TAKE 20  
8 MINUTES --

9                   OR, DEB, WORK WITH THEM SILENTLY DURING THIS RECESS  
10 TO MAKE SURE THAT THEIR EXHIBITS WHICH ARE IN DIFFERENT BOOKS  
11 AND EXHIBITS ARE FULLY IN EVIDENCE.

12                  ALL RIGHT. THEN, DEB, WE CAN GO OFF THE RECORD FOR A  
13 MOMENT.

14                  (RECESS AT 10:39 A.M. TO 11:28 A.M.)

15                  THE COURT: -- THE DEFENDANT IS PRESENT.

16                  AND THE RECORD SHOULD REFLECT THAT YOUR CLIENT HAS  
17 HAD HIS HANDCUFFS TAKEN OFF DURING THE PROCEEDING. AND I THINK  
18 THAT THAT WOULD BE AN APPROPRIATE RECORD.

19                  IS THERE ANYTHING ELSE DURING THE RECESS THAT EITHER  
20 COUNSEL WANTS TO STATE?

21                  I JUST RECOGNIZE THE EFFORT THAT YOU PUT INTO THIS.  
22 AND I WANT TO MAKE SURE YOU'VE HAD A FULL HEARING ON BOTH  
23 SIDES.

24                  MR. NARE: NOTHING FROM THE GOVERNMENT, YOUR HONOR.

25                  THE COURT: MOTION -- ACCEPTABLE. OKAY.

1 MS. JACOBS: NO, YOUR HONOR.

2 THE COURT: FIRST, THIS COURT FINDS THAT THE OFFICERS  
3 HAD A REASONABLE SUSPICION TO INITIATE A TRAFFIC STOP AFTER  
4 OBSERVING THE DEFENDANT'S VEHICLE PARKED IN WHAT I'M GOING TO  
5 CALL THE WRONG SIDE OF THE ROAD, BUT IT WAS REALLY A 80, 90  
6 PERCENT OBSTRUCTION WITH THE VEHICLE AT AN ANGLE THAT APPEARED  
7 TO BE PROBABLY AND EVENTUALLY TRYING TO ENTER A GATED DRIVEWAY.

8 I'M STRUCK AND I DON'T -- I'M GOING TO DESCRIBE THE  
9 PHOTOGRAPHS AS I GO BECAUSE I'M HAVING TROUBLE WITH THE EXHIBIT  
10 NUMBERS AND BOUNCING BACK AND FORTH. BUT THAT I BELIEVE,  
11 COUNSEL, WOULD BE THE PHOTOGRAPH THAT I HAVE MARKED AS --

12 LET ME FIND IT NOW. WHERE IS IT.

13 (PAUSE IN PROCEEDINGS.)

14 THE COURT: IT'S GOING TO SHOW THE VEHICLE WITH THE  
15 TAILLIGHTS ON THAT COUNSEL YOU HAD POINTED TO FOUR DIFFERENT  
16 PICTURES OF IT ON THE BACK.

17 WOULD SOMEBODY JUST BE KIND ENOUGH TO PUT THAT UP ON  
18 THE ELMO FOR ME. I'D LIKE TO AT LEAST HAVE THE CORRECT EXHIBIT  
19 NUMBER.

20 MS. JACOBS: DEFENSE EXHIBIT K, YOUR HONOR.

21 THE COURT: ALL RIGHT.

22 LET'S PUT THAT UP. BECAUSE REMEMBER WHAT WAS MARKED  
23 K WAS HANDED TO ME IN THIS WAY. I --

24 MS. JACOBS: CORRECT.

25 THE COURT: I RECEIVED K AND THERE WERE FIVE

1 PHOTOGRAPHS.

2 MS. JACOBS: THERE'S MULTIPLE PICTURES.

3 THE COURT: GUESS WHICH PHOTOGRAPH WAS MISSING WHEN  
4 IT WAS HANDED TO ME.

5 MS. JACOBS: NO.

6 THE COURT: YES.

7 MS. JACOBS: I DON'T BELIEVE SO.

8 THE COURT: I'M GOING TO HAND YOU BACK EXACTLY WHAT  
9 YOU HANDED TO ME. AND YOU FIND THAT PHOTOGRAPH FOR ME. I'M  
10 WAITING TO SEE WHAT I GET TO LOOK AT. THAT WAS HANDED TO ME.  
11 I'VE NEVER TAKEN THAT CLIP OFF OF IT.

12 MS. JACOBS: OKAY.

13 THE COURT: AND I'M NOT LOOKING FOR THAT PHOTOGRAPH.  
14 I'M LOOKING FOR THE PHOTOGRAPH OF THE BACK END OF THE CAR.

15 MS. JACOBS: THAT'S THE GOVERNMENT'S EXHIBIT.

16 THE COURT: AHH. EXCELLENT.

17 MS. JACOBS: COUNSEL --

18 THE COURT: PUT THAT EXHIBIT UP ON THE ELMO FOR ME.  
19 THANK YOU.

20 (PAUSE IN PROCEEDINGS.)

21 THE COURT: AND I THINK THAT --

22 MR. NARE: YOUR HONOR, IS THIS THE CORRECT ONE?

23 THE COURT: -- THAT'S EXHIBIT A TO YOUR DECLARATION  
24 IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS.

25 IS THAT CORRECT?

1 MR. NARE: YES, YOUR HONOR.

2 THE COURT: AND THAT CLEARLY SHOWS TO THE COURT THAT  
3 THIS CAR WAS OBSTRUCTING THE HIGHWAY.

4 THE SECOND ISSUE IS -- AND SUBJECT TO THE  
5 REASONABLENESS TO INITIATE A TRAFFIC STOP -- NOW, I THINK IF  
6 WE'RE BEING QUITE CANDID WITH ALL THE PARTIES HERE, THAT, OF  
7 COURSE, THE OFFICERS WANTED TO SEARCH THIS VEHICLE. AND OF  
8 COURSE THEY WANTED TO GET INSIDE THE VEHICLE. AND WE CAN DRESS  
9 THAT UP IN A TUXEDO, BUT THAT'S WHAT IT IS.

10 AND, SO, I DON'T KNOW WHETHER IT'S PRETEXTUAL OR NOT,  
11 BUT IT IS A VIABLE STOP.

12 AND ALTHOUGH YOU'VE ATTACHED ON BOTH SIDES SOME  
13 WEIGHT, WHICH I RESPECT, TO WHETHER THE CORRECT CITATION WAS  
14 ISSUED, FROM THE COURT'S POSITION IT DOESN'T REALLY MATTER. IF  
15 IT'S A 22518 OR A 225734 -- AND I'M JUST JOKING WITH YOU. I  
16 COME FROM SUPERIOR COURT. IT WAS 20 YEARS AGO. AND I USED TO  
17 HAVE THESE MEMORIZED. THAT DOESN'T TURN THIS CASE BY VIRTUE OF  
18 THE OFFICERS CITING THE EXACT CITATION. SO, WHILE I APPRECIATE  
19 THAT IT'S NOT SOMETHING THAT'S PERSUASIVE TO THE COURT.

20 SO, I HAVE TO -- I WANT TO STATE ON THE RECORD I'M  
21 NOT SURE IF THIS WAS THE CORRECT CITATION FOR APPELLATE  
22 PURPOSES IF THIS GOES UP FOR EITHER SIDE.

23 THE MORE INTERESTING IS THE DISAGREEMENT ABOUT  
24 WHETHER THIS WAS A STRONG AND DISTINCT ODOR OF MARIJUANA. AND  
25 I'M GOING TO EVEN TAKE AWAY STRONG OR DISTINCT FOR A MOMENT

1 BECAUSE NOW WE HAVE A VALID WHAT I'M GOING TO CALL TERRY STOP  
2 -- OR TRAFFIC STOP.

3 AND THAT'S CAUSED ME SOME CONCERNS BECAUSE I THINK  
4 OVER THE YEARS THE DEFENSE AND OFTENTIMES A COURT WOULD BE VERY  
5 SUSPICIOUS OF THE OVERUSE PERHAPS GENERALLY SPEAKING OF THIS  
6 FURTIVE GESTURE, WHICH BACK IN THE 1970'S WAS MY ERA, EVERYBODY  
7 MADE A FURTIVE GESTURE IN THE CAR. THAT'S WHY THEY GOT  
8 STOPPED.

9 AND NOW IT'S MARIJUANA. AND I'M JUST JOKING WITH YOU  
10 A LITTLE BIT, BUT YOU CAN IMAGINE HOW MANY FURTIVE GESTURES AND  
11 NOW MARIJUANA SMELLS WE HAVE. TWO DIFFERENT ERAS FRANKLY.

12 I AM GOING TO FIND THAT THE WEIGHT OF THE EVIDENCE  
13 SUPPORTS THE GOVERNMENT IN THIS REGARD FOR THREE REASONS.

14 FIRST, I DON'T THINK IT WILL EVER BE DISCERNED  
15 BECAUSE OF THE DESTRUCTION OF THIS, WHICH I COMMEND THE DEFENSE  
16 AND THE INVESTIGATORS FOR BEING HIGHLY SUSPICIOUS BECAUSE THERE  
17 WAS NO SEIZURE OF THESE PIPES.

18 SECOND, THERE WERE NUMEROUS PIPES FROM THE OFFICERS.  
19 AND I'M GOING TO FIND THAT THAT TESTIMONY IS CREDIBLE, ALTHOUGH  
20 I ONLY HAVE THE PICTURE OF THE ONE, TWO, THREE, FOUR -- NO.  
21 ONE, TWO, THREE, FOUR -- FOUR PIPES, WHICH WOULD BE AN EXHIBIT  
22 -- HOLD ON -- NO, THREE. MY APOLOGIES. IN EXHIBIT C TO THE  
23 DECLARATION IN SUPPORT OF THE GOVERNMENT'S OPPOSITION.

24 SO, ONE, I KNOW THE VAPE PIPES EXIST. THAT'S NOT  
25 MADE-UP TESTIMONY.



1 IT'S THE QUANTITY AND NOW THE QUALITY.

2 THE CENTER REASON I'M FINDING THAT YOU'RE CREDIBLE ON  
3 THE GOVERNMENT'S SIDE IS BECAUSE OF THE AMOUNT OF MONEY  
4 INVOLVED. THIS DOES APPEAR AND HAS THE STENCH OF A -- OF A  
5 NARCOTICS TRANSACTION OR A BUY.

6 AND THAT AMOUNT OF MONEY AND THE TESTIMONY THAT THIS  
7 WAS SIMPLY POOLED TO GO TO LOS ANGELES BECAUSE WE ALL TRUSTED  
8 EACH OTHER IS SOMETHING THAT THIS COURT TOTALLY REJECTS. I'LL  
9 SAY IT A DIFFERENT WAY. THAT'S JUST FALSE TESTIMONY AND NOT  
10 BELIEVED BY THIS COURT NOR ACCEPTED.

11 THE THIRD IS THAT WHEN THE TESTIMONY BECOMES THAT  
12 YOU'RE IN A HIGH GANG AREA WHICH MADE THESE OFFICERS GUNG HO,  
13 QUITE FRANKLY, TO STOP THIS -- OR TO SEARCH THIS VEHICLE, WE  
14 GET INTO A CREDIBILITY ISSUE ABOUT MARIJUANA.

15 OKAY. YEAH. I ACTUALLY -- AT THE START OF THIS  
16 HEARING BEING HIGHLY SUSPICIOUS OF THAT. AND HAVING TO MAKE A  
17 VALUE JUDGMENT, I THINK THAT THIS SWINGS TO THE GOVERNMENT'S  
18 SIDE IN MY FINDINGS BECAUSE OF THE PIPES. NO PIPES, MAYBE A  
19 DIFFERENT DECISION.

20 NUMBER TWO, THE QUANTITY OF CASH. I'M STRUCK BY  
21 THAT. AND THE CONSOLIDATION OF IT, FRANKLY.

22 AND, THEREFORE, I FIND THAT THE OFFICERS ARE CREDIBLE  
23 IN TERMS OF THEIR TESTIMONY CONCERNING THE SMELL OF MARIJUANA.  
24 BUT I HAVE TO TELL YOU, HIGHLY SUSPICIOUS TO BEGIN WITH.

25 AND IN FINDING THAT, I WOULD NOTE THAT OFFICERS MAY

App. 15a

1 CONDUCT A WARRANTLESS SEARCH OF A VEHICLE UNDER THE AUTOMOBILE  
2 EXCEPTION TO THE WARRANT REQUIREMENT IF THEY HAVE PROBABLE  
3 CAUSE TO BELIEVE IT CONTAINS CONTRABAND. AND HERE I MAKE THAT  
4 FINDING.

5 OF COURSE, THIS EXCEPTION HAS ALWAYS BEEN CREATED  
6 BECAUSE OF THE MOBILITY OF A CAR AND WHAT'S BEEN COMMONLY  
7 REFERRED TO AS REDUCED EXPECTATIONS. AND I FORGET THE CASE.  
8 IT'S A 1923 CASE. WAS IT CARROLL -- THAT WE WERE BRINGING 58  
9 BOTTLES OF WHISKEY FROM DETROIT TO GRAND RAPIDS, MICHIGAN. AND  
10 THERE THE STANDARD WAS FINALLY SET OUT IN 1923 THAT BECAUSE OF  
11 THE MOBILITY AND THE EXPECTATION OF PRIVACY BEING REDUCED, THAT  
12 AUTOMOBILE SEARCHES WERE GOING TO BE GIVEN MUCH MORE, LET'S  
13 SAY, SWAY THAN WHAT I CALL RESIDENTIAL OR HOME SEARCHES.

14 AND THAT EXCEPTION HAS EXISTED. AND I BELIEVE IT'S  
15 TERRY OR IT COULD BE CARROLL.

16 WHICH ONE IS IT, COUNSEL? YOU WERE BORN IN 1923.

17 (LAUGHTER.)

18 THE COURT: WHAT WAS IT? -- CARROLL OR TERRY?

19 MS. JACOBS: I'M NOT SURE --

20 THE COURT: AND IT'S A BOOTLEGGER. HE'S RUNNING FROM  
21 DETROIT TO GRAND RAPIDS, 156 MILES. HE'S GOT 58 BOTTLES OF  
22 WHISKEY IN THE BACK. IT'S A HIGH WHISKEY AREA RUN. THE POLICE  
23 SEE HIM. THEY'RE HIGHLY SUSPICIOUS -- KIND OF LIKE A GANG AREA  
24 -- I'M JUST KIDDING YOU.

25 SO, THEY SEE THIS GENTLEMAN COMING BACK. I THINK

App. 16a

1 IT'S MR. -- IT'S CARROLL. IT'S CARROLL. AND THEY STOP THIS  
2 GENTLEMAN. AND HE OFFERS THEM -- HE SAYS, LET ME MAKE IT RIGHT  
3 WITH YOU, OFFICER. TRIES TO HAND HIM \$5. BIG MONEY AT THAT  
4 TIME. OBVIOUSLY, THE OFFICERS REJECTED IT.

5 THE FACTS OF THE CASE WERE THAT THEY SUSTAINED THIS  
6 AUTOMOBILE EXCEPTION.

7 NOW, THE OTHER INTERESTING ISSUE IS THEIR ENTRANCE  
8 INTO THE CAR WHICH I'VE TALKED ABOUT, THIS BEING A PROPER TERRY  
9 STOP, BUT THE -- THEY HAD AN OBJECTIVE BASIS. AND THEY HAD  
10 REASONABLE SUSPICION TO FURTHER THEIR INVESTIGATION FOR DRUG  
11 DISTRIBUTION. AND I'M FINDING THAT THEY DID, IN FACT, DETECT  
12 AN ODOR OF MARIJUANA. HOW STRONG? I'M NOT SURE FOR THE  
13 REASONS THAT I'VE STATED BEFORE. AND IT'S NOT THE HIGH-CRIME  
14 AREA. IT'S THE VAPE PIPES, WHICH CAN BE USED FOR EITHER OR  
15 DUAL PURPOSES, AND THE AMOUNT OF MONEY AS WELL AS I'M GOING TO  
16 HAVE TO MAKE SOME VALUE JUDGMENTS ON WHO IS BASICALLY TELLING  
17 ME THE TRUTH.

18 AS FAR AS THEIR EXPERTISE, YOU MUST LIVE IN THE 1910  
19 ERA IF YOU DON'T -- CAN'T RECOGNIZE MARIJUANA THIS DAY. SO,  
20 THEIR EXPERTISE IS NOT IN QUESTION. I THINK A COMMON CITIZEN  
21 COULD TESTIFY TO THAT NOW.

22 WELL, WHETHER YOUR CLIENT WAS IN CUSTODY, I FIND HE  
23 WAS IN CUSTODY. I WANT YOU TO LOOK AT -- THIS IS NOT A  
24 DETENTION. THIS IS FROM MY VIEWPOINT A CUSTODIAL SITUATION.

25 AND THIS IS MOST APTLY VIEWED IN A PHOTOGRAPH THAT HAS THE TWO  
App. 17a

1 GENTLEMEN -- BACK TO K --

2 MS. JACOBS: THAT'S EXHIBIT K.

3 THE COURT: BACK TO K, SITTING IN THE BACK OF A CAR.

4 AND I THINK THIS COURT OR ANY APPELLATE COURT WOULD  
5 TAKE A LOOK AT THE FOURTH PHOTOGRAPH IN K AT THE TWO YOUNG MEN  
6 SITTING THERE. AND THAT IS A CUSTODIAL SITUATION WHETHER THE  
7 DOOR IS OPEN OR CLOSED. (LAUGHTER.) THEY'VE BEEN -- THEY'RE  
8 IN CUSTODY. PERIOD.

9 AND I'LL MAKE THAT MY CLEAR AND CONVINCING PROBABLE  
10 CAUSE STANDARD OR BEYOND A REASONABLE DOUBT IT YOU WANT TO --  
11 ON EACH OF THESE FINDINGS THAT I'VE MADE THUS FAR, INCLUDING  
12 THE RIGHT TO A -- GET INTO THE CAR UNDER THE PROBABLE CAUSE NOW  
13 OF MARIJUANA.

14 I'VE STRUGGLED WITH ONE PART WHICH IS WHY I WANTED  
15 THE RECESS.

16 THE TESTIMONY WAS THAT -- FROM BOTH OFFICERS THAT  
17 THEY HAD MIRANDIZED BOTH THESE YOUNG LADIES. I HAVE AN  
18 AFFIDAVIT THAT STATES THAT, NO, THEY WERE NOT MIRANDIZED. THAT  
19 CAUSES ME GREAT CONCERN.

20 ONE IS AN AFFIDAVIT, BUT IT HAS MORE -- NO MORE OR  
21 LESS WEIGHT THAN TESTIMONY. BUT IF I'M GOING TO NOW MAKE A  
22 VALUE CHOICE ABOUT CREDIBILITY, IT'S BECOME RATHER EASY  
23 UNFORTUNATELY.

24 I BELIEVE AND FIND THAT MIRANDA RIGHTS WERE GIVEN IN  
25 THIS INSTANCE. THAT THE TWO YOUNG LADIES TO THE -- IT'S TO

1 SPENCER AND VASQUEZ, THAT THE TWO YOUNG LADIES WERE OUTSIDE THE  
2 CAR. AND THE PHOTOGRAPHS SHOW THEM OUTSIDE THE CAR IN K, THE  
3 FIRST PHOTOGRAPH.

4 SO, I'LL NEVER KNOW, QUITE FRANKLY, WHETHER MIRANDA  
5 WAS GIVEN TO THEM OR NOT. BUT IF I WAS TO MAKE A DECISION, I'M  
6 QUITE CERTAIN NOW I'M MAKING THIS DECISION THAT MIRANDA WAS.  
7 AND THAT'S SIMPLY A CREDIBILITY DETERMINATION NOW. WHO DO I  
8 BELIEVE?

9 AND I'VE DISCOUNTED THE YOUNG LADY WHO TESTIFIED. I  
10 WANT TO BE AS KIND AS POSSIBLE. I DON'T BELIEVE THAT THE \$6600  
11 WAS JUST FOR A CONSOLIDATION. AND I FIND IT INCREDULOUS THAT  
12 THE GUN WAS SIMPLY SITTING ON THE FLOOR OR BETWEEN THEM OR IN  
13 THE BACK SEAT WITHOUT ANY CONVERSATION, KNOWLEDGE WHO OR WHERE  
14 IT CAME FROM.

15 SO, THEREFORE, I FIND THAT THE DEFENDANT DID  
16 VOLUNTARILY WAIVE HIS RIGHT AGAINST SELF-INCRIMINATION.

17 AND I WAS STRUCK BY SOMETHING BECAUSE OFTENTIMES I  
18 THINK COUNSEL FOR BOTH SIDES BELIEVE AN ARGUMENT DOESN'T MEAN  
19 MUCH TO A COURT. THAT'S NOT TRUE ON MANY OCCASIONS.

20 AND HERE THIS WILLINGNESS TO TESTIFY, I WAS STRUCK BY  
21 YOU MAY HAVE THE BETTER ARGUMENT NOW AND IN FRONT OF THE JURY  
22 FOR THIS REASON. I HADN'T CONSIDERED THAT GOING IN JUST  
23 READING THE PAPERS.

24 I THINK THIS YOUNG MAN MR. VASQUEZ HAS A DEEPER  
25 RELATIONSHIP THAN I IMAGINE. AND THAT'S SOMEWHAT SPECULATIVE.

1 IT COULD BE JUST A LONG-TERM FRIEND. IT COULD BE A ROMANTIC  
2 RELATIONSHIP. IT DOESN'T MATTER. BUT HE DID SOMETHING VERY,  
3 VERY KIND IN A SENSE.

4 THIS MOTIVATION TO TALK AFTER THE WAIVER OF THE  
5 MIRANDA RIGHTS REALLY HAS A LOT OF VIRTUE TO IT, QUITE FRANKLY.

6 IT'S AMAZING I'D SAY TO YOU THAT YOU'RE A VIRTUOUS  
7 PERSON -- BECAUSE YOU HAD TWO YOUNG LADIES IN THE BACK. AND  
8 YOU JUST DIDN'T WANT THEM TO GET IN TROUBLE.

9 NOW IF -- WHETHER THE GUN WAS ON THE CONSOLE OR THE  
10 BACK SEAT OR WAS FOUND IN THE BACK SEAT AND MOVED TO THE  
11 CONSOLE, I DON'T KNOW THAT THAT NECESSARILY IS OF GREAT CONCERN  
12 TO THE COURT ABOUT THE ACTUAL LOCATION. WHAT CONCERNED ME WAS  
13 THAT GUN BEING IN THEIR PRESENCE, COMING ALL THE WAY FROM LAS  
14 VEGAS.

15 SO, THERE'S EVERY MOTIVATION AS YOU ARGUED AND I  
16 HADN'T CONSIDERED FOR THIS YOUNG MAN TO COME FORWARD. VERY  
17 CHIVALROUS.

18 AND THE SECOND THING IS I THINK THAT YOU'RE THE  
19 GENESIS OF THIS REQUEST FOR THE THOUSAND DOLLARS OR HELPING  
20 THESE YOUNG LADIES GET BACK TO -- TO LAS VEGAS.

21 AND, THEREFORE, THERE'S EVERY WILLINGNESS ON THIS  
22 PERSON'S PART -- NOT AN EVIL PERSON AT ALL. BUT BEING PUT IN  
23 THAT SITUATION WITH THE GUN -- YOU'LL FIGHT THESE CHARGES, OF  
24 COURSE, AND GO TO THE JURY. BUT THERE'S A LOT OF VIRTUE IN  
25 WHAT YOU DID. AND I WANT YOU TO HEAR THAT.

1           THIS 15-YEAR-OLD GAL, SHE NEEDED TO GET SOME MONEY  
2           AND GET BACK TO LAS VEGAS.    OKAY.

3           SO, I THINK THERE'S EVERY MOTIVATION HERE FOR -- FOR  
4           THE GENTLEMAN TO HAVE NOT ONLY SPOKEN FREELY TO THE POLICE, BUT  
5           I DO FIND THAT THEY WERE MIRANDIZED.

6           AND IF I'M MAKING A VALUE JUDGMENT IN TERMS OF  
7           CREDIBILITY, THIS JUDGMENT CALL BY THIS COURT COMES DOWN TO  
8           CREDIBILITY IN TERMS OF THE POLICE OFFICERS.

9           NOW, I'M GOING TO TELL YOU I'VE HAD TO DO A LOT OF  
10          REFLECTION ON THAT.   THIS HAS GONE BACK AND FORTH ON MY -- IN  
11          MY MIND.   AND THIS IS RIPE FOR APPEAL.

12          I THINK, COUNSEL, YOU'VE WORKED EXTRAORDINARILY HARD.  
13          AND I'VE TRIED TO SET A DECENT RECORD FOR BOTH OF YOU AND GIVE  
14          YOU BOTH A FULL AND FAIR HEARING.   SO, THE COURT COULD MISTAKEN  
15          ABOUT THAT.

16          BUT THOSE CREDIBILITY CALLS DO FALL ON BEHALF OF THE  
17          POLICE OFFICERS IN THIS MATTER IN TERMS OF TRUTHFULNESS.   I'M  
18          SPECIFICALLY FINDING THAT I BELIEVE AND FIND THAT THEY MADE AND  
19          GAVE THEIR MIRANDA WARNINGS, THAT THERE'S EVERY MOTIVATION FOR  
20          YOUR CLIENT TO SPEAK FREELY TO THEM BECAUSE OF VIRTUE, QUITE  
21          FRANKLY, ON HIS PART -- THAT HE WAS IN CUSTODY, THAT THIS  
22          WASN'T SIMPLY A DETAIN.

23          BUT I AM ALSO SPECIFICALLY FINDING THAT HE -- THERE  
24          WAS PROBABLE CAUSE TO SEARCH THIS VEHICLE, THAT THERE WAS AN  
25          ODOR OF MARIJUANA.   HOW STRONG?   I CAN'T -- I'M NOT GOING TO

1 SAY STRONG ODOR. I JUST DON'T KNOW.

2 WHAT SUPPORTS THAT ARE THE VAPE PIPES, BEING ASKED TO  
3 GET SOME MARIJUANA, COMING OUT TO CALIFORNIA -- WHICH IS THE  
4 THIRD FACTOR -- AND, ALSO, THE AMOUNT OF MONEY. EVERY INDICIA  
5 OF NARCOTICS.

6 AND INITIALLY THAT REASONABLE SUSPICION TO STOP --  
7 I'M NOT SURE OF THE VIOLATIONS UNDER THE VEHICLE CODE TO THIS  
8 DAY, BUT THERE'S PROBABLE CAUSE TO MAKE THIS TERRY STOP --  
9 STRIKE THAT, NOT TERRY STOP BUT TO MAKE THIS TRAFFIC STOP.

10 SO, THEREFORE, COUNSEL, YOUR MOTION IS DENIED.

11 NOW, WHEN ARE YOU SET FOR TRIAL?

12 MS. JACOBS: MAY, YOUR HONOR.

13 THE COURT: MAY? OKAY. WELL, WE'LL -- WE'LL SEE YOU  
14 SOMETIME IN MAY. OKAY.

15 THANK YOU VERY MUCH, COUNSEL. AND THANK YOU FOR YOUR  
16 COURTESY.

17 SO, THEREFORE, FOR THE RECORD, THE DEFENSE MOTION IS  
18 DENIED.

19 AND I CAN MAKE A MUCH MORE COMPLETE RECORD IF COUNSEL  
20 WOULD LIKE.

21 OKAY.

22 (PROCEEDINGS ADJOURNED AT 11:47 A.M.)

23

24

25