Appendix

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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. AARON MARTIN MERCADO-GRACIA, Defendant - Appellant.	No. 19-2153

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:16-CR-01701-JCH-1)

Irma Rivas, Assistant Federal Public Defender, Albuquerque, New Mexico, for Appellant Mercado-Gracia.

Tiffany L. Walters, Assistant United States Attorney (John C. Anderson, United States Attorney, with her on the brief), Albuquerque, New Mexico, for Appellee United States of America.

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **BACHARACH**, Circuit Judges.

EBEL, Circuit Judge.

In this direct criminal appeal, Defendant Aaron Mercado-Gracia challenges his three convictions for drug trafficking, conspiring to traffic drugs, and using a firearm

in relation to a drug-trafficking offense. In upholding his convictions, we conclude: 1) The district court did not err in denying Mercado-Gracia's motion to suppress evidence discovered as the result of a traffic stop. The traffic stop evolved into a consensual encounter during which the police officer developed reasonable suspicion to believe Mercado-Gracia was involved in drug trafficking. That reasonable suspicion justified a brief investigative detention, during which the officer deployed his drug-sniffing dog, which alerted, leading to the discovery of a gun and two kilograms of heroin in the car Mercado-Gracia was driving. 2) The district court did not abuse its discretion in denying Mercado-Gracia's request to play during voir dire a video to educate prospective jurors on implicit bias. Having jurisdiction under 28 U.S.C. § 1291, we, therefore, AFFIRM Mercado-Gracia's convictions.

I. BACKGROUND

Just before noon on March 25, 2016, New Mexico State Police Officer Ronald Wood, with his drug-sniffing dog Arras, was patrolling Interstate 40 just west of Albuquerque. The officer clocked Mercado-Gracia driving a Dodge Charger ninety-two miles an hour in a seventy-five-mile-an-hour zone, heading east toward Albuquerque. Officer Wood pulled Mercado-Gracia over.

Mercado-Gracia provided the officer with his driver's license, car registration and proof of insurance. At the officer's direction, Mercado-Gracia exited his vehicle and stood beside the patrol car while Officer Wood used his in-car computer to check these documents Mercado-Gracia provided. Mercado-Gracia's driver's license indicated that he was from Phoenix, Arizona. The car was also registered in Arizona

but to a Hector Ramirez Reyes. A third individual, Favian Reyes, had insured the car.[1] Although Mercado-Gracia first stated that his cousin Favian owned the car, Mercado-Gracia did not know Favian's last name. Mercado-Gracia then explained to the officer that Favian was actually "my lady's, uh, husband's cousin."[2] (I R. 338 (internal quotation marks omitted).) According to Mercado-Gracia, Favian had let him borrow the car to drive to Albuquerque.

While writing a speeding ticket, Officer Wood inquired about Mercado-Gracia's travel plans, asking what brought him to Albuquerque:

> Defendant: Just I own my own business —
>
> Officer Wood: Do you?
>
> Defendant: Yeah. It is a remodeling company. I'm trying to just like get going at it.
>
> Officer Wood: So you're coming to Albuquerque for work?
>
> Defendant: Oh no, just so I can drive around.
>
> Officer Wood: Drive around?
>
> Defendant: Yeah. I have a lady over here I want to meet.
>
> Officer Wood: Oh, okay. Well, I thought your lady was over there [back in Arizona]. This was her cousin's car.
>
> Defendant: Yeah, I know.

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[1] The district court referred to this individual as Favian Reyes, while the parties refer to him instead as Fabian Reyes.

[2] Mercado-Gracia notes that both the defense and the Government transcribed this statement, instead, as his "lady's cousin." (Aplt. Br. 6 n.2.) But Officer Wood testified that Mercado-Gracia stated that he was driving "his lady's husband's cousin's car." (I SROA 52.)

> Officer Wood: Oh, okay.
>
> Defendant: (Inaudible) girl down here.
>
> Officer Wood: I see.
>
> Defendant: So I couldn't bring my car.
>
> Officer Wood: Ah, I see. How long are you going to be over here?
>
> Defendant: Where?
>
> Officer Wood: Albuquerque.
>
> Defendant: Who, me?
>
> Officer Wood: Yeah.
>
> Defendant: How long have I been here?
>
> Officer Wood: No. How long are you going to be over here?
>
> Defendant: Oh, I don't know. It depends. Probably just the weekend.
>
> Officer Wood: Ah.
>
> Defendant: Yeah. I have to go back to work Monday. I would like to make it back by Easter.

(Id. at 339.) The traffic stop occurred on the Friday afternoon before Easter Sunday. It is a seven-hour drive from Phoenix to Albuquerque. During this conversation, Officer Wood noticed that Mercado-Gracia "became increasingly fidgety, antsy, moving his hands and feet around," and "was answering [the officer's] questions, which should have had easy answers, with a question, and based on [the officer's] training, [this] was an attempt for the brain to buy time to fabricate a response." (Id. at 340.)

Officer Wood checked the vehicle identification number (VIN) on the Dodge Charger, completed writing the traffic ticket, and explained to Mercado-Gracia "the process to resolve the speeding citation." (Id.) The officer also checked to see if the VIN matched the documents Mercado-Gracia had provided the officer—it did—and then determined through NCIC that the vehicle had not been reported stolen.

Seven minutes after initiating the stop, Officer Wood handed back to Mercado-Gracia his driver's license, the car's registration and proof of insurance, gave him the speeding ticket, and told Mercado-Gracia, "Okay. You're free to go." (Id.) As Mercado-Gracia walked back to his vehicle, however, Officer Wood invoked "the old highway patrol 'two-step,'" United States v. White, 584 F.3d 935, 943 (10th Cir. 2009):

> Officer: Excuse me, Aaron.
>
> Defendant: Yeah?
>
> Officer: Is it okay if I ask you some questions?
>
> Defendant: What?

(I R. 3441.) Mercado-Gracia walked back to the officer, who was standing near the passenger door of his patrol car.

> Officer: Is it okay if I ask you some questions?
>
> Defendant: Regarding?
>
> Officer: Huh? Well, I'm just a little confused, is all, on your travel here, your trip. It's a little confusing to me, you know what I mean?

(Id. at 341.) The district court found that the officer's "tone of voice was cordial and friendly." (Id.)

The officer then questioned Mercado-Gracia for three more minutes:

> Officer Wood . . . asked [Mercado-Gracia] questions about whether he personally owns a car and why he did not bring it, and [Mercado-Gracia] replied that he has a car but that's the only car "we have at home." Officer Wood was confused because his answer indicated his lady had the car back in Phoenix, but [Mercado-Gracia] just said he was coming to Albuquerque to meet a lady. Officer Wood inquired whether he has a wife or girlfriend. [Mercado-Gracia] replied it was his partner, they had only one car, and he was here to see a girl. Officer Wood asked where in Albuquerque he was going, to which [Mercado-Gracia] responded that he did not know and that he had to call and meet her. Officer Wood asked for the woman's name, and after asking why he needed to know, [Mercado-Gracia] gave a first name. Officer Wood asked where he was going to stay, to which [Mercado-Gracia] revealed that he was going to rent a place and pay cash, because he did not bring his credit cards. Officer Wood inquired if the owner of the car knew [Mercado-Gracia] had his car and knew he was driving to Albuquerque with it, and he replied yes to both questions.

(Id. (record citations omitted).) The district court found that, during this exchange, Mercado-Gracia "had also become increasingly nervous, such that now when answering Officer Wood's questions, he would look down or away without making eye contact." (Id. at 342.) "Officer Wood had also noticed that [Mercado-Gracia's] keyring had only one key." (Id.)

> Officer Wood asked if [Mercado-Gracia] had any weapons in the car, to which [Mercado-Gracia] said, "No." . . .
>
> Officer Wood then asked if there were any drugs in the vehicle, to which [Mercado-Gracia] said, "No." When asked if he had any marijuana, [Mercado-Gracia] replied, "Not that I am aware of." When Officer Wood inquired about other drugs, [Mercado-Gracia] responded no. . . .

> Officer Wood asked for permission to search the vehicle. [Mercado-Gracia] replied, "No," and when asked why, [he] explained that he "thought it was just my ticket." Officer Wood attempted to clarify by asking if he did not want the vehicle or his own property searched, but [Mercado-Gracia] said, "The whole thing" and "I know I have the right." At 12:08 p.m., Officer Wood responded, "No, definitely you do. So I'll be straight up with you. Right now I have some concerns, okay? And so what I am going to have to do is I'm going to deploy my canine on the vehicle, okay? He then explained that he was going to deploy his dog on the exterior of the vehicle because of concerns he had that [Mercado-Gracia's] travel plans did not make sense, but [the officer] did not further elaborate on his reasons when [Mercado-Gracia] asked about them. [Mercado-Gracia] looked into the patrol unit and his eyes widened, seemingly scared, that the dog was there to search.

(Id. at 342–43 (record citations omitted).)

Officer Wood called for assistance and patted down Mercado-Gracia for weapons. Finding none, the officer asked Mercado-Gracia to stand away from his vehicle. Officer Wood then deployed his drug-sniffing dog Arras for two minutes around the outside of the Dodge Charger, during which time Arras alerted. Officer Wood then handcuffed Mercado-Gracia and explained that Mercado-Gracia now had to accompany the officer while he applied for a search warrant for the car. A second officer arrived at this point. Mercado-Gracia then consented to the officers searching his vehicle.[3]

During that search, the officers found over two kilograms of heroin and a firearm. Based on this evidence, the United States charged Mercado-Gracia with 1) possessing one kilogram or more of heroin with the intent to distribute it, in

[3] Although he initially denied Officer Wood consent to search the car, on appeal Mercado-Gracia does not challenge the fact that, at this point in the encounter, he did consent to the officers searching the car.

violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A); 2) conspiring to possess, with the intent to distribute, more than one kilogram of heroin, see id. § 846; and 3) using or carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. § 924(c). After the district court denied Mercado-Gracia's suppression motion, the case proceeded to trial. Defense counsel asked to show a video during voir dire to educate prospective jurors about implicit racial bias. The district court declined that request. The jury convicted Mercado-Gracia of all three charges, and the district court sentenced him to 180 months in prison. That sentence represented a mandatory minimum ten years in prison on each of the distribution and conspiracy convictions, see 21 U.S.C. §§ 841(b)(1)(A)(i), 846, to run concurrently, and a mandatory minimum five-year sentence on the weapons charge, to run consecutively to the two ten-year drug-trafficking sentences, see 18 U.S.C. § 924(c)(1)(A)(i).

II. LEGAL DISCUSSION

On appeal, Mercado-Gracia challenges the district court's decision to deny his motion to suppress and the court's refusal to show the video on implicit bias during voir dire.

A. The district court did not err in denying Mercado-Gracia's motion to suppress

The Fourth Amendment protects persons against "unreasonable searches and seizures." U.S. Const. amend. IV.[4] This court reviews de novo "the ultimate question

[4] "The Fourth Amendment is enforceable against the States through the Due Process Clause of the Fourteenth Amendment." United States v. Hammond, 890 F.3d 901, 904 n.1 (10th Cir. 2018) (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961)).

of reasonableness under the Fourth Amendment," and reviews the factual findings that inform the reasonableness determination for clear error. United States v. Cruz, 977 F.3d 998, 1003-04 (10th Cir. 2020). When this court reviews the "denial of a defendant's motion to suppress, we view the evidence in the light most favorable to the government." Id. at 1003.

1. The traffic stop began as a Fourth Amendment seizure but evolved into a consensual citizen-police encounter that did not implicate the Fourth Amendment

> This Court has recognized three types of police-citizen encounters: (1) "consensual encounters which do not implicate the Fourth Amendment"; (2) "investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity"; and (3) "arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause."

United States v. Hammond, 890 F.3d 901, 904 (10th Cir. 2018) (quoting United States v. Davis, 94 F.3d 1465, 1467-68 (10th Cir. 1996)). The traffic stop at issue here was a seizure for Fourth Amendment purposes. See United States v. Bradford, 423 F.3d 1149, 1156 (10th Cir. 2005); see also Rodriguez v. United States, 575 U.S 348, 354 (2015). Mercado-Gracia does not challenge the validity of that initial stop. Instead, he contends that Officer Wood unreasonably prolonged the traffic stop. "[O]nce a traffic stop is completed, the driver must be allowed to leave unless '(1) the officer has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring, or (2) the initial detention has become a consensual encounter.'" United States v. Gomez-Arzate, 981 F.3d 832, 842 (10th Cir. 2020) (quoting Bradford, 423 F.3d at

1156–57); see also Rodriguez, 575 U.S. at 354 ("Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.").

The district court determined that, after Officer Wood issued Mercado-Gracia a speeding ticket and returned his documents, the encounter between the two became consensual. Applying an objective reasonable person standard to the facts presented, see United States v. Gaines, 918 F.3d 793, 796 (10th Cir. 2019) (citing Florida v. Bostick, 501 U.S. 429, 436 (1991)), we review that determination de novo, see United States v. Rogers, 556 F.3d 1130, 1137 (10th Cir. 2009).

"A consensual encounter is the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer." Bradford, 423 F.3d at 1158 (quoting United States v. West, 219 F.3d 1171, 1176 (10th Cir. 2000)). "Whether an encounter can be deemed consensual depends on whether the police conduct would have conveyed to a reasonable person that he or she was not free to decline the officer's requests or otherwise terminate the encounter." Id. (quoting West, 219 F.3d at 1176). In deciding whether an encounter between a police officer and a citizen is consensual or is instead a Fourth Amendment seizure, then, a court must determine "whether 'a reasonable person under the circumstances would believe [he] was free to leave or disregard the officer's request for information.'" Gomez-Arzate, 981 F.3d at 842 (quoting Bradford, 423 F.3d at 1158); see also Bostick, 501 U.S. at 437.

"We follow a bright-line rule that requires the driver's documents to be returned before the stop may be considered a consensual encounter." Gomez-Arzate, 981 F.3d at 842. "The return of a driver's documentation is not, however, always sufficient to

demonstrate that an encounter has become consensual." Bradford, 423 F.3d at 1158. In considering whether an encounter is consensual, we consider several non-exclusive factors applied to an objective reasonable person being stopped, including

> the location of the encounter, particularly whether the defendant is in an open public place where he is within the view of persons other than law enforcement officers; whether the officers touch or physically restrain the defendant; whether the officers are uniformed or in plain clothes; whether their weapons are displayed; the number, demeanor and tone of voice of the officers; whether and for how long the officers retain the defendant's personal effects such as tickets or identification; and whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent.

Gomez-Arzate, 981 F.3d at 842 (quoting United States v. Spence, 397 F.3d 1280, 1283 (10th Cir. 2005)). "[N]o one factor is dispositive." Id. We focus "on 'the coercive effect of police conduct, taken as a whole on a reasonable person.'" Id. (quoting Spence, 397 F.3d at 1283).

Here, seven minutes after he initiated the traffic stop, Officer Wood gave Mercado-Gracia a speeding ticket, returned his driver's license, the vehicle's registration and proof of insurance, and told Mercado-Gracia, "Okay. You're free to go." (I R. 340 (internal quotation marks omitted).) Although an officer is not required to inform a citizen he is free to go before the encounter becomes consensual, see United States v. Patten, 183 F.3d 1190, 1194 (10th Cir. 1999), here Officer Wood clearly did so. Mercado-Gracia understood because he began walking back to his car before the officer called him by name and asked if he could ask Mercado-Gracia a few questions. See Gomez-Arzate, 981 F.3d at 842-43 (rejecting argument that

calling motorist back to the patrol car after telling him he could go amounted to a coercive show of authority). The district court found that

> Officer Wood did not use an overbearing show of authority, he spoke in a friendly manner, and he let [Mercado-Gracia] walk back towards his own car. He was the only officer present on the side of a public interstate, did not display a weapon, did not touch or restrain Defendant and did not stand in his way.

(I R. 349.) The district court further found that Mercado-Gracia voluntarily consented to answer the officer's questions, noting that Mercado-Gracia "responded to Officer Wood's request with 'regarding,' walked back toward Officer Wood, and proceeded to answer Officer Wood's questions," and "did not act or express intent to affirmatively end the consensual encounter at any time before Officer Wood told him he would deploy his dog around the car." (Id. at 349–50.)

Considering the totality of these circumstances, we agree with the district court that an objectively reasonable person in Mercado-Gracia's position would have felt free to decline to answer Officer Wood's additional questions and go on his way. See United States v. Hunter, 663 F.3d 1136, 1140, 1144–45 (10th Cir. 2011) (holding traffic stop became consensual encounter after officer gave driver back his documentation and told him to have a nice day, before asking the driver if he could ask him some additional questions, and driver responded "yes"); United States v. Hernandez, 93 F.3d 1493, 1498–1500 (10th Cir. 1996) (holding defendant consented to further questioning while sitting in patrol car, after officer handed him back his license and registration and told him he could leave); see also West, 219 F.3d at 1174–77 (defendant consented to officer's questions after officer handed back the

driver's license, rental agreement for the car, and a warning before continuing to ask driver questions).

Citing United States v. Mendenhall, 446 U.S. 544, 558 (1980), Mercado-Gracia argues that "it seems unlikely that after a seizure anyone—particularly a person of color—would actually feel free to leave when recalled by a police officer." (Aplt. Br. 23.) This court has rejected interjecting race into the objective reasonable person test—at issue here—for determining whether a citizen-police encounter was consensual or instead a Fourth Amendment seizure. See United States v. Easley, 911 F.3d 1074, 1081 (10th Cir. 2018), cert. denied, 139 S. Ct. 1644 (2019). "Mendenhall's discussion of race . . . was in the context of assessing voluntariness, not seizure. While the test for voluntariness of consent accounts for some subjective characteristics of the accused, the Fourth Amendment's seizure analysis has always been an objective one." Easley, 911 F.3d at 1081 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)) (further citation omitted). "Indeed, the Tenth Circuit has specifically disclaimed considerations that could inject the objective reasonable person analysis with subjective considerations: '[W]e reject any rule that would classify groups of travelers according to gender, race, religion, national origin, or other comparable status.'" Id. (quoting United States v. Little, 18 F.3d 1499, 1505 (10th Cir.1994) (en banc)).

Importantly, in this appeal, there is no issue presented challenging the voluntariness of Mercado-Gracia's consent to the search of the car, after the drug dog alerted. Nor does the Government rely on consent to justify deploying the drug dog

in the first place. Instead, as explained in the next section of this opinion, by the time he deployed the drug dog, Officer Wood had acquired reasonable suspicion that Mercado-Gracia was engaged in criminal activity sufficient to justify a further brief detention while the dog sniffed the exterior of the car.

As for Mercado-Gracia's argument that no objectively reasonable person in his position would have felt free to disregard Officer Wood's additional questions and leave, the cases cited above, as well as innumerable other cases, have long concluded that, under the right circumstances similar to those presented here a traffic stop can become a consensual citizen-police encounter that does not implicate the Fourth Amendment. Mercado-Gracia's argument to the contrary is unavailing. We conclude that, under the totality of the circumstances presented here, an objective reasonable person would have felt free to decline to answer Officer Wood's questions, posed after the officer gave Mercado-Gracia back his identification and documents and told him he was free to go.[5]

2. The district court did not err in determining that, during the consensual encounter, Officer Wood acquired reasonable suspicion to detain Mercado-Gracia briefly in order to deploy the drug-sniffing dog

By the time Mercado-Gracia declined Officer Wood's initial request to search the car, the consensual encounter between the two had ended and the officer,

[5] In light of our conclusion that the traffic stop evolved into a consensual citizen-police encounter, we need not address the Government's alternative assertion that, at the time the officer returned Mercado-Gracia's documents, the officer already had reasonable suspicion to believe that Mercado-Gracia was involved in criminal activity to justify extending the stop.

therefore, needed reasonable suspicion to detain Mercado-Gracia further while the officer deployed his drug-sniffing dog.[6] See United States v. Berg, 956 F.3d 1213, 1216-18 (10th Cir. 2020), cert. denied, 141 S. Ct. 605 (2020). The district court concluded that the officer, by that time, had developed reasonable suspicion that Mercado-Gracia was engaged in criminal activity—transporting illegal drugs—sufficient to justify a brief detention to deploy the dog, based on the following: Mercado-Gracia's answers to the officer's questions were "inconsistent"—he provided confusing explanations for his trip to Albuquerque, he did not know the last name of the car's owner, and changed his answer as to who the owner was, first a cousin and then his lady's husband's cousin; he was traveling from Phoenix, a known drug "source city"; and he had become increasingly nervous during his interaction with the officer. Reviewing de novo the district court's determination that these facts supported reasonable suspicion sufficient to justify a brief detention, see Ornelas v. United States, 517 U.S. 690, 694-99 (1996), we again agree.

The fact that Mercado-Gracia was from Phoenix, which authorities consider a "source" city, is not entitled to much weight. See United States v. Williams, 271 F.3d 1262, 1270 (10th Cir. 2001) ("Standing alone, a vehicle that hails from a purported known drug source area is, at best, a weak factor in finding suspicion of criminal activity."). Neither is nervousness, standing alone. See Bradford, 423 F.3d

[6] A dog sniff occurring outside a car is not a search, see Felders ex rel. Smedley v. Malcom, 755 F.3d 870, 880 (10th Cir. 2014) (citing Illinois v. Ceballes, 543 U.S. 405, 409 (2005)), but it may involve an additional brief detention.

at 1157 (warning courts not to "overcount[]" nervousness). But here those facts add to the calculus of reasonable suspicion. So did Mercado-Gracia's response to the question whether he had any marijuana in the car—"[n]ot that I am aware of." (I R. 342.) Most compelling, Mercado-Gracia's description of his travel plans as reasonably understood by Officer Wood kept changing, as did his explanation of whose car he was driving. Further, he did not know the full name of the person who lent him the car. Officer Wood testified that these circumstances are consistent with a drug courier's general modus operandi: often, a drug courier will drive another person's car to a distant city, not knowing where in that city he is to go until he gets there and calls someone to make the delivery, then he will turn around and immediately return home. While Mercado-Gracia's suspicious travel plans could be explained instead by his traveling to Albuquerque to have an affair, the officer need not "rule out the possibility of innocent conduct" before acquiring reasonable suspicion of criminal activity sufficient to justify a brief investigative detention. United States v. Cortez, 965 F.3d 827, 834 (10th Cir. 2020), cert. denied, 2021 WL 161110 (U.S. Jan. 19, 2021). Further, "in assessing reasonable suspicion we defer to a police officer's training and ability to discern innocent conduct from suspicious behavior." Id. Considering the totality of these circumstances, the district court did not err in concluding that the officer had acquired reasonable suspicion of criminal activity to detain Mercado-Gracia briefly while the officer deployed his drug-sniffing dog. We conclude, then, that the district court did not err in denying

Mercado-Gracia's motion to suppress the drugs and gun found in the car he was driving.

B The district court did not abuse its discretion in refusing to play a video during voir dire to educate prospective jurors on implicit bias

"[F]ederal judges have . . . ample discretion in determining how best to conduct the voir dire." Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981) (addressing whether trial court should have asked voir dire question regarding bias based on race or Mexican descent). Mercado-Gracia argues that the district court abused its ample discretion in denying his request to show an eleven-minute video produced by the federal district court for the Western District of Washington to educate prospective jurors on implicit bias. We cannot agree.

By implicit bias, Mercado-Gracia means "unconscious assumptions that humans make about individuals." (Aplt. Br. 33-34 (quoting United States v. Mateo-Medina, 845 F.3d 546, 553 (3d Cir. 2017)).) Mercado-Gracia, who was born in Mexico, contends that "[t]here was a reasonable possibility that implicit bias against Mexican immigrants or nationals would influence a juror because of the political climate and nature of the charge[s]" filed against him. (Id. at 37.) More specifically, Mercado-Gracia cites historical "anti-Mexican sentiment" in the United States and contemporary political rhetoric that suggests "Mexico sends drug dealers to America." (I R. 655.) On that basis, Mercado-Gracia sought to use the video "to educate potential jurors about [such] implicit bias." (Id. at 653.) The video informs jurors that everyone has unconscious biases, urges jurors to be aware of their own

unconscious biases, and encourages jurors, during the trial, to ask themselves if they would reach the same decisions if the defendant, witness, or lawyer was of another age, gender, or race. See "Unconscious Bias," http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited Feb. 3, 2021). The video, then, is not designed to identify for removal any specific jurors who hold biases against the defendant but aims instead to make all jurors aware of the possibility of their own subconscious biases.

In support of playing this video for the jury venire, Mercado-Gracia cited studies "demonstrat[ing] that implicit bias can be overcome by training, awareness, and active deliberation." (I R. 654 (citing Hon. Mark Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149, 156-57 (Winter 2010)).) The Government opposed playing the video, citing legal scholars and other studies suggesting that raising racial bias during voir dire actually risks injecting bias into jury deliberations. See Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (noting "the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at voir dire" because "[g]eneric questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions 'could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.'" (quoting Rosales-Lopez, 451 U.S. at 195 (Rehnquist, J., concurring in the result))).

The district court declined Mercado-Gracia's request to show the video to the jury venire, ruling that "[s]howing the video is not necessary to protect Defendant's right to a fair and impartial criminal jury under the Sixth Amendment and is an inefficient use of Court time." (I R. 759.) While a trial court, in the exercise of its discretion, might decide to show such a video during voir dire, we cannot say here that the court abused its discretion in declining to do so.

On appeal, in support of his argument that the trial court abused its discretion in declining to play the video for the jury venire, Mercado-Gracia relies on case law addressing a different question—when a trial court must, at the defense's request, ask prospective jurors about the possibility that racial or ethnic prejudice might impact their ability to judge the evidence in a given case fairly and impartially.[7] But here, at the request of both the Government and the defense, the trial court asked prospective jurors the following question:

> So you have heard the charges involving the possession of heroin and possession of a firearm in connection with the drug charge.

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[7] Among other cases, Mercado-Gracia cites Rosales-Lopez, 451 U.S at 189-92 (noting that, when the defendant requests it, the Constitution requires an inquiry into prospective jurors' potential racial or ethnic bias only under "special circumstances" where race is inextricably bound with the conduct of the trial, and that under the Court's supervisory authority federal courts must also permit inquiry into prospective jurors' racial or ethnic bias when the defendant is accused of a violent crime committed against a victim of a different race than the defendant); Ham v. South Carolina, 409 U.S. 524, 525-27 (1973) (holding trial court was constitutionally required to ask prospective jurors, at the defense's request, about their possible racial bias, where defendant accused of marijuana possession defended by asserting police framed him in retaliation for the defendant's civil rights activism); and United States v. Aldridge, 283 U.S. 308, 309-15 (1931) (holding trial court in capital murder case erred in not questioning, at defense's request, prospective white jurors about their possible racial bias against black defendant charged with killing white victim).

> One thing I want to say to you is that the defendant is of Mexican ancestry and so what I want to know is whether any of you would be inclined to believe the defendant is guilty based on, you know nothing yet about the case, but based on the fact that he is of Mexican ancestry and is charged with these drug and firearm charges, any of you, are any of you inclined to think he is guilty based on those facts[?]

(IV R. 246-47.) On appeal, Mercado-Gracia argues this question was "inadequate" to make "jurors . . . aware of their potential for unconscious biases. A juror is unlikely to be explicit about an implicit bias." (Aplt. Br. 39.) But Mercado-Gracia cites no authority requiring a trial court to educate prospective jurors about implicit biases.

Mercado-Gracia complains that the question the trial court asked prospective jurors "served only to inform the jurors of the defendant's national origin, without asking questions designed to meaningfully reveal any prejudices." (Id.) But at trial, defense counsel agreed to the wording of this question before the district court asked it. Furthermore, during voir dire, the attorneys for each side had an opportunity to pose other questions to prospective jurors. While defense counsel did ask several voir dire questions, counsel could have asked, but did not ask, prospective jurors about any biases they might have against Mexican nationals or immigrants. Instead, both defense counsel and the Government told the trial court they preferred that the court itself ask prospective jurors about potential prejudice. The court did so, using the question approved by both sides. Defense counsel did not request the trial court ask any further questions.[8]

[8] Before trial, defense counsel suggested three specific voir dire questions inquiring about possible racial prejudice. The district court ruled that it would "take up the

At the conclusion of trial, the court instructed jurors that it was the Government's "burden of proving the defendant guilty beyond a reasonable doubt," and it was jurors' "duty to base [their] verdict solely upon the evidence, without prejudice or sympathy. That was the promise that you made and the oath you took." (I R. 965, 975.)

Under these circumstances, we cannot conclude that the district court abused its discretion in the manner in which the court conducted voir dire.

III. CONCLUSION

For the foregoing reasons, we AFFIRM Mercado-Gracia's three convictions.

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issues regarding specific questions during the voir dire outside the presence of the jury, after the Court conducts its voir dire." (I R. 759.) During voir dire, however, defense counsel did not request that the court ask the specific questions counsel had previously proposed, nor did counsel seek to pose those question herself to the jury venire.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR No. 16-1701 JCH

AARON MERCADO-GRACIA,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant Aaron Mercado-Gracia's Motion to Suppress Evidence (ECF No. 47). The Court held a hearing on the motion on November 7, 2017, and on May 1, 2018. The Court, having considered the motion, briefs, evidence, applicable law, and otherwise being fully advised, concludes that the motion to suppress should be denied.

I. FACTUAL BACKGROUND

New Mexico State Police ("NMSP") Officer Ronald Wood has been an officer for 11 years and a canine ("K-9") officer for four-and-a-half years. Nov. 7, 2017 Hr'g Tr. 5:4-6:3. Although Ronald Wood has been promoted to Sergeant since the incident, at the time he was a Senior Patrolman, so the Court will refer to him herein as Officer Wood. *Id.* In September 2013, Officer Wood received K-9 training from the United States Custom and Border Patrol ("CBP") K-9 School where he was certified as a handler. *Id.* 6:24-7:6. In 2015 and 2016, Officer Wood received additional training in advanced patrol techniques, advanced K-9 handling, K-9 instruction, and a K-9 detection instructor course. *See id.* 7:6-11:10.

For the last four-and-a-half years, Officer Wood has been assigned a Belgian Malinois named Arras who was certified in drug detection beginning in September 2013 by three agencies: CBP, NMSP, and the California Narcotics Canine Association ("CNCA"). *See id.* 11:18-19:15; May 1, 2018 Hr'g Tr. 189:24-190:2. Arras was certified each year thereafter, and at the time of the incident in question, Arras held NMSP and CNCA certifications for the detection of the odors of marijuana, cocaine, heroin and methamphetamines. *See* Nov. 7, 2017 Hr'g Tr. 11:18-19:15; May 1, 2018 Hr'g Tr. 184:20-188:10; Gov.'s Ex. 2, 3A-D, 4A-D. The certification process is designed to simulate real world scenarios. Nov. 7, 2017 Hr'g Tr. 14:13-16:8.

Officer Wood generally had Arras with him for his approximately 8-12 hours per shift and Arras returned home with Officer Wood, so Officer Wood was very familiar with Arras's demeanor and behavior. *See id.* 13:6-14:12. Officer Wood trained with Arras 16 hours a month in addition to regular obedience training. *Id.* In his time as a K-9 officer, he has conducted approximately 500 stops in which he seized some type of contraband, with approximately 150 of those stops resulting in a seizure of narcotics in amounts not for personal use. *Id.* 6:4-19.

An alert is a behavioral change that a drug detection dog exhibits when his nose gets into the target odor he is trained to detect, which may include a change in search direction, a change in search speed, a change in body posture, and/or a change in breathing pattern. *See* May 1, 2018 Hr'g Tr. 181:10-25, 183:15-184:19. When a dog detects an odor for which he is trained, his respiration typically becomes deeper, his mouth will close to put more air through the olfactory nose system, and his sniffing pattern changes. Nov. 7, 2017 Hr'g Tr. 19:21-25; May 1, 2018 Hr'g Tr. 183:15-184:11. A drug detection dog is also trained to have a final response – a trained indication separate from an alert. *See* Nov. 7, 2017 Hr'g Tr. 20:22-25; May 1, 2018 Hr'g Tr. 182:11-17. Examples of an active final response include barking at the source of the odor or

scratching/digging at the source of the odor, while examples of a passive final response include sitting or lying down, and staring at the source of the odor. *See* May 1, 2018 Hr'g Tr. 182:18-183:4. The common element of the active and passive final responses is the stare behavior. *Id.* 182:25-183:4.

Arras is an energetic dog who makes rapid movements typical for the Belgian Malinois breed. *See* Nov. 7, 2017 Hr'g Tr. 86:22-87:2; May 1, 2018 Hr'g Tr. 190:111-191:5. Arras's alert is to close his mouth, increase his respiration through his nose, and to either become a little more rigid, a little more frantic, and/or it may be accompanied with a change of direction. Nov. 7, 2017 Hr'g Tr. 20:5-21, 145:2-6. Arras's final response is to go into a half sit/squat, with a pinpoint stare towards the source of the odor, and then typically he barks several times. *Id.* 20:22-22:9, 146:9-13.

On March 25, 2016, Officer Wood was traveling westbound on Interstate-40 with Arras when he observed a silver Dodge Charger traveling eastbound on I-40 seemingly driving faster than the posted 75 miles per hour speed limit. *Id.* 34:21-36:1. Officer Wood engaged his properly tested and working radar, which showed the vehicle speed was 92 mph, so he turned around, caught up to the vehicle, and stopped the vehicle by activating his emergency lights. *See id.* 36:17-41:8. The vehicle stopped on the shoulder to the highway, and Officer Wood approached the passenger side. *Id.* 41:6-7, 45:10-14. A video camera in Officer Wood's patrol vehicle recorded the stop. *Id*. 37:24-39:6.

The driver spoke English and appeared to understand Officer Wood throughout the encounter. *See* Gov.'s Ex. 6 ("Video of Stop"). Officer Wood explained to the driver, later identified as Defendant Mercado-Gracia, that he was going 92 mph, asked for his license and vehicle registration, and asked him to come over to the police vehicle while he checked

Defendant's identification. Gov.'s Ex. 7 ("Tr. of Stop") 2:7-14, ECF; Video of Stop 11:58 a.m. It is Officer Wood's common practice to ask motorists to exit their cars and accompany him to his patrol vehicle because his computer is in his vehicle and he can ask questions as they arise. Nov. 7, 2017 Hr'g Tr. 48:7-24. Officer Wood stood in the doorway of his patrol unit next to the passenger side front seat while Defendant stood by his passenger side front tire on the opposite side of his passenger door from Officer Wood. *Id.* 49:4-16. Officer Wood observed that Defendant was fidgeting, moving around, but engaged with Officer Wood as he talked to him. *Id.* 49:17-25. It is normal, however, for the traveling public to be fidgety when Officer Wood first stops them. *Id.* 50:18-21.

Defendant provided an Arizona driver's license for Aaron Mercado-Gracia and a vehicle registration matching the stopped Dodge Charger. *Id.* 46:12-47:7. The vehicle registration showed the car was registered to Hector Ramirez Reyes. *Id.* At this point, Officer Wood became concerned that that name on the license did not match the registration. *See id.* 47:1-12.

Officer Wood then asked about ownership of the vehicle because it was unclear from the paperwork Defendant provided. *See id.* 51:10-24. In response to Officer Wood's question who owned the vehicle, Defendant said, "Huh?" Tr. of Stop 2:16-18. When Officer Wood repeated his question, Defendant answered, "My cousin." *Id.* 2:19-20. Defendant gave his cousin's name as "Favian." *Id.* 2:21-25. Officer Wood observed that the insurance card had the name Favian Reyes, so he asked Defendant what Favian's last name was. *Id.*; Nov. 7, 2017 Hr'g Tr. 52:5-14; Gov.'s Ex. 8. When Defendant could not provide Officer Wood with Favian's last name, he clarified, "Well, he's my lady's, uh, husband's cousin." Video of Stop at 11:59 a.m. Defendant said Favian let him borrow his car to come over here for the weekend, and when asked where he was heading, Defendant responded, "Albuquerque." Tr. of Stop 3:5-8. Officer Wood found

Defendant's answers regarding who owned the car confusing, and he was suspicious that Defendant did not know the last name of Favian, with whom he claimed a family tie of sorts, or in any event, someone with whom he had a relationship of trust to allow him to borrow the vehicle for a long trip. *See* Nov. 7, 2017 Hr'g Tr. 52:18-53:11. Officer Wood further found it suspicious that Defendant was driving a vehicle registered to Hector Ramirez Reyes but insured by Favian Reyes, which in his mind, made the true ownership of the car unclear. *See id.* 54:12-21.

While writing the citation, Officer Wood engaged Defendant in casual conversation. *Id.* 55:6-13. Officer Wood asked what brings him to Albuquerque, and the following exchange occurred:

Defendant:	Just I own my own business –
Officer Wood:	Do you?
Defendant:	Yeah. It's a remodeling company. I'm trying to just like get going at it.
Officer Wood:	So you're coming to Albuquerque for work?
Defendant:	Oh no, just so I can drive around.
Officer Wood:	Drive around?
Defendant:	Yeah. I have a lady over here I want to meet.
Officer Wood:	Oh, okay. Well, I thought your lady was over there. This was her cousin's car.
Defendant:	Yeah, I know.
Officer Wood:	Oh, okay.
Defendant:	(Inaudible) girl down here.
Officer Wood:	I see.
Defendant:	So I couldn't bring my car.
Officer Wood:	Ah, I see. How long are you going to be over here?
Defendant:	Where?
Officer Wood:	Albuquerque.
Defendant:	Who, me?
Officer Wood:	Yeah.
Defendant:	How long have I been here?
Officer Wood:	No. How long are you going to be over here?
Defendant:	Oh, I don't know. It depends. Probably just the weekend.
Officer Wood:	Ah.
Defendant:	Yeah. I have to go back to work Monday. I would like to make it back by Easter.

Tr. of Stop 3:12-5:2; Video of Stop 12:00-:01 p.m.

Officer Wood found Defendant's answers to why he was going to Albuquerque odd. Nov. 7, 2017 Hr'g Tr. 55:18-56:22. He found it strange Defendant would mention his business, but when asked if he was coming for work, he said he was just driving around, even though Albuquerque is a long way to come from Phoenix to merely drive around. *Id.* He then found it suspicious that Defendant gave a new answer for why he was in town – to see a lady. *See id.* 56:19-57:2. At this point, Defendant became increasingly fidgety, antsy, moving his hands and feet around, although at this stage he was still looking at Officer Wood for the most part when answering questions. *Id.* 57:3-10. Officer Wood additionally noticed that Defendant was answering his questions, which should have had easy answers, with a question, and based on his training, was an attempt for the brain to buy time to fabricate a response. *Id.* 57:15-58:21. Phoenix is also a known source city and distribution point for narcotics. *Id.* 154:18-21.

Officer Wood then checked the VIN on the car, completed the rest of the traffic citation, and explained the process to resolve the speeding citation. Tr. of Stop 5:4-6:2; Video of Stop 12:02-:04 p.m.; Nov. 7, 2017 Hr'g Tr. 60:10-62:9. Officer Wood checked the VIN to verify it matched the paperwork, which it did, and according to NCIC, the vehicle was not stolen. Nov. 7, 2017 Hr'g Tr. 60:17-61:7, 123:13-24. It is possible, however, to have a stolen vehicle that has not been reported stolen to NCIC. *Id.* 150:5-8. He handed Defendant his license and vehicle information and said, "Okay. You're free to go." Tr. of Stop 6:3-6; Nov. 7, 2017 Hr'g Tr. 62:10-15. The time between when Defendant stopped his car and Officer Wood issued him the citation for speeding was approximately seven minutes. *See* Video of Stop 11:57 a.m.-12:04 p.m.

At that point, Defendant walked toward his vehicle. *Id.* at 12:04 p.m. When Defendant was near the rear of his vehicle, *see id.*, the following exchange occurred:

Officer:	Excuse me, Aaron.
Defendant:	Yeah?
Officer:	Is it okay if I ask you some questions?
Defendant:	What?

Tr. of Stop 6:8-12. Defendant then walked toward Officer Wood who was standing near the passenger door of his vehicle. *See* Nov. 7, 2017 Hr'g Tr. 62:19-64:7.

Officer:	Is it okay if I ask you some questions?
Defendant:	Regarding?
Officer:	Huh? Well, I'm just a little confused, is all, on your travel here, your trip. It's a little confusing to me, you know what I mean?

Tr. of Stop 6:13-19. Officer Wood's tone of voice was cordial and friendly. Video at 12:04 p.m.

Officer Wood then asked Defendant questions about whether he personally owns a car and why he did not bring it, and Defendant replied that he has a car but that's the only car "we have at home." Tr. of Stop 6:21-7:4. Officer Wood was confused because his answer indicated his lady had the car back in Phoenix, but Defendant just said he was coming to Albuquerque to meet a lady. Nov. 7, 2017 Hr'g Tr. 65:10-17. Officer Wood inquired whether he has a wife or girlfriend. Tr. of Stop 7:5-7:10. Defendant replied it was his partner, they had only one car, and he was here to see a girl. *See id.* 7:3-18. Officer Wood asked where in Albuquerque he was going, to which Defendant responded that he did not know and that he had to call and meet her. *Id.* 7:19-22. Officer Wood asked for the woman's name, and after asking why he needed to know, Defendant gave a first name. *Id.* 7:23-8:15. Officer Wood asked where he was going to stay, to which Defendant revealed that he was going to rent a place and pay cash, because he did not bring his credit cards. *Id.* 8:24-9:7. Officer Wood inquired if the owner of the car knew Defendant had his car and knew he was driving to Albuquerque with it, and he replied yes to both questions. *Id.* 9:9-24.

Officer Wood found Defendant's answers suspicious and improbable because it was odd

to go to the trouble of borrowing a car and driving seven hours from Phoenix to Albuquerque without knowing where he was going or where he was staying, and without bringing his credit cards, even if he did not intend to use them. *See* Nov. 7, 2017 Hr'g Tr. 65:10-68:10. In his experience, Officer Wood found the inconsistencies in Defendant's answers not normal in contrast to the answers of the innocent motoring public with whom he usually dealt. *See id.* 68:16-20. Defendant had also become increasingly nervous, such that now when answering Officer Wood's questions, he would look down or away without making eye contact. *Id.* 69:20-70:2. Based on his training and experience, Officer Wood found that the lack of eye contact corresponded with people trying to hide their answers or being untruthful with their answers. *Id.* 70:23-71:5. Defendant's answers were also slow, as he took long pauses before responding to simple questions. *Id.* 70:2-4. All this behavior was unusual for the innocent motoring public, who usually became more relaxed as the traffic stopped continued. *See id.* 69:20-70:22. Officer Wood had also noticed that Defendant's keyring had only one key, which is unusual because the common motoring public generally have multiple keys, key rings, or cards with their car key. *See id.* 78:6-20.

Officer Wood asked if he had any weapons in the car, to which Defendant said, "No." Tr. of Stop 10:1-4. Officer Wood asked this question for officer safety reasons, given Defendant's nervousness and inconsistent answers, and because he might be able to eliminate nervousness due to a weapon in the car as a factor to explain Defendant's demeanor and answers. *See* Nov. 7, 2017 Hr'g Tr. 68:16-69-17.

Officer Wood then asked if there were any drugs in the vehicle, to which Defendant said, "No." *Id.* 71:6-9. When asked if he had any marijuana, Defendant replied, "Not that I'm aware of." Tr. of Stop 10:8-9. When Officer Wood inquired about other drugs, Defendant responded

no. *Id.* 10:13-17. At this point, Officer Wood was suspicious that Defendant was transporting marijuana, because it is an odorous drug, and he had control of the vehicle for a seven-hour drive from Phoenix, so he should know whether marijuana was in the car. Nov. 7, 2017 Hr'g Tr. 71:8-72:8. Officer Wood believed that Defendant was giving a half truth, trying to distance himself from the possibility. *Id.* Moreover, it is common, based on his experience, for drug smugglers not to know where they are going, but to have only partial information, such as a phone number to call, and to use vehicles that do not belong to them. *See id.* 154:21-156:7.

Officer Wood asked for permission to search the vehicle. *Id.* 79:3-14. Defendant replied, "No," and when asked why, Defendant explained that he "thought it was just my ticket." Tr. of Stop 11:3-6. Officer Wood attempted to clarify by asking if he did not want the vehicle or his own property searched, but Defendant said, "The whole thing" and "I know I have the right." *Id.* 11:9-12:1. At 12:08 p.m., Officer Wood responded, "No, definitely, you do. So I'll be straight up with you. Right now I have some concerns, okay? And so what I'm going to have to do is I'm going to deploy my canine on the vehicle, okay?" *Id.* 12:2-6. He then explained that he was going to deploy his dog on the exterior of the vehicle because of concerns he had that Defendant's travel plans did not make sense, but he did not further elaborate on his reasons when Defendant asked about them. *See id.* 12:8-13:25. Defendant looked into the patrol unit and his eyes widened, seemingly scared, that the dog was there to search. Nov. 7, 2017 Hr'g Tr. 80:1-10.

At 12:10 p.m., Officer Wood patted Defendant's pockets for weapons and had him stand away from the vehicle while he conducted the dog sniff. *See* Tr. of Stop 14:11-22; Video of Stop 12:10-:11 p.m. Officer Wood conducted the pat-down for officer safety reasons because his attention would be on his dog, and he did not feel safe turning his back on a suspect that had not been patted for weapons. Nov. 7, 2017 Hr'g Tr. 82:22-83:10. Officer Wood radioed for

assistance and at around 12:13 p.m., Officer Wood deployed Arras for about two minutes. *See* Video of Stop 12:12-:14 p.m.

Officer Wood kept Arras on a leash because of the heavy, fast traffic on the driver side of the vehicle. Nov. 7, 2017 Hr'g Tr. 84:20-86:5. He made two complete circles around the vehicle, beginning at the front of the vehicle and moving counterclockwise. *Id.* 88:14-96:19; Video of Stop 12:12-:14 p.m. This two-lap technique is standardly taught within the law enforcement community; the first lap is the dog's search by sniffing with minimal handler influence, if possible. May 1, 2018 Hr'g Tr. 197:2-21. The purpose of the second lap is for the handler to present a search pattern for the dog, for example, showing the seams of car doors in a high/low search pattern. *Id.* 197:22-198:15. Because the second lap involves more handler influence, the first lap is generally the best lap for a dog alert/final response. *Id.* 198:16-20.

In Officer Wood's first pass of the car, he provided less input to Arras, using a longer leash. *See* Nov. 7, 2017 Hr'g Tr. 88:14-89:13. As they passed the driver's side door, Arras got up on the window, closed his mouth, and took several breaths through his nose, which indicated to Officer Wood that he smelled something that got his attention. *Id.* 90:9-19. At the driver's side rear taillight, Arras closed his mouth, took several rapid breaths, changed directions, and came back toward Officer Wood, breathing rapidly. *Id.* 91:1-17. Arras's body posture changed, he became excited, and changed direction back toward the taillight. *Id.* This behavior was consistent with Arras's alert behavior, and at this point, Officer Wood reasonably believed Arras had alerted to the presence of narcotics. *See id.* 90:13-94:1; May 1, 2018 Hr'g Tr. 201:6-205:10, 212:6-21, 214:2-6.

Arras then pinpoint stared at the taillight and barked strongly and rhythmically four times. Nov. 7, 2017 Hr'g Tr. 91:18-92:3; May 1, 2018 Hr'g Tr. 202:1-203:7. The four barks

differed in type and repetitiveness from Arras's earlier high frequency whine. *See* May 1, 2018 Hr'g Tr. 200:22-24, 202:7-203:7. This behavior was consistent with Arras's final response behavior, and at this point, Officer Wood reasonably believed Arras gave a final response indicating the presence of narcotics in the vehicle. *See* Nov. 7, 2017 Hr'g Tr. 91:1-93:15; May 1, 2018 Hr'g Tr. 213:2-6, 214:2-6. Arras continued on, changing direction again at the passenger side rear taillight and focused on the trunk area, part of his bracketing behavior. *See* Nov. 7, 2017 Hr'g Tr. 93:22-94:13; May 1, 2018 Hr'g Tr. 203:15-204:23. Approximately ten minutes passed from the time Officer Wood issued the speeding ticket to Arras's alert and final response, for a total detention time of approximately 16 minutes from the initial stop of the car to Arras's alert and final response. *See* Video 11:57 a.m. – 12:13 p.m.

In the second pass, Officer Wood used a more detailed, guided pattern pass where he presented the seams of the doors and trunk to Arras, showing Arras where to sniff on a shorter leash. *See* Nov. 7, 2017 Hr'g Tr. 94:25-96:6; Video of Stop 12:13 p.m. Arras took rapid breaths through his nose and quickly flashed back his head at the driver's side rear taillight, but he did not give another indication or final response in the second pass. *See* Nov. 7, 2017 Hr'g Tr. 94:25-96:16. When Officer Wood began walking back to return Arras to his patrol unit, Arras attempted to get back to the driver side's rear taillight, indicating his trying to be obedient to the odor. *See id.* 98:16-99:9; May 1, 2018 Hr'g Tr. 209:14-210:14; Video 12:13-:14 p.m.

Officer Wood subsequently told Defendant the dog alerted, and that Defendant was going to go with Officer Wood while he applied for a search warrant. Tr. of Stop 14:24-15:2; Nov. 7, 2017 Hr'g Tr. 108:7-17. Officer Wood handcuffed Defendant and placed him in the rear of his patrol unit. Nov. 7, 2017 Hr'g Tr. 109:1-12. Officer Wood took Defendant's wallet, money, and ID at around 12:15 p.m. *See* Tr. of Stop 15:5-22; Video of Stop 12:15 p.m. Defendant asked to

use the restroom, but Officer Wood did not allow him at that time. Tr. of Stop 15:23-25.

Sergeant Arcenio Chavez (now Lieutenant) arrived on scene, spoke to Defendant, and explained the process of what was going to happen next. Nov. 7, 2017 Hr'g Tr. 164:3-170:3. A high school student in plain clothes accompanied Sergeant Chavez but stayed in the vehicle. *Id.* 175:6-178:25. Sergeant Chavez and Defendant were outside of the patrol unit and Defendant was handcuffed. *Id.* 171:3-18. Among other things, Sergeant Chavez explained that they were going to go the office to apply for a search warrant, which would take a long time, but that if he changed his mind, he could let them know, and that it was totally up to him. *Id.* 169:13-170:3. Defendant indicated to Sergeant Chavez that he changed his mind about the search. *See id.* 172:20-173:4.

Sergeant Chavez then told Officer Wood Defendant wished to give consent to search. *Id.* 173:3-8. Officer Wood un-cuffed Defendant and allowed him to get his jacket from the Charger. *Id.* 110:4-111:11. Officer Wood then gave Defendant a consent-to-search form, Officer Wood explained the form to Defendant, Defendant read it, Defendant said he understood it, and Defendant signed it. *Id.* 111:24-113:25; Tr. of Stop 16:22-17:15; Gov.'s Ex. 10. At the time Defendant signed the form, he was not handcuffed and was standing at the passenger side front door of the patrol unit. Nov. 7, 2017 Hr'g Tr. 114:20-115:1. Officer Wood then allowed Defendant to use the bathroom. *Id.* 115:2-8.

Sergeant Chavez and Officer Wood searched the interior of Defendant's car where they found two large bundles of heroin and a firearm. *Id.* 115:8-9, 174:7-21. The United States subsequently charged Defendant in a two-count Indictment (ECF No. 12) for Possession with Intent to Distribute 1 Kilogram and More of Heroin under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and Using and Carrying a Firearm During and in Relation to a Drug Trafficking Crime and

Possessing a Firearm in Furtherance of Such Crime under 18 U.S.C. § 924(c). On July 10, 2017, Defendant filed a motion to suppress (ECF No. 47) challenging the legality of the detention and search.

II. ANALYSIS

Defendant contends Officer Wood violated the Fourth Amendment by extending the traffic stop beyond its initial purpose of issuing a speeding ticket without reasonable suspicion. Defendant asserts that he did not voluntarily consent to further detention or to the search of the vehicle. Finally, Defendant argues that the Government failed to prove the reliability of Arras or that he alerted and made a final response to establish probable cause to search the car.

A. Reasonableness of Investigative Detention during Issuance of Citation

An investigative detention is an exception to the probable cause requirement, the reasonableness of which is determined by a two-part test: (1) whether the officer's action was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *See United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000) (citing *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968)). An investigative detention may only last as long as necessary to effectuate its purpose. *Florida v. Royer*, 460 U.S. 491, 500 (1983). The scope of the detention must be carefully tailored to its underlying justification. *United States v. Manjarrez*, 348 F.3d 881, 885 (10th Cir. 2003). It is the Government's burden to show that a seizure was sufficiently limited in scope and duration to satisfy the conditions of an investigative detention. *Royer*, 460 U.S. at 500.

During a routine traffic stop, an officer may ask questions, examine documentation, run computer checks of the vehicle, and issue citations. *United States v. Zubia-Melendez*, 263 F.3d 1155, 1161 (10th Cir. 2001). Questioning, even unrelated to the purpose of the stop, including

asking about illegal items, does not offend the Fourth Amendment, so long as it does not appreciably lengthen the detention. *United States v. Valenzuela*, 494 F.3d 886, 890 (10th Cir. 2007) (citing *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1259 (10th Cir. 2006)). "[Q]uestions about travel plans are routine and 'may be asked as a matter of course without exceeding the proper scope of a traffic stop.'" *West*, 219 F.3d at 1176 (quoting *United States v. Hernandez*, 93 F.3d 1493, 1499 (10th Cir. 1996)). After an officer has issued a citation, the driver must be allowed to leave if he has produced a valid license and proof he is entitled to operate the car. *Zubia-Melendez*, 263 F.3d at 1161.

Defendant does not contest the validity of the initial stop to issue a speeding citation. The Court concludes that the approximately seven-minute period during which Officer Wood issued the ticket, and checked NCIC and the VIN to ensure the vehicle was not stolen, while asking questions of Defendant including about his travel plans, was reasonable. *See West*, 219 F.3d at 1176; *United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995) ("an officer may detain a driver until assured that the driver's license is valid and the driver is legitimately operating the vehicle").

B. Voluntary Consent to Answer Questions

After the officer has issued a citation, the driver generally must be allowed to proceed on his way, unless the officer has a reasonable, articulable suspicion that illegal activity has occurred or is occurring or the driver consents to additional questioning. *See West*, 219 F.3d at 1176. "A consensual encounter is simply the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official." *United States v. Patten*, 183 F.3d 1190, 1194 (10th Cir. 1999) (quotation omitted). A seizure, by contrast, occurs when an individual has an objective reason to believe that he is not free to end the conversation with the

officer and leave. *Id.* The Tenth Circuit follows the "'bright-line rule that an encounter initiated by a traffic stop *may not* be deemed consensual unless the driver's documents have been returned to her.'" *United States v. Guerrero-Espinoza*, 462 F.3d 1302, 1308-09 (10th Cir. 2006) (quoting *United States v. Bradford*, 423 F.3d 1149, 1158 (10th Cir. 2005)) (italics in original).

"Valid consent is that which is "freely and voluntarily given.'" *United States v. Pena*, 143 F.3d 1363, 1366 (10th Cir. 1998) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). The court must determine whether (1) the consent was unequivocal, specific, and freely and intelligently given, and (2) it was given without implied or express duress or coercion. *See United States v. Mendez*, 118 F.3d 1426, 1432 (10th Cir. 1997). The government bears the burden to show that the consent was voluntary. *Patten*, 183 F.3d at 1194. Mere acquiescence to a claim of lawful authority is insufficient to meet the government's burden. *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). "The central question is whether 'a reasonable person would believe he was free to leave or disregard the officer's request.'" *United States v. Ledesma*, 447 F.3d 1307, 1314 (10th Cir. 2006) (quoting *Manjarrez*, 348 F.3d at 885-86). A police officer does not have to inform the citizen that he is free to disregard any further questioning for the encounter to be consensual. *See West*, 219 F.3d at 1176-77.

At the time Officer Wood asked Defendant if he could ask him some more questions, Officer Wood had returned Defendant's documents to him and told him he was free to go. Officer Wood did not use an overbearing show of authority, he spoke in a friendly manner, and he let Defendant walk back towards his own car. He was the only officer present on the side of a public interstate, did not display a weapon, did not touch or restrain Defendant, and did not stand in his way. Defendant responded to Officer Wood's request with "regarding," walked back toward Officer Wood, and proceeded to answer Officer Wood's questions. This continued

encounter between Defendant and Officer Wood while Officer Wood asked additional questions was consensual. *Cf. West*, 219 F.3d at 1176-77 (affirming district court's conclusion that encounter between suspect stopped for traffic violation was consensual after officer returned papers before questioning him about drugs, and officer did not use commanding or threatening manner or tone of voice, display a weapon, or touch suspect). Defendant did not act or express intent to affirmatively end the consensual encounter at any time before Officer Wood told him he would employ his dog around the car.

C. Reasonableness of Investigative Detention to Conduct Dog Sniff

A canine sniff of an already legitimately detained vehicle is not an unlawful search within the meaning of the Fourth Amendment. *See Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (a canine sniff of the exterior of a vehicle during a lawful traffic stop does not implicate legitimate privacy interests); *United States v. Hunnicutt*, 135 F.3d 1345, 1350 (10th Cir. 1998). Detention of a suspect to accomplish a canine sniff is generally permissible if supported by reasonable suspicion. *See Hunnicutt*, 135 F.3d at 1347, 1350 (holding, in alternative, that 15 minute wait for drug dog was permissible because supported by reasonable suspicion, including extreme nervousness of passengers and inconsistent statements about destination). For reasonable suspicion to exist, the officer must have "some minimal level of objective justification for making the stop," and evidence "falling considerably short of a preponderance satisfies this standard." *United States v. Winder*, 557 F.3d 1129, 1134 (10th Cir. 2009) (quotations and citations omitted). Dubious, inconsistent answers to questions or implausible or contradictory travel plans can contribute to reasonable suspicion. *Zubia-Melendez*, 263 F.3d at 1162.

In this case, the following articulable facts gave Officer Wood reasonable suspicion that criminal activity was afoot. Defendant gave inconsistent, odd answers to Officer Wood's

questions that were atypical of his encounters with the general public when issuing tickets. Defendant gave multiple, inconsistent reasons for the purpose of his trip to Albuquerque from Phoenix, a known drug source city. It was suspicious that Defendant would mention his business, but when asked if he was coming for work, he said he was just driving around, even though Albuquerque is a long way to come from Phoenix to merely drive around. Adding to Officer Wood's reasonable suspicion was the fact that Defendant gave a new answer for why he was in town – to see a lady, and that he was driving all the way to Albuquerque to meet her, but he did not know where and had to call her. *See United States v. Karam*, 496 F.3d 1157, 1164-65 (10th Cir. 2007) ("[C]onfusion about details is often an indication that a story is being fabricated on the spot…."). Defendant's latter story was consistent with drug smugglers who often have to call to meet up with their contacts. It was additionally unusual that Defendant left his credit cards at home for a long out-of-state trip.

Defendant also changed his answer for whom the car belonged from "my cousin" to "my lady's husband's cousin." Defendant could only give a first name for the car's owner, even though he suggested Favian had a family tie and loaning a car for an out-of-state trip would generally indicate a trusted relationship. Although the name "Favian" matched the first name on the insurance card, there was a different name on the registration. In Officer Wood's experience, drug traffickers often do not use their own vehicles to transport drugs. *Cf. United States v. Ludwig*, 641 F.3d 1243, 1249 (10th Cir. 2011) (explaining that driving vehicle registered to third party who was not present is factor that is relevant in reasonable suspicion analysis because it may indicate vehicle is stolen or involved in drug trafficking).

Additionally, Defendant became increasingly nervous during the course of the encounter, later avoiding eye contact and answering questions slowly and with questions instead of answers

to Officer Wood's simple questions. Although nervousness generally is of limited significance, Officer Wood explained that usually the public becomes less nervous as the stop proceeds, whereas Defendant became more nervous. Based on Officer Wood's training, he understood answering easy questions with questions was a sign that the person is trying to stall to give the brain time to fabricate an answer. Finally, when asked if marijuana was in the car, Defendant responded, "Not that I'm aware of," an unusual response given that he had been in the car for many hours and marijuana has a strong, distinct odor. Moreover, based on Officer Wood's experience, usually the innocent motoring public answers this question in a straight way, whereas Defendant did not say "no" and attempted to distance himself from the possibility, indicating he may be somebody who either does or is around people who use marijuana. *See* Nov. 7, 2017 Hr'g Tr. 71:8-72:8. Vague and evasive answers may be considered as part of the totality of the circumstances in the reasonable suspicion analysis. *Karam*, 496 F.3d at 1165.

Based on all the facts, Officer Wood developed reasonable suspicion during the encounter to believe Defendant may be engaged in criminal activity, to wit, the transportation of illegal narcotics. He could constitutionally detain Defendant for a reasonable length of time to conduct a dog sniff to investigate his articulable suspicion that Defendant might be transporting drugs. *See United States v. Turrentine*, 542 F. App'x 714, 716, 719-20 (10th Cir. Oct. 18, 2013) (holding that district court did not err in finding that trooper had reasonable suspicion to further detain suspects to conduct dog sniff based on clearly contradictory travel stories and passenger's efforts to feign sleep); *United States v. Contreras*, 506 F.3d 1031, 1036 (10th Cir. 2007) (implausible travel plans, significant nervousness, and use of rental car gave rise to reasonable suspicion of drug trafficking); *United States v. Kopp*, 45 F.3d 1450, 1453-54 (10th Cir. 1995) (finding reasonable suspicion justifying continued detention where defendant's explanation of

travel plans and purpose was not plausible; driver said he was driving from California to North Carolina merely to take dilapidated sofa to friends, he was uncertain as to where in North Carolina he was going, and answers were inconsistent with passenger's responses, which were also internally inconsistent).

Furthermore, the time between the initial stop and when Officer Wood conducted the dog sniff around the vehicle was approximately 16 minutes, which is not unreasonable under the circumstances. *See United States v. Montes*, 280 F. App'x 784, 789 (10th Cir. 2008) (unpublished opinion) (holding that total time of traffic stop before dog's initial alerts – 15 minutes – is within reasonable range and citing with approval cases ranging from 13 to 19 minutes) (and cases cited therein).

D. Probable Cause to Search

A warrantless arrest does not violate the Fourth Amendment so long as an officer has probable cause to believe that the arrestee committed a crime. *Rife v. Oklahoma Department of Public Safety*, 854 F.3d 637, 645 (10th Cir. 2017). Probable cause to search a vehicle under the automobile exception to the Fourth Amendment's warrant requirement is established if, under the totality of the circumstances, there is a fair probability that the vehicle contains contraband or evidence. *United States v. Vasquez-Castillo*, 258 F.3d 1207, 1212 (10th Cir. 2001). A reliable narcotics dog alerting establishes probable cause for searches and seizures. *See United States v. Rosborough*, 366 F.3d 1145, 1152-53 (10th Cir. 2004) (canine alert toward one area of vehicle generally gives probable cause to search other areas of vehicle).

The Court finds the testimony of Officer Wood and Terry Fleck credible. The testimony and evidence established that Arras had extensive training in drug detection, was certified in drug detection beginning in September 2013 by three agencies, and at the time of the search in

question, held NMSP and CNCA certifications for the detection of the odors of marijuana, cocaine, heroin and methamphetamines. The Court finds that Arras was fully trained and certified to detect narcotics and was reliable at the time of the incident in question. *Cf. United States v. Villa*, 348 F. App'x 376, 379 (10th Cir. Oct. 6, 2009) (holding that alert by drug-detection dog established probable cause to search rental vehicle where district court found dog reliable based on facts that dog had completed certification for three years prior to search of rental vehicle and was fully trained and certified to detect narcotics at the time it alerted).

The Court further finds that Arras alerted and gave a final response during Arras's first lap around Defendant's vehicle. Officer Wood testified credibly that he heard Arras's change of respiration, and saw up close his closing of his mouth and his change in body posture. The video clearly shows Arras changing direction multiple times at or near the driver's side taillight. The evidence additionally demonstrates that Arras paused at the driver's side taillight, closed his mouth, stared fixedly at the taillight, and barked rhythmically four times. Officer Wood credibly testified that this behavior constituted Arras's alert and final response.

Although defense expert Andre Jimenez testified that passive alerts, such as a sit, are more common than active alerts, he acknowledged in his report that a trained alert may include barking. *See* Def.'s Ex. D (Report of Andy Falco Jimenez) ¶ 7 ("A reaction or trained alert would have included barking *or* other trained behavior such as sit, down or aggressive alert by scratching.") (italics added). He also noted that a behavior change, such as a sudden change of direction, change in breathing, or change in body language may tell a handler that the dog was interested in an odor. *See id.* ¶ 9.

Terry Fleck, who the Court found at the hearing to be an expert in law enforcement K-9 subject matter, persuasively corroborated Officer Wood's testimony. Mr. Fleck testified to his

opinion that Arras alerted by closing his mouth, changing his search direction, and engaging in bracketing behavior. *See* May 1, 2018 Hr'g Tr. 212:6-24, 219:21-220:7. Mr. Fleck further opined that Arras engaged in a final response at the driver's side rear taillight in his first lap around Defendant's car when he focused on the driver's side taillight with a pinpoint stare and gave four rhythmic barks. *Id.* 213:2-6, 220:8-14.

Based on the totality of the circumstances and for the foregoing reasons, Officer Wood had a reasonable basis for his belief that Arras alerted to and had a final response indicating the presence of illegal narcotics in Defendant's vehicle. Accordingly, Officer Wood had probable cause to search the vehicle, and he proceeded to search the vehicle in a reasonable period of time. The subsequent discovery of the drugs and firearm therein did not violate Defendant's Fourth Amendment rights.[1]

IT IS THEREFORE ORDERED that Defendant Aaron Mercado-Gracia's Motion to Suppress Evidence (**ECF No. 47**) is **DENIED**.

UNITED STATES DISTRICT JUDGE

[1] Because of the Court's findings and conclusions, it need not determine whether Defendant's consent to search the vehicle was voluntary, as an alternative ground to permit the search.