NO. _____

In The Supreme Court of the United States

ROBERT MICHAEL JUNKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred in denying Junkins' Defendant's Motion to Suppress Evidence for the evidence discovered in Mr. Junkins' vehicle after an illegal search conducted on November 20, 2018 and which led to the charges contained in Counts One, Two and Three of the Indictment.

2. Whether the district court erred in denying Junkins' Defendant's Motion to Suppress Evidence for the evidence discovered in Mr. Junkins' vehicle after an illegal search conducted on August 1, 2017 and which led to the charges contained in Counts Four and Five of the Indictment.

3. Whether the district court erred in basing its calculation of the total amount of methamphetamine attributable to Junkins, pursuant to U.S.S.G. § 2D1.1, almost solely on the testimony of one particular admitted drug user and addict.

RULE 14.1(b)(i) STATEMENT

There are no parties in addition to those listed in the caption.

RULE 14.1(b)(iii) STATEMENT

There are no proceedings in any state or federal trial and appellate court that are directly related to the case in this Court.

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The United States Court of Appeals for the Fourth Circuit filed an unpublished opinion on August 13, 2021 affirming the petitioner's conviction and sentence. U.S. v. Robert Michael Junkins, ___ Fed.Appx. ___, (No. 20-4380)(4th Cir. 2021). The unpublished opinion of the Court of Appeals for the Fourth Circuit is attached at Appendix 1a-15a to this Petition.

JURISDICTION

On August 13, 2021, the United States Court of Appeals for the Fourth Circuit rendered its decision and entered judgment whereby it affirmed the sentence imposed upon Mr. Junkins in the district court. The United States District Court for the Northern District of West Virginia had jurisdiction pursuant to 18 U.S.C. § 3231 which provides in part that "the district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 1291 which provides in part that "the courts of appeals (other than the United States Court of Appeals for the Federal circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States" and by Rule 4(b) of the Federal Rules of Appellate Procedure. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1)

§ 841. Prohibited acts A.

(a) Unlawful acts
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 841(b)(1)(C)

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be
sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual
or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily
injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under

the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

18 U.S.C. § 924(a)(2)

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not morethan 10 years, or both.

18 U.S.C. § 924(c)(1)(A)(i)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-
(i) be sentenced to a term of imprisonment of not less than 5 years;

18 U.S.C. § 922(g)(1)

(g) It shall be unlawful for any person-

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

On December 18, 2018 a federal Grand Jury returned a seven count Indictment against the petitioner, Robert Michael Junkins ("Junkins"), in the Northern District of West Virginia. (JA 12-19). A forfeiture allegation was also returned by the Grand Jury.

The Indictment set forth alleged criminal activity on behalf of Junkins on three separate dates. Count One of the Indictment charged that Junkins possessed with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C), Count Two charged him with possession of a firearm during and in relation to a drug offense in violation of 18 U.S.C. § 924(c)(1)(A)(i) and Count Three charged him with unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). All of these charges stemmed from a stop of Mr. Junkins' vehicle on November 30, 2018.

Count Four of such Indictment charged Junkins again with possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) and Count Five charged him with unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). These two counts stemmed from a stop of Junkins' vehicle on August 1, 2017.

The final two counts of the indictment charged Junkins with possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) (Count Six) and unlawful possession of a firearm in violation of 18 U.S.C.

§ 922(g)(1) and 924(a)(2) (Count Seven). These charges stemmed from a search of Junkins' residence on September 20, 2017.[1]

Counts One, Two and Three of the Indictment arise from an investigation by law enforcement on November 30, 2018. On the morning of November 30, 2018, at around 6:00 a.m., Officer D.T. Sayre ("Sayre") of the Elkins Police Department was in his police cruiser with Officer Ryan Summerfield ("Summerfield") in Elkins, West Virginia, and were traveling to a local restaurant to get some breakfast. (JA 52, 365). While pulling into a local GoMart parking lot Sayre happened to notice a black Mercury vehicle in the GoMart parking lot with an expired registration sticker. (JA 52, 299-300). Sayre also observed a "male subject leaning on the driver's side of the vehicle." He called dispatch on the license plate to "make sure it was expired." (JA 300). Sayre drove his police cruiser past the vehicle in question and "Randolph County 911 confirmed that [the registration was] expired." (JA 55, 301). Sayre then circled back and parked his police cruiser behind the black mercury (JA 56). His police cruiser was around 10 to 15 feet behind the black mercury vehicle, making it very difficult for the driver of such vehicle to leave. (JA 76). In fact, Sayre admitted that by parking his cruiser that close to the black mercury vehicle he "blocked [Junkins] into that spot right there at the GoMart." (JA 322). Summerfield likewise stated that Sayre parked the cruiser behind the black Mercury in such a "was to block the vehicle in." (JA 95).

[1] The government moved to dismiss these counts on February 8, 2019 (JA 27) which motion was granted by the district court on February 13, 2019. (JA 177).

Both Sayre and his partner Summerfield exited their police cruiser. (JA 56-57, 301). Sayre approached the driver's side of the black Mercury vehicle while Summerfield approached the passenger side. (JA 58, 301). Before making contact with the driver, Sayre reported the occupants of the black Mercury kept looking back and "making motions towards the front of themselves." (JA 57, 302). The vehicle was also reported to be running, but parked. (JA 56, 86, 322).

Sayre then asked for the driver's identification at which time the driver, later identified to be Junkins, "appeared to be nervous." (JA 59, 303). Because of Junkins' apparent nervousness Sayre asked him to "step out of the vehicle for my safety along with his." (JA 303). As the car door opened and Junkins stepped out, Sayre "observed a blue in color smoking device along with a syringe lying on the floorboard . . ." (JA 303-304). He then conducted a pat down search of Junkins for weapons. No weapons were found but approximately $723 was found in his right front pocket. (JA 55-56, 304-305). Sayre asked Junkins if "there was anything else in the vehicle other than what I could see" at which point Junkins "became irate." (JA 61-62, 306) Sayre attempted to restrain Junkins, Junkins resisted, which led to Sayre pepper spraying Junkins and finally restraining him. (61-63).

Junkins, along with a female occupant of the vehicle, were handcuffed and placed in separate police cruisers (Senior Patrolman C.G. Boatwright ("Boatwright") had arrived on scene to assist with the stop. (JA 358-364)). Officers Sayre and Summerfield then conducted a search of Junkins' vehicle. (JA 65, 307). Sayre searched the driver's side area of the vehicle as well as the rear seat area and trunk.

(JA 55, 307). Sayre found two syringes, a cell phone, baggies, and a firearm which was recovered under the driver's side seat. (JA 65-66, 307). He also found a set of scales in the trunk of the vehicle. (JA 66, 307). Also in the trunk of the vehicle was a backpack with Junkins' State identification card as well as a metal tube with "an unknown substance in it." (JA 66). Sayre also recovered a "cylinder necklace, around [Junkins' neck]" which contained a "crystal-like substance." (JA 67).

Summerfield discovered a bag of suspected methamphetamine under the passenger seat of Junkins' vehicle. (JA 67-68, 367-368).

Junkins was transported back to the Elkins Police Department where he was read his Miranda rights by Randolph County Deputy Sheriff David Van Meter and gave statements which incriminated himself. (JA 279-292). These statements were recorded.

Counts Four and Five of the Indictment arise from a traffic stop conducted on August 1, 2017 in Shinnston, Harrison County, West Virginia. During that afternoon, Chief of Police Officer Jason Carlson ("Carlson") of the Shinnston Police Department received a call while he was in his office regarding a welfare check at a nearby McDonald's. (JA 108, 420). The caller reported that there were two individuals in a red Ford Mustang who "appeared to be passed out." (JA 108, 420). Also in the office with Carlson was Deputy Chief Lee Goad ("Goad). (JA 108). Carlson and Goad left the office to drive to the McDonald's to investigate. (JA 109, 421). When they arrived at the McDonald's they turned into the parking lot but did not immediately see the red Ford Mustang. (JA 109, 422). As Carlson, who was driving

the police cruiser, circled around the McDonald's parking lot he and Goad noticed the red Ford Mustang "pulling out onto Route 19." (JA 109, 422).

Carlson then pulled onto Route 19 "to get behind the vehicle to check the welfare of the driver." (JA 110). As they were following the red Ford Mustang both Carlson and Goad "noticed that the passenger side window – something white appeared to have come out of the window and it was long and slender-shaped, so it was a straw from McDonald's, because they had just left there." (JA 110). Carlson "tried to call in the registration" on the vehicle but "couldn't make out all the characters because there was a piece of license plate bracket that was broken off, hanging down over the characters at the beginning of the license plate." (JA 111, 423). Carlson then activated the emergency lights on his cruiser and initiated a traffic stop on the red Ford Mustang "for the litter and the obstructed registration and obviously checking the welfare of the driver." (JA 111, 424).

Carlson and Goad exited the police cruiser and approached the red Ford Mustang. (JA 112). Carlson approached on the driver's side of the vehicle and made contact with the driver who turned out to be Junkins. (JA 112, 426). A female passenger, Clarissa Adkins ("Adkins"), was also present in the vehicle. Carlson asked Junkins for his driver's licence, registration and proof of insurance at which time Junkins became "kind of belligerent" and seemed "very agitated." (JA 112, 427). However, Junkins complied to Carlson's request and handed Carlson his driver's license, some sort of receipt where he traded another vehicle for the Ford Mustang he was currently driving and a temporary registration for the Mustang. (JA 113, 427).

Junkins did not have any proof of insurance for the vehicle and Carlson informed him that he could have his vehicle towed for lack of proof of insurance. (JA 113). Junkins informed Carlson that he could call his wife regarding insurance coverage for the Mustang and Carlson agreed with this proposal telling Junkins to have his wife text him a picture of the insurance information so Carlson could verify that the vehicle did in fact have insurance coverage. (JA 116-117, 432).

Carlson then returned to his cruiser so he could run the full registration on the Ford Mustang with dispatch and wait for Junkins to provide him with proof of insurance coverage. (JA 117). He had previously told Junkins that once Junkins' wife sent him a picture of the insurance card Junkins was to hold his hand out of his car window with the phone to let Carlson know he had received such insurance information. (JA 117). While in his police cruiser Carlson ran the Ford Mustang registration information with dispatch and was told such number was "not on file." (JA 119, 431). He then ran the VIN number on the Ford Mustang and doing that verified that the Ford Mustang was in fact registered with a valid license plate. (JA 120, 432). When this was concluded Carlson still had not heard back from Junkins about the insurance coverage. (JA 120). Carlson then proceeded to "get my ticket book and stuff out so I could issue citations for the infractions." (JA 120-121).

Carlson then went back to Junkins' vehicle to explain " a lot of the stuff to him" and brought up the subject about someone calling in to complain about he and his female passenger were reportedly at the McDonald's and had purportedly been "taking pictures of each other and they were passed out . . ." (JA 121). Junkins

became "belligerent again" and said none of that had happened. (JA 121, 433). Carlson then proceeded to ask Junkins "if there was anything in the vehicle I needed to know about, any illegal narcotics, since that was the original complaint, and Mr. Junkins eluded the questions, didn't even answer it." (JA 121-122, 433). Carlson asked if he could search Junkins' vehicle and was met with no response. (JA 122, 433). Based on Junkins' refusal to consent to a search of his vehicle Carlson went back to his cruiser and "requested a canine." (JA 122, 434). Carlson was told that the canine unit was out on another call at that time. (JA 126).

A couple of minutes after requesting the canine unit Carlson noted Junkins holding his hand out of his window as previously instructed by Carlson. (JA 122). Carlson asked Goad to go up to Junkins' vehicle to get the insurance information from Junkins. (JA 122, 435). Goad did so and returned to the cruiser and retrieved Junkins phone. The insurance information on the picture on Junkins' phone was listed in the names of Junkins and his wife but listed the insured vehicle as being an Econoline van instead of a Ford Mustang. (JA 123-124, 435). Since the insurance was issued by Liberty Mutual Insurance Company ("Liberty Mutual") Carlson proceeded to call the insurance company to verify if the Ford Mustang had coverage. He was doing this to see if he could "let [Junkins] go" if there was insurance on the Ford Mustang, or to "tow it" if the vehicle did not have coverage. (JA 124).

Carlson placed the call to Liberty Mutual but could not immediately speak with someone and had to navigate an automated menu in order to talk to someone. (JA 125). While Carlson was on the phone with Liberty Mutual he received word that the

canine unit was en route to his location. (JA 126). While still on the phone waiting to speak with someone from Liberty Mutual, Deputy Laulis ("Laulis"), from the Harrison County Sheriff's Department, and his canine "Rebel" arrived on scene. (JA 126-127, 437). Upon Laulis' arrival Goad went over to talk with him about "what's on with the traffic stop." (JA 127, 438). Laulis then proceeded to walk his dog around Junkins' car and "it alerted on the driver's side door." (JA 127). Carlson stated that he finally spoke with someone from Liberty Mutual confirming that the Ford Mustang was indeed covered "about the same time" as when Laulis began walking his dog around Junkins' car. (JA 127-128, 439).

After the dog had alerted on Junkins' vehicle Laulis and Goad opened the driver's side door. (JA 128). Carlson did not participate in the search of Junkins' vehicle. (JA 128-129, 440). Carlson specifically stated that he was not attempting to delay the stop to allow time for the canine unit to arrive but that reaching someone at Liberty Mutual about the insurance coverage on the Ford Mustang just took time. (JA 131-132). Carlson provided that he was just giving Junkins "the benefit of the doubt rather than just tow his car" and that he has "always given people the benefit of the doubt, because I wouldn't want my car towed just because I didn't have an insurance card." (JA 132).

When shown the CAD for the traffic stop and the call log contained therein, Carlson discussed the time line of events from the initial stop of Junkins' vehicle to the time when the canine unit arrived on scene. (JA 136-138). In doing this it became clear that the canine unit did not arrive on scene until "almost 30 minutes" from the

original stop (and the actual sniff on Junkins' vehicle did not occur for "a minute or two" after arriving on scene. (JA 137, 452). And again, when the canine unit arrived Carlson stated he was still on the phone waiting to speak with someone from Liberty Mutual. (JA 137-138).

Deputy Chief Lee Goad also testified about the August 1, 2017 traffic stop of Junkins' vehicle. (JA 146-168, 461-474). Goad likewise testified that although he and Carlson were originally dispatched to the McDonald's for a possible welfare check on the driver and passenger of a red Ford Mustang, that a traffic stop was initiated on the vehicle due to littering and an obscured registration. (JA 148-150, 462-463). Goad approached the passenger side of Junkins vehicle. After Carlson had spoken with Junkins and received Junkins' driver's license and temporary registration both he and Goad returned to the cruiser. (JA 152).

Once back in the cruiser Carlson asked Goad to go up to Junkins and ask Junkins to have his wife send him a photograph to his smart phone of his insurance information. (JA 153). Goad did this and told Junkins to hold his phone out of the vehicle window when he got the photo from his wife. Goad said that when he saw Junkins hold his phone out the window he went back up to Junkins' vehicle and, using his own cell phone, took a picture of the "information on his cell phone with my cell phone and returned back to the cruiser." (JA 154, 465). Seeing that the insurance information pertained to a Ford Econoline van, Carlson contacted the insurance company to ascertain whether there was insurance coverage on the Ford Mustang. Goad testified that the call to the insurance company "was a very long phone call."

(JA 155-156, 466). Goad also testified that Carlson requested a canine unit to respond on scene while he was on the phone with the insurance company. (JA 156, 466). While Carlson was "talking back and forth with the insurance company" and "waiting for them to give [Carlson] the information on the Mustang" Deputy Laulis arrived on scene with his canine. (JA 157, 467).

Once Laulis arrived Goad stepped out of the cruiser to give Laulis "the information of what was going on with the vehicle." (JA 157, 467). Laulis then proceeded to walk his dog around Junkins' vehicle and the dog alerted on both the passenger side front door as well as the driver's side door. (JA 158, 469). Carlson got off the phone with the insurance company as the dog "was in the process of the sniff . . ." (JA 159).

After the positive alert by the dog, Laulis asked both Junkins and Adkins to exit the vehicle. (JA 160). Both Goad and Laulis searched the vehicle in which "some kind of smoking device" was found on the passenger side seat" as well as "various items of narcotic use . . ." (JA 161, 470). Laulis found a pistol and "another bag that had some other drug paraphernalia and stuff inside it." (JA 161).

On cross examination during the February 11, 2019 suppression hearing Goad admitted that his report stated that while he and Carlson were waiting for information regarding insurance coverage Carlson requested a canine unit to come to the scene. (JA 163). Goad also admitted that in his police report he stated that "[t]he chief then called the insurance company regarding coverage for the Mustang. The insurance company advised that there was current coverage on the Mustang." (JA

163). On redirect during the suppression hearing Goad again reiterated that Carlson finally verified with the insurance company that there was coverage on the Mustang at the same time that the dog sniff was occurring. (JA 166).

The evidence recovered from the search of Junkins' vehicle was collected by Harrison County Deputy Sheriff Tim Ankrom and included methamphetamine (and some heroin), various pieces of drug paraphernalia, a book "ledger" and a Ruger P95 pistol. (JA 332-355). Additionally, Special Agent Matt Kocher from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("Kocher"), and his partner Special Agent Perry, also arrived on scene of the August 1, 2017 traffic stop, pulled Junkins aside and asked if Junkins would talk to him. (JA 527). Junkins agreed, stated he was aware of his Miranda rights but still wanted to talk to Kocher and Perry. (JA 528). During the ensuing interview Junkins admitted that the drugs in the vehicle, as well as the firearm, were his. (JA 529-530).

Based on the police encounters and investigations on November 30, 2018, August 1, 2017, as well as the September 20, 2017 search of Junkins' residence, a federal Grand Jury returned a seven count Indictment on December 18, 2018 against Junkins in the Northern District of West Virginia. (JA 12-19). A forfeiture allegation was also returned by the Grand Jury.[2]

On January 31, 2019 Junkins filed Defendant's Motion to Suppress Evidence seeking to suppress the physical evidence seized during the November 30, 2018,

[2] Again, the September 20, 2017 investigation which gave rise to Counts Six and Seven of the Indictment were dismissed on motion of the government. (JA 177).

August 1, 2017 and September 20, 2017 incidents. Such motion also sought to suppress incriminating statements made by Junkins related to the November 30, 2018 and August 1, 2017 arrests. (JA 20-26). In such motion Junkins asserted that the November 30, 2018 and August 1, 2017 search and seizure of evidence from his person and vehicle were illegal due to lack of reasonable suspicion (November 30, 2018 investigation) and an impermissibly extended traffic stop (August 1, 2017 investigation). Such motion also sought to exclude all evidence and statements obtained during a search of Junkins' residence in Clarksburg, West Virginia on September 20, 2017.

Interestingly, on February 8, 2019, in response to Junkins suppression motion, the government filed a Dismissal of Counts 6 and 7 of the Indictment as to Defendant Junkins. (JA 27). The government filed its United States Response in Opposition to the Defendant's Motion to Suppress Evidence on February 8, 2019. (JA 28-45). In its response the government countered that the November 30, 2018 police investigation in the GoMart in Elkins was supported by probable cause and therefore lawful. It also argued that the August 1, 2017 investigation was also supported by probable cause and not impermissibly long in duration and therefore was likewise lawful. No argument for the lawfulness of the September 20, 2017 investigation was made by the government as it had already filed the previously mentioned motion seeking to dismiss those counts in the Indictment related to that incident.

A hearing on Junkins' suppression motion on February 11, 2019 was held before United States Magistrate Judge Michael J. Aloi. (JA 46-176). The government

called Officers Sayre, Summerfield, Carlson and Goad to testify about their investigation concerning Junkins during the November 20, 2018 and August 1, 2017 incidents. Defense counsel cross examined each of the officers in turn.

On February 13, 2019 United States District Judge John Preston Bailey entered an Order granting the government's motion to dismiss Counts 6 and 7 of the Indictment. (JA 177).

On March 1, 2019 Magistrate Judge Michael J. Aloi issued a Report and Recommendation Recommending that Defendant's Motion to Suppress be Denied ("the R&R"). (Appendix 50a-72a). The R&R found that both the November 30, 2018 and August 1, 2017 search and seizures were lawful.

On May 18, 2019 Junkins, by and through newly appointed counsel, filed Objections to Report and Recommendation Recommending that Defendant's Motion to Suppress be Denied. (JA 201-207). By an Order Adopting Report and Recommendation the Honorable John Preston Bailey upheld Magistrate Judge Michael Aloi recommendation that Junkins' motion to suppress be denied. (Appendix 41a-49a).

On June 17 and 18, 2019 Junkins exercised his right to a jury trial on the remaining counts of the Indictment at the United States District Court for the Northern District of West Virginia in Wheeling West Virginia, before the Honorable John Preston Bailey. (JA 253-602). The jury trial lasted two days at the conclusion of which the jury returned a guilty verdict on each remaining count of the Indictment. (JA 603-607).

On July 18, 2019 Junkins filed a Motion for New Trial and Motion for Judgment of Acquittal. (JA 608-618). On August 16, 2019 the government filed its United States' Response in Opposition to the Defendant's Motion for New Trial and Motion for Judgment of Acquittal. (JA 619-631). On August 21, 2019 United States District Judge John Preston Bailey entered an Order Denying Motion for New Trial and Motion for Judgment of Acquittal. (Appendix 26a-40a).

A sentencing hearing was held on January 30, 2020 and was continued until a later date due to recent changes in the law related to felon in possession cases (Counts 3 and 5 of the Indictment) and the United States Supreme Court's recent ruling in Rehaif vs. United States, 139 S. Ct. 2919 (2019). (JA 647-684). On July 15, 2020 sentencing was reconvened at the conclusion of which Junkins was sentenced to 240 months of incarceration each as to Counts 1 and 4 of the Indictment, to run concurrently with each other, and 60 months of incarceration as to Count 2 of the Indictment, to be served consecutively with Counts 1 and 4.[3] Additionally, the district court sentenced Junkins to serve a term of three (3) years of supervised release each as to Counts 1 and 4 and five (5) years of supervised release as to Count 2, all such terms to run concurrently. Junkins was also ordered to pay the special mandatory assessment of $300.00. The Judgment in a Criminal Case entered on July 16, 2020 reiterated Junkins' sentence. (Appendix 17a-25a).

[3] Counts 3 and 5 of the Indictment were dismissed upon motion of the government due to the Rehaif case. (JA 697).

On July 15, 2020 the clerk for the United States District Court for the Northern District of West Virginia filed a Notice of Appeal upon a request from Junkins. (JA 721). On July 27, 2020 Junkins, *pro se*, filed another Notice of Appeal. (JA 731).

On February 19, 2021 counsel for Junkins filed his Opening Brief and Joint Appendix and on April 9, 2021 the government filed its Response Brief. Junkins, through counsel, filed a Reply Brief on May 19, 2021.

On August 13, 2021, the Court of Appeals affirmed the judgment and sentence of the district court in an unpublished opinion U.S. v. Robert Michael Junkins, ___ Fed.Appx. ___, (No. 20-4380)(4th Cir. 2021). The unpublished opinion of the Court of Appeals for the Fourth Circuit is attached at Appendix 1a-15a to this Petition.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT ERRED IN DENYING JUNKINS' MOTION TO SUPPRESS ALL OF THE EVIDENCE OBTAINED DURING AN INVESTIGATION OF JUNKINS ON NOVEMBER 30, 2018 AS THE STOP WAS UNLAWFUL.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of a person within the meaning of the Fourth Amendment." United States v. Brugal, 209 F.3d 353, 356 (4th Cir. 2000). See Delaware v. Prouse, 440 U.S. 648, 653 (1979).

On November 30, 2018 Junkins was not observed to be operating his motor vehicle. Instead his vehicle was sitting stationary in a GoMart parking lot in Elkins,

West Virginia. (JA 52, 299-300). Sayre noticed an expired registration sticker on the vehicle and confirmed with dispatch that the registration was in fact expired. (JA 55, 301). At no time did Sayre report seeing the vehicle in motion.

West Virginia Code § 17A-3-2(a) provides in part that "[e]very motor vehicle, trailer, semitrailer, pole trailer and recreational vehicle when driven or moved upon a highway is subject to the registration and certificate of title provisions of this chapter . . ." (West Virginia Code (2018 Edition)). West Virginia Code § 17A-3-1(a) provides that "***[i]t is unlawful for any person to drive or move*** or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered under this article which is not registered or for which a certificate of title has not been issued or applied for or for which the appropriate fee has not been paid when and as required under this article, except as otherwise permitted by the provisions of this chapter. (Emphasis added). A violation of these statutes is a misdemeanor offense. See West Virginia Code § 17A-3-1(b).

Again, Sayre and Summerfield did not observe Junkins to be operating the vehicle. The vehicle was stationary in the GoMart parking lot and at all times during the investigation. Although Junkins was sitting in the driver's seat when Sayre and Summerfield approached his vehicle, it cannot be known with absolute certainty that Junkins was the one who drove the car to the GoMart. The "stop" of Junkins' vehicle was unlawful.

The district court, therefore, erred in failing to suppress the physical evidence retrieved as a result of this unlawful seizure as well as failing to suppress the statements later made by Junkins.

II. THE DISTRICT COURT ERRED IN DENYING JUNKINS' MOTION TO SUPPRESS ALL OF THE EVIDENCE OBTAINED AS A RESULT OF A TRAFFIC STOP ON AUGUST 1, 2017.

The August 1, 2017 traffic stop of Junkins' vehicle was premised on a presumed straw wrapper flying out the passenger side window of Junkins' vehicle ("littering") and the vehicle having an obstructed registration.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of a person within the meaning of the Fourth Amendment." United States v. Brugal, 209 F.3d 353, 356 (4th Cir. 2000). See Delaware v. Prouse, 440 U.S. 648, 653 (1979).

As noted in Brugal, "[t]he Terry[4] reasonable suspicion standard requires an officer to have a reasonable suspicion that criminal activity is afoot before he may conduct a brief investigatory stop of a person . . .*or continue to seize a person following the conclusion of the purposes of a valid stop*." 209 F.3d at 358. (Emphasis added). Additionally, in United States v. Rusher, 966 F.2d 868, 876-77 (4th Cir. 1992) this

[4] Terry v. Ohio, 392 U.S. 1 (1968).

Court held that "during a routine traffic stop, the officer may request a driver's license and vehicle registration, run a computer check, and issue a citation, but that "[a]ny further detention for questioning is beyond the scope of the Terry stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime."

Again, the August 1, 2017 traffic stop was initiated for littering and an obstructed registration, minor and routine traffic violations. Carlson testified that Junkins was "belligerent" and "seemed agitated" but did not report that he was in any way nervous in Carlson's encounters with him. (JA 112, 427). During Carlson's second conversation with Junkins, during which he explained to Junkins "a lot of the stuff to him," Carlson this time asked Junkins whether there was anything illegal in the vehicle and asked for permission to search Junkins' vehicle. (JA 121, 433). Carlson was met with silence. (JA 121, 433). Silence by itself is not indicative of anything as consent can be freely refused. Carlson did not explain why this time he asked Junkins this particular set of questions and also why he asked to search Junkins' vehicle. Is it solely because Junkins was "belligerent" and "agitated" or does Carlson always ask those he detains during routine traffic stops if he could search their vehicles?

In his testimony, both at the suppression hearing as well as during trial, Carlson made it sound like he was doing Junkins a big favor, giving him "benefit of the doubt," when he extended the stop to verify whether or not Junkins had insurance coverage. And it seems clear that Carlson, once Junkins refused consent for him to search Junkins' vehicle, took it upon himself to request a canine unit to respond to

the scene when he returned to his cruiser. (JA 122, 434). Both Carlson and Goad testified that Carlson was still on the phone trying to reach Liberty Mutual when the canine unit arrived and the dog began its sniff of Junkins' vehicle. (JA 137-138, 166). It is also clear from Carlson's testimony that approximately 30 minutes had passed from the initial stop to when the canine unit arrived on scene. (JA 452).

Despite Carlson testifying that he was not purposefully delaying the traffic stop to give time for the canine unit to arrive (JA 131-132) Carlson's actions raise two important questions. First, does Carlson always calls a canine unit while awaiting confirmation of insurance coverage on someone's vehicle? And second, how does the simple task of calling Liberty Mutual to confirm insurance coverage on a vehicle take so long?? It seems implausible that it would take 15 minutes, or more, a "very long phone call" as Goad testified, to simply talk to someone from Liberty Mutual to verify coverage on Junkins' vehicle. (JA 155-156, 466). Simply put, Carlson impermissibly delayed the traffic stop to allow time for the canine unit to arrive on scene. Carlson did not like Junkins' refusal to consent for a search of his vehicle and immediately requested a canine unit upon returning to his cruiser. (JA 122, 434).

The law is clear that that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). However, the law is likewise clear that a traffic stop cannot be extended artificially in order to allow time for a canine sniff on a vehicle. See Rodriguez v. United States, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015)(wherein the United States Supreme Court held that "a police

stop exceeding the time needed to handle the matter for which the stop was made violated the Constitution's shield against unreasonable seizures").

Additionally, this Court has held in United States v. Branch, 537 F3d. 328, 337 (4th Cir. 2008) that:

> if a police officer observes a traffic violation, he is justified in stopping the vehicle for long enough to issue the driver a citation and determine that the driver is entitled to operate his vehicle. The driver's consent or reasonable suspicion of a crime is necessary to extend a traffic stop for investigatory purposes. In order to demonstrate reasonable suspicion, a police officer must offer "specific and articulable facts" that demonstrate at least "a minimal level of objective justification" for the belief that criminal activity is afoot (internal citations omitted). Judicial review of the evidence offered to demonstrate reasonable suspicion must be commonsensical, focused on the evidence as a whole, and cognizant of both context and the particular experience of officers charged with the ongoing tasks of law enforcement.

For the August 1, 2017 traffic stop Carlson and Goad impermissibly extended the stop. Besides Junkins appearing to be "belligerent" and "agitated" there was nothing else Carlson reported seeing which would have given rise to reasonable suspicion for him to extend the routine traffic stop of Junkins' vehicle and request and wait for a canine unit to arrive. See Branch, at 537 F3d. at 338-339 (wherein this Court noted the litany of factors which together were enough to justify the continued detention of Branch's vehicle).

And again, it seems implausible that it took as long as Carlson said it took to talk with someone at Liberty Mutual to confirm that Junkins in fact had insurance coverage on his vehicle. Simply put, Carlson requested a canine to respond to the scene and he gave himself enough time in order for that to happen by prolonging the call with Liberty Mutual.

The August 1, 2017 traffic stop and detention and eventual search, therefore, was unlawful and the district court erred in denying Junkins' motion to suppress all the evidence retrieved from this stop.

III. THE DISTRICT COURT ERRED IN ITS CALCULATION OF DRUG RELEVANT CONDUCT ATTRIBUTABLE TO JUNKINS DURING SENTENCING.

The United States Probation Officer tabulated the weight of drugs seized as a result of the August 1, 2017 traffic stop, the November 30, 2018 stop and the September 20, 2017 search of Junkins' residence, as well as the testimony of one witness at trial (Adkins) and one confidential informant who did not testify at trial. In doing do he concluded that the total amount of drug relevant conduct attributable to Junkins was 83,344.6552 kilograms of converted drug weight. (JA 742-743). This amount placed Junkins' Base Offense Level at 36 pursuant to U.S.S.G. § 2D1.1(c)(2). (JA 743). Importantly, almost all of this drug weight was placed on Junkins by the confidential informant who did not testify at trial. Rather, that weight came from a debriefing of the confidential informant on October 5, 2017. (JA 742-743). The amount of drug relevant conduct attributed to Junkins by this one individual was 81,750 kilograms of converted drug weight.[5] (JA 743). The remaining drug weight attributed to Junkins was comprised of the drug seizures from the August 1, 2017 and November 30, 2018 traffic stops, the trial testimony of Clarissa

[5] This calculation is based on Junkins providing the confidential informant with 7.5 grams of crystal methamphetamine daily for 18 months (545 days). This amount, 7.5 grams, is more than a quarter of an ounce and counsel is not sure why the probation officer used 7.5 grams in his calculations. However, during the January 30, 2020 sentencing hearing the confidential informant testified differently.

Adkins and the amounts seized from Junkins' residence on September 20, 2017. This weight totaled 1,594.6552 kilograms of converted drug weight. While 83,344.6552 kilograms of converted drug weight results in a Base Offense Level of 36 pursuant to U.S.S.G. § 2D1.1(c)(2), 1,594.6552 kilograms of converted drug weight would result in a Base Offense Level of 30 pursuant to U.S.S.G. § 2D1.1(c)(5).

Two (2) levels were added to Junkins' Base Offense Level for maintaining a drug-involved premises pursuant to U.S.S.G. § 2D1.1(b)(12). (JA 745). In the Presentence Investigation Report ("PSR") the United States Probation Officer calculated Junkins' criminal history category to be II. (JA 751). With a total offense level of 38 and a criminal history category II Junkins advisory guidelines range was 262 to 327 months. (JA 760). However, subtracting out the drug relevant conduct attributed to Junkins by the confidential informant, Junkins total offense level would have been a 32. With a criminal history category of II his advisory guideline range would have been 121-151 months. The low end such advisory guideline range is 141 months (11.75 years) less than that calculated by the United States Probation Officer.

Therefore, the increase in Junkins' potential sentence by 141 months came solely from the debriefing of the confidential informant.

Junkins objected to the drug weight attributed to him in the PSR. During the first sentencing hearing on January 30, 2020 the confidential informant, Jason Cano ("Cano"), who had been debriefed back on October 5, 2017, was an admitted addict of methamphetamine. He was called by the government to testify as to his purported dealings with Junkins. (JA 656-679). Cano, who was sentenced to federal prison on

a federal firearm conviction, was subpoenaed to testify by the government. (JA 658). He was testifying as his former plea agreement required it (JA 659) plus he was on supervised release from such federal sentence at the time of his testimony. (JA 674).

Cano testified that he had known Junkins since 2002 or 2003 and that Junkins was "like a brother to me." (JA 657). Cano testified that he got an eightball (1/8 ounce), "about three and a half grams" of methamphetamine from Junkins for "a good year, year and a half." (JA 663-664). He further testified that during this time he was getting the methamphetamine from Junkins on an "almost" daily basis. (JA 664). Cano also testified that the quantity of methamphetamine he got from Junkins went from an eighth of an ounce to a quarter of an ounce. (JA 664).

Shockingly, and frankly, simply unbelievably, Junkins ***gave*** this quantity of methamphetamine to Cano, stating that "[h]e's always given it to me, and as a brother-to-brother thing, you know, he'd give me something, I'd give him back a little bit of money when I can, just because he helped me out, you know, here's some money for your troubles." (JA 663). Cano went on to testify about his not paying for the methamphetamine he received from Junkins stating that "what my brother gave me was for me to smoke" and that the methamphetamine given to him by Junkins "went up in smoke." (JA 665). While Cano did say that he "needed some money to survive, you know, I got a habit to support, so of course I sold some dope" he did not ever purchase it from Junkins. (JA 665). It goes beyond reason why a purported drug dealer, whom Cano was trying to make Junkins out to be, would give that much methamphetamine away to Cano almost every day and receive little or no

compensation whatsoever. Junkins himself noted the implausabily of this notion when he stated during the July 15, 2020 sentencing hearing that "I'm either the stupidest drug dealer alive, how much money did he say he gave me, none, because I was my own best client. That's right, I'm not stupid. Why would I give somebody methamphetamine that's going to take it off and run off, hide in his bedroom and do it and not pay no money for it? It doesn't make sense." (JA 708).

Another statement from Cano adds support to Junkins' position that Cano is simply lying. During the January 30, 2020 sentencing Cano testified that once, while he was in Junkins' bedroom, he saw on the dresser "a piece of meth as big as your arm." (JA 667). He further stated that "I didn't even know what it was. It looked like a crystal you would set on your coffee table for an ornament, you know, just something like you just chip off and smoke up, you know what I'm saying?" (JA 667). Cano later described the size of this purported piece of methamphetamine as being "as big as my arm around, and long." (JA 673). Again, this story from Cano is simply unbelievable. The undersigned has been involved with numerous methamphetamine cases and has never heard of methamphetamine coming in chunks as big as an arm! It has always been in crystal (sometimes powder) form but the crystals have not even measured an inch in length (with a diameter much less than an inch) let alone one that is big around as a person's arm and long too. Additionally, the undersigned spent time on the internet looking at pictures of methamphetamine and saw no pictures of a crystal of methamphetamine which came close to measuring that size. The largest ones seen still fit easily into a small Ziploc baggie. Simply put, Cano's testimony that

he saw a crystal piece of methamphetamine "as big as your arm" is simply not believable, is a complete fiction, and renders his testimony completely unreliable.

Additionally, despite Cano testifying that he saw a piece of methamphetamine "as big as your arm" on Junkins' bedroom dresser, he testified that Junkins kept his drugs "in a safe" he had in his house as well as in his toolbox in the garage. (JA 668). This contradiction cannot be left unnoticed. If Junkins had most of his drugs locked away in a safe somewhere in the house (Cano was "not exactly" sure where such safe was) then why would Junkins have such an enormous piece of methamphetamine just laying on his bedroom dresser? The answer is simple, there was no piece of methamphetamine "as big as your arm" on the Junkins' bedroom dresser and he was simply lying.

Cano further testified that on two separate occasions he was with Junkins in Doddridge County, West Virginia Junkins had with him "close to a kilo" of methamphetamine on at least one of those occasions. (JA 669-670).[6]

It must also be noted that in addition to the unbelievable tale Cano was telling during the January 30, 2020 sentencing, he first spun his story when he was debriefed back on October 5, 2017. (JA 742). His testimony during the January 30, 2020 sentencing, therefore, was over two (2) years prior to the date he was debriefed. Also,

[6] It must be noted that while Cano testified during the January 30, 2020 sentencing hearing that Junkins had "close to a kilo" of methamphetamine on him on at least one of these trips to Doddridge County, in his debriefing he said he "accompanied Junkins on several deliveries of ounces of methamphetamine for which Junkins would receive $3,000-$4,000 in United States currency." (JA 742). Ounces, not kilograms! But still the district court found Cano's inflation of ounces of methamphetamine to a kilogram to be reliable.

it seems implausible that the federal or State government would not have targeted Junkins earlier if the agents, who conducted the October 5, 2017 debriefing, truly believed themselves what Cano was telling them. Remember, Junkins first dealings with law enforcement in this matter occurred during the August 1, 2017 stop by Shinnston Police Officers where he was found in possession of methamphetamine and a firearm. Cano was debriefed approximately two (2) months after this stop.

State and federal prosecutors and law enforcement officers, where state law enforcement officers are often deputized by the federal government and work on drug task forces, along with federal DEA agents, share information all of the time. Surely, when Cano was debriefed on October 5, 2017 and made it appear as if Junkins was the biggest methamphetamine dealer in the area, law enforcement would have vigorously pursued Junkins to prosecute him and not have waited another full year (Junkins indicted on December 18, 2018).

But yet, according to Cano, Junkins was giving him from 1/8 to 1/4 ounce (3.54 to 7.09 grams) of methamphetamine every other day. Cano's testimony is simply unbelievable and therefore unreliable. Again, by not acting on the information Cano information provided to drug task force officers on October 5, 2017 seems to indicate that the task force officers who debriefed him that day did not give much credence to what he was saying.

It should also be noted that when Junkins' residence was suddenly and surprisingly, to Junkins, searched on September 20, 2017, 50 days after the August 1, 2017 traffic stop, only 3.72 grams of methamphetamine "Ice" and 0.766 grams of

heroin were recovered. (JA 743). Also, there is no mention of a safe being found in Junkins' residence which was filled with drugs. From Cano's testimony it made Junkins sound like he was the biggest methamphetamine dealer in the whole area, but a surprise search of his residence only resulted in the seizer of user amounts of methamphetamine, not dealer amounts. Also, there was no mention of large amounts of cash found or anything else which one would expect to find when raiding a drug dealers home. These facts shed further light on the simple truth that Cano lied during his testimony at the January 30, 2020 sentencing hearing, as well as during his October 5, 2017 debriefing. The district court erred, therefore, in finding Cano credible and reliable in calculating the drug relevant conduct on Junkins.

Finally, Cano's testimony is further discounted by his being an addict. Again, Cano testified that he is an addict (JA 665). On cross examination during the January 30, 2020 sentencing hearing Cano testified about the effects of using methamphetamine on his ability to perceive things and remember things as follows:

ATTORNEY CURNUTTE: Q: Okay. Meth doesn't affect your ability to perceive things?

CANO: A. Absolutely.

Q. Doesn't affect your memory thought, right?

A. No, sir.

Q. It affects your ability to perceive things but not your ability to remember them?

A. Perceive things as in working, going out in public and socializing with people, that's what I'm talking about. I can't do that.

(JA 676-677).

Cano, therefore, admitted that he was an addict who, apparently by how much methamphetamine he got from Junkins and was "always smoking it up," (JA 675) was almost certainly to be constantly high and under the influence of methamphetamine. Despite this indicia of the lack of credibility and reliability of Cano, the district court, while not directly commenting on the credibility of Cano, nevertheless found that he was credible when it said the following:

> All right. I find the base offense level to be 36, and this is based upon the – there are the smaller purchases of 1,667 kilograms of converted drug weight, but more importantly is Mr. Cano's testimony. He testified that he got an eightball every other day for two months. And that, at three and a half grams, times 30 days, times the 20 kilograms, is 2100 kilograms of converted drug weight.
>
> He also said that that went up to a quarter ounce for the rest of – I think he said a year to a year and a half. I used a year. Give the benefit of the doubt to the defendant. I subtracted, of course, the two months that – where it was an eightball, and I did every other day for the remainder of the year at seven grams, which came up with a converted drug weight of 21,280 kilograms.
>
> There was description of the big piece of meth weighing a pound, obviously, 454 ounces, which I realize in an estimate, but I find it to be sufficient. And that comes up to 9,080 kilograms.
>
> And there was a kilo delivered to Doddridge County and that was – that is 20,000 kilograms. The total of all that is 54,127 kilograms, which if we look at 2D1.1, level 36 is 30,000 kilograms to 90,000 kilograms of converted drug weight. So that provides a sufficient cushion, if there's some small calculating error, that Mr. Junkins is well within level 36 and I am using level 36 as the base offense level.

(JA 698).

As noted by the district court, the calculation of relevant drug weight is based almost entirely on the testimony of Cano during the January 30, 2020 sentencing hearing. It is painfully clear however, that the drug weight testified to by Cano was

historical in nature, therefore demanding that his powers of recollection and memory were pristine. Again, Cano was debriefed on October 5, 2017 and he testified on January 30, 2020. Cano admitted to being an addict and given the amount of methamphetamine he supposedly smoked each day he surely must have been high and under the influence of such drug constantly. These facts by themselves reasonably puts into question his ability to recall events. But still the district court found Cano credible and reliable and attributed 52,460 kilograms of converted drug weight to Junkins based solely on his testimony.[7]

The testimony of Cano is based on his guesses and faulty recollections and perceptions as to the quantity of methamphetamine which he attributed to Junkins. It is common knowledge that the memory of drug addicts and drug users can be and quite often is impaired. Further, Cano testifying that he saw a piece of methamphetamine as big as his arm on Junkins' bedroom dresser is patently unbelievable and clearly demonstrates his lack of credibility. Accordingly, the testimony of Cano lacks the "indicia of reliability to support its accuracy" as required by United States v. Uwaeme, 975 F.2d 1016, 1021 (4th Cir.1992). The district court, therefore, clearly erred in basing the weight of methamphetamine attributable to Junkins for relevant conduct purposes almost entirely on the testimony of Cano. Junkins' offense level for the drug convictions should have been based solely on the amount of drugs seized by law enforcement and the trial testimony of Clarissa Adkins

[7] Again, the remaining relevant conduct attributed to Junkins, based on the drugs seized during the two traffic stops and from Junkins' residence as well as the trial testimony of Adkins, made up the remaining 1,667 kilograms of converted drug weight.

which demonstrate more the necessary indicia of reliability. The testimony of Cano should simply have been ignored as being unbelievable and unreliable.

CONCLUSION

For all of the foregoing reasons, Robert Michael Junkins respectfully requests that this Petition for Writ of Certiorari be granted. The decisions of the district and appellate court must be overruled and Mr. Junkins' conviction must be reversed and the case remanded to the district court for a new trial.

Respectfully submitted,

ROBERT MICHAEL JUNKINS, Petitioner

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4380

UNITED STATES OF AMERICA,

Plaintiff − Appellee,

v.

ROBERT MICHAEL JUNKINS,

Defendant – Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. John Preston Bailey, District Judge. (2:18−cr−00030−JPB−MJA−1)

Submitted: May 21, 2021 Decided: August 13, 2021

Before DIAZ, MOTZ, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Scott C. Brown, SCOTT C. BROWN LAW OFFICE, Wheeling, West Virginia, for Appellant. Randolph J. Bernard, Acting United States Attorney, Wheeling, West Virginia, Brandon S. Flower, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Clarksburg, West Virginia, for Appellee.

PER CURIAM:

Robert Junkins was arrested, convicted, and sentenced for drug-related crimes in West Virginia. This appeal arises from the district court's denial of Junkins's motion to suppress evidence collected during two traffic stops, which he claims were unlawful. Junkins also challenges his sentence, claiming that the district court erred in calculating his converted drug weight. We reject these arguments and affirm the district court's judgment.

I.

A.

On August 1, 2017, officers Jason Carlson and Lee Goad received a call requesting a welfare check on two people in a red Mustang parked at a restaurant. They'd been unconscious for a spell but then got up and began taking pictures of themselves and other people. The officers arrived in time to watch the Mustang pull onto a public road, so they followed it to check on the driver. While trailing after the Mustang, the officers saw what looked like a straw fly out of the passenger window and observed that the car's license plate was obstructed. They then initiated a traffic stop.

Carlson approached the driver, Junkins, informed him of the nature of the stop, and asked for his license, registration, and proof of insurance. Junkins was agitated and belligerent, but handed over his license and a receipt that showed he had traded another car for the Mustang. Junkins didn't have proof of insurance, but Carlson allowed him to call his wife, who Junkins claimed could text him a picture of the insurance card. While Junkins

was trying to contact his wife, Carlson ran the Mustang's registration and, after some trouble, confirmed it was valid.

Carlson returned to the Mustang and informed Junkins of the initial welfare complaint. Junkins again became belligerent and uncooperative. Junkins didn't answer when Carlson asked if there was anything in the Mustang he should be worried about and if he could search the car. At this point, Carlson requested a canine unit, which had to complete a stop nearby before it could report to the scene.

"[A] couple minutes" later, Junkins received a picture of the insurance card from his wife. J.A. 122. But the insurance card was for a different vehicle, so Carlson called the insurance company to verify that the Mustang was insured under the same policy. During what was a "lengthy telephone call" with the insurance company, the canine unit arrived at the scene. J.A. 125. While the dog was sniffing the car for drugs, Carlson received verification that the Mustang was insured. Carlson was still in his vehicle writing citations for obstructed registration and littering when the dog alerted to the driver's side door.[1] The officers then searched the Mustang and found narcotics, a gun, and drug

[1] Officer Goad wrote the initial report of the incident, which could be read to suggest that Carlson had verified the Mustang's insurance coverage before the canine unit arrived. But when he testified, Goad recalled that the dog sniff took place at about the same time that the officers received insurance verification and while Carlson was writing the citations.

paraphernalia.[2] On direct examination, Carlson confirmed that he "[did] everything [he] could to speed things along" during the traffic stop. J.A. 131.

More than a year later, on November 30, 2018, officers Daniel Sayre and Ryan Summerfield noticed a black Mercury parked in front of a convenience store with its engine running and expired registration tags. The only entrance and exit to the store parking lot connected to a public roadway. The officers ran the license plate number and confirmed with dispatch that the tags were expired. The officers then initiated a traffic stop.

As the officers approached the Mercury, they saw its occupants making furtive movements "towards the front of themselves, around the floorboards of the vehicle." J.A. 302. Sayre asked the driver, Junkins, for identification, but he couldn't find it after erratically searching. Because "he appeared to be nervous," Sayre asked Junkins to step out of the car. J.A. 303. Junkins complied, and Sayre saw drug paraphernalia on the floorboard as the car door opened.

Following a scuffle, the officers detained Junkins and his passenger, and then they searched the car. They found a gun, drug paraphernalia, and a small amount of meth. In an interview at the police station following the search and arrest, Junkins made incriminating statements about there being some meth in his car, owning the gun, and his "involvement in the drug trade." J.A. 290.

[2] Junkins also spoke with federal agents who arrived at the scene after the dog alerted. He admitted that the drugs, gun, and other paraphernalia found in the car were his, but was not immediately arrested.

B.

A grand jury indicted Junkins on seven counts: counts one, four, and six charged Junkins with possession with intent to distribute meth in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); count two charged him with possession of a gun during and in relation to a drug offense in violation of 18 U.S.C. § 924(c)(1)(A)(i); and counts three, five, and seven charged him with unlawful possession of a gun in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Junkins moved to suppress the evidence seized during the November 30 traffic stop (which led to counts one, two, and three) and the August 1 traffic stop (which led to counts four and five), claiming that it was obtained "through illegal searches and subsequent questioning." J.A. 20. The district court denied the motion, concluding that both traffic stops were lawful. Junkins also moved to suppress evidence found during a search of his home (which led to counts six and seven), but the court eventually dismissed these counts on the government's motion.

After a two-day trial, a jury found Junkins guilty of the remaining five counts.

C.

At sentencing, the government called a cooperating defendant ("CD") as a witness.[3] CD is a drug addict and felon who agreed to cooperate with the government as part of a plea agreement. CD had known Junkins "[s]ince 2003, 2002" and called him his "brother." J.A. 657.

[3] Because the government's briefs refer to the witness as "CD," we do the same.

CD testified that Junkins gave him meth for free, "as a brother-to-brother thing. . . . Whenever [he] asked [Junkins] for" it. J.A. 663. CD also testified that although he couldn't "say that [Junkins] ever sold [him] any drugs," he gave Junkins some money when he could. *Id.* CD received an eighth of an ounce of meth from Junkins every other day for "[a]t least two months." J.A. 675. This quantity increased to a quarter ounce after two months and, all in all, Junkins gave CD drugs for "[a] good year, year and a half." J.A. 664. CD testified that he once saw "a piece of meth as big as your arm" in Junkins's bedroom, which "was a pound itself, easily." J.A. 667, 673. CD also recalled two instances during which he accompanied Junkins on drug deliveries. CD estimated the quantity of one such delivery was "close to a kilo." J.A. 670.

After CD testified, the district court continued the hearing so that it could examine the effect of a recent Supreme Court ruling in *Rehaif v. United States*, 139 S.Ct. 2191 (2019) on the gun charges. The court ultimately dismissed counts three and five on the government's motion.

At the continued sentencing hearing, the court calculated Junkins's drug weight by relying on CD's testimony (and the testimony of one other witness) and accounting for the drugs seized in the traffic stops. The court attributed 54,127 kilograms of converted drug weight to Junkins, significantly less than the 83,344 kilograms that the probation office attributed to him in the presentence report.[4] The court calculated Junkins's base offense

[4] Though the district court found that "Ice" methamphetamine made up the vast majority of the drugs in this case, officers also found a small amount of heroin following the August 1 traffic stop. When a drug case contains different controlled substances, courts

level to be 36 as to counts one and four. The court also "added two levels for maintaining a drug-involved premises," bringing Junkins's total offense level to 38, which, under the Guidelines, corresponds with a sentencing range of 262 to 327 months in prison. J.A. 699. The court sentenced Junkins to 240 months for counts one and four and 60 months for count two, to be served consecutively, for a total sentence of 300 months in prison.

This appeal followed.

II.

Junkins appeals both the denial of his motions to suppress and his sentence. We address each in turn.

A.

Junkins claims that all the evidence collected during and after the two traffic stops should have been suppressed because the stops themselves were unlawful. In reviewing a district court's decision on a motion to suppress, "we review legal determinations de novo and the court's underlying factual findings for clear error." *United States v. Thomas*, 908 F.3d 68, 72 (4th Cir. 2018). When, as here, the district court has denied the defendant's motion, we view the "facts in the light most favorable to the government." *United States v. Palmer*, 820 F.3d 640, 644 (4th Cir. 2016). Additionally, we review de novo whether

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use converted drug weight to standardize the amounts of the various drugs before calculating a sentence using the Guidelines' drug weight table. *See* U.S.S.G. § 2D.1.1(c) cmt. n.8(B). The converted drug weight calculation involves multiplying the amount of a drug actually found (in grams) by the number of kilograms assigned to that specific substance, according to U.S.S.G. § 2D.1.1(c) cmt. n.8(D) (assigning 20 kilograms of converted drug weight for every gram of "Ice").

an officer had reasonable suspicion for an investigatory stop. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

When an officer temporarily detains someone during a traffic stop, the detention is a seizure under the Fourth Amendment and therefore must be reasonable. *See Whren v. United States*, 517 U.S. 806, 809–10 (1996). "Because a traffic stop is more akin to an investigative detention than a custodial arrest, we analyze the constitutionality of such a stop under the two-prong standard enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968)." *United States v. Williams*, 808 F.3d 238, 245 (4th Cir. 2015) (cleaned up). Under *Terry's* reasonableness test, a stop (1) "must be legitimate at its inception," and (2) "the officers' actions during the stop must be reasonably related in scope to the basis for the stop." *United States v. Hill*, 852 F.3d 377, 381 (4th Cir. 2017) (cleaned up).

Junkins claims that the August 1 stop wasn't reasonable in scope, violating *Terry's* second prong. And he claims that the November 30 stop wasn't legitimate at its inception, violating *Terry's* first prong. We disagree with both arguments.

1.

Junkins argues that the district court should have granted his motion to suppress the evidence seized during the August 1 traffic stop because the officers unlawfully extended the stop to allow for the canine unit to arrive on the scene. But the record, viewed in the light most favorable to the government, doesn't support that contention.

"[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren*, 517 U.S. at 810. A traffic stop is a seizure, but "the Fourth Amendment tolerate[s] certain unrelated investigations

that [do] not lengthen the roadside detention." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). A canine sniff test is one of those tolerable investigations, so long as the officers act within the scope of the "seizure's mission—to address the traffic violation that warranted the stop." *Id.* (cleaned up). In the context of analyzing a canine sniff's constitutionality, a seizure's mission includes "ordinary inquiries incident to the traffic stop," including "inspecting the automobile's registration and proof of insurance." *Id.* at 355 (alterations and internal quotation marks omitted).

An officer doesn't need separate reasonable suspicion to justify using a canine during an otherwise legitimate traffic stop "because a dog sniff is not a search" for Fourth Amendment purposes. *United States v. Branch*, 537 F.3d 328, 335–36 (4th Cir. 2008) (citing *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005)). But an alert from a drug sniffing dog gives probable cause to search a vehicle. *See Florida v. Harris*, 568 U.S. 237, 246–47 (2013); *see also Caballes*, 543 U.S. at 410 ("A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.").

Here, officers Carlson and Goad had probable cause to stop the car when they saw two traffic violations: (1) littering, in the form of a plastic straw flying out of the car's window, and (2) an obstructed license plate. *See* W. Va. Code §§ 17C-14-14 (Unlawful to Litter from Motor Vehicle) and 17A-3-15 (Display of Registration Plates). The only question here is whether the officers extended the stop beyond its initial scope to stall for the canine unit to arrive.

They didn't. Carlson had just received confirmation that the Mustang was insured and was still writing citations when the dog alerted. It's true that Goad's initial police report could be read to suggest that Carlson learned of the Mustang's insurance coverage before the canine unit arrived. But during his testimony, Goad clarified that Carlson received the verification while the sniff was underway, and that Carlson was still writing citations when the dog alerted.

When, exactly, Carlson received the insurance verification is a factual question, which we must view in the light most favorable to the government. *See Palmer*, 820 F.3d at 644. Considering the facts from that perspective, the officers didn't impermissibly extend the stop because, while the dog sniff was taking place, they were still conducting "[o]rdinary tasks incident to a traffic stop includ[ing] . . . verifying the registration of a vehicle and existing insurance coverage." *United States v. Bowman*, 884 F.3d 200, 210 (4th Cir. 2018) (cleaned up). And once the dog alerted, the officers had probable cause to search the car. *See Harris*, 568 U.S. at 250.

We therefore affirm the district court's denial of the motion to suppress the evidence obtained during the August 1 stop.

2.

Junkins next claims that the court erred in denying his motion to suppress the evidence seized during the November 30 stop because the officers unlawfully initiated a

traffic stop without seeing him violate a traffic law, given that he was parked at the time of the stop.

Determining whether a traffic stop was legitimate is an objective inquiry. If an "officer has probable cause or a reasonable suspicion to stop a vehicle, there is no intrusion upon the Fourth Amendment." *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir. 1993). In considering whether an officer had reasonable suspicion, "we look to the circumstances known to the officer and 'the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.'" *United States v. Smith*, 396 F.3d 579, 583 (4th Cir. 2005) (quoting *Terry*, 392 U.S. at 27). In short, "we must consider 'the totality of the circumstances—the whole picture.'" *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Here's the whole picture: Officers Sayre and Summerfield saw a Mercury parked in front of a convenience store. The only way to enter or leave the store was on a public road. The officers recorded the registration tag and confirmed with dispatch that it was expired. And it's undisputed that driving on a public highway without valid registration is unlawful in West Virginia. *See* W. Va. Code § 17A-3-1(a).

Based on those facts, the officers were entitled to draw the reasonable inference that Junkins had driven on public roads to reach the convenience store. In a similar case, a district court concluded that an officer's reasonable suspicion justified a traffic stop. *See United States v. Stewart*, 149 F. Supp. 2d 236, 242–44 (E.D. Va. 2001). There, the officer saw a car with heavily tinted windows in a parking lot. Under Virginia law, cars with heavily tinted windows can't drive on public roads, so the officer conducted a traffic stop.

A test after the officer initiated the stop confirmed that the tint on the windows exceeded the lawful limit. *Id.* at 241. In rejecting the defendant's argument that the officer made an unlawful stop, the *Stewart* court found that the officer hadn't "run afoul of the Fourth Amendment" because he "had an objectively reasonable suspicion based on specific and articulable facts that defendant had violated" Virginia law. *Id.* at 240–41.

Like the too-dark shade of the *Stewart* defendant's windows, the location of Junkins's car, the fact that it was running, and the reality that the driver needed to use public roadways to reach the convenience store were objectively reasonable indicia that Junkins had violated West Virginia law. Because the officers had reasonable suspicion that criminal activity had occurred, the stop was "legitimate at its inception." *Hill*, 852 F.3d at 381. Thus, the district court properly denied Junkins's motion to suppress evidence seized during the November 30 stop.

B.

Lastly, Junkins claims that the district court wrongfully attributed to him 52,460 kilograms of converted drug weight based on the allegedly unreliable testimony of witness CD. We review the district court's drug calculation for clear error, deferring "to a district judge's credibility determinations and how the court may choose to weigh the evidence." *United States v. Williamson*, 953 F.3d 264, 272–73 (4th Cir. 2020). "The defendant bears the burden of establishing" that the evidence "relied upon by the district court" was clearly erroneous. *United States v. Slade*, 631 F.3d 185, 188 (4th Cir. 2011).

When the amount of drugs seized doesn't reflect the scale of the offense, the court must estimate the amount of the controlled substance. *See* U.S.S.G. § 2D1.1 cmt. n.5.

"District courts enjoy considerable leeway in crafting this estimate" and "may 'give weight to any relevant information before [them], including uncorroborated hearsay, provided that the information has sufficient indicia of reliability to support its accuracy.'" *Williamson*, 953 F.3d at 273 (quoting *United States v. Wilkinson*, 590 F.3d 259, 269 (4th Cir. 2010)).

We've previously held that a witness's mere willingness to testify suggests that he's reliable. *See United States v. Whitted*, 785 F. App'x 948, 953 (4th Cir. 2019). And the Supreme Court instructs that a district court's decision to credit the testimony of a witness who "has told a coherent and facially plausible story that is not contradicted by extrinsic evidence" over the defendant's word "can virtually never be clear error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).

At its core, Junkins's argument is that CD's testimony is incredible and riddled with lies. We disagree. In calculating Junkins's converted drug weight, the district court relied on three aspects of CD's testimony. First, the court attributed 23,380 kilograms of converted drug weight to Junkins based on CD's testimony that Junkins gave him anywhere from 3.5 to 7 grams of meth every other day for a year.

Junkins claims this is clear error because it's implausible that he would give free drugs to CD. The district court, however, was entitled to credit CD's testimony that he and Junkins were close ("He's like a brother to me," J.A. 657) as support for CD's assertion that Junkins often gave him drugs. And CD's testimony isn't that he never paid for drugs—CD testified that he sometimes gave Junkins "some money for [his] troubles." J.A. 663. In the absence of extrinsic evidence to the contrary, we can't reverse the district court's

decision to credit CD's testimony simply because Junkins disagrees with it. *See Anderson*, 470 U.S. at 575.

Second, the court attributed 9,080 kilograms to Junkins based on CD's testimony that he had seen a one-pound chunk of crystal meth in Junkins's room. Junkins contends "this story from [CD] is simply unbelievable," relying on counsel's assertion that he has never encountered a piece of meth that large, either in his professional experience or through internet searches. Appellant's Br. at 32–33. No matter what counsel claims to have been his experience, we decline to rely on unsupported attorney statements as proof that a witness isn't credible.[5] *See United States v. Wilson*, 135 F.3d 291, 298 (4th Cir. 1998) (explaining that arguments by counsel can't be relied on as evidence if they are not based on facts in the record).

Third, the district court attributed 20,000 kilograms to Junkins based on CD's testimony that he'd been in a car with Junkins when he delivered a kilogram of methamphetamine for a drug sale. Junkins claims it was error to rely on this testimony because he disputed it and because the testimony differed from what CD told investigators in an interview two years earlier. But the inconsistency, to the extent it exists, is a credibility question. And once again, it wasn't clear error for the district court to resolve that question in the government's favor. *See Anderson*, 470 U.S. at 575.

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[5] And even if we elected to take Junkins's counsel at his word, the result would be the same. That is, Junkins's converted drug weight would still land within Base Offense Level 36 after subtracting 9,080 kilograms from the district court's total calculation of 54,127 kilograms. *See* U.S.S.G. § 2D1.1(c)(2) (corresponding with 30,000 to 90,000 kilograms of converted drug weight).

Alternatively, Junkins argues that CD's testimony can't be reliable because he's a drug addict with a faulty memory. While a court may "consider a witness's status as a drug user or criminal history in assessing his or her credibility," status alone doesn't "render a witness per se unreliable." *United States v. Crawford*, 734 F.3d 339, 343 (4th Cir. 2013). Here, the district court considered CD credible despite his addiction and acted well within its "considerable leeway" by relying on his statements to craft the converted drug weight estimate. *Williamson*, 953 F.3d at 273.

In sum, CD's testimony, at the very least, had "sufficient indicia of reliability," so "the district court did not err at all here, let alone do so clearly."[6] *Id.* (internal quotation marks omitted).

III.

For the reasons given, the district court's judgment is

AFFIRMED.

[6] If anything, the district court "[gave Junkins] the benefit of the doubt" when it conservatively used the lower end of CD's testimony in calculating Junkins's converted drug weight. J.A. 698. For example, CD testified that he received a quarter ounce of meth every other day for a year to a year and a half, and the district court used a year in its calculation. *See United States v. Bell*, 667 F.3d 431, 441 (4th Cir. 2011) ("[W]hen the approximation is based only upon uncertain witness estimates, district courts should sentence at the low end of the range to which the witnesses testified." (cleaned up)).

FILED: August 13, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4380
(2:18-cr-00030-JPB-MJA-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROBERT MICHAEL JUNKINS

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
v.
ROBERT MICHAEL JUNKINS

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:18CR30

USM Number: 05276-087

Scott A. Curnutte
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☑ was found guilty on count(s) after a plea of not guilty. One (1), Two (2), and Four (4)

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Possession with Intent to Distribute Methamphetamine	11/30/2018	1
18 U.S.C § 924(c)(1)(A)(i)	Possession of a Firearm During and In Relation to a Drug Offense	11/30/2018	2

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Counts 3 and 5 are dismissed on the motion of the United States.

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

July 15, 2020
Date of Imposition of Judgment

Signature of Judge

Honorable John Preston Bailey, U.S. District Judge
Name and Title of Judge

Date 7-16-2020

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: ROBERT MICHAEL JUNKINS
CASE NUMBER: 2:18CR30

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C §§ 841(a)(1) and 841(b)(1)(C)	Possession with Intent to Distribute Methamphetamine	08/01/2017	4

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: ROBERT MICHAEL JUNKINS
CASE NUMBER: 2:18CR30

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 240 months on each of Counts 1 and 4, to be served concurrently, and 60 months on Count 2, to be served consecutively to Counts 1 and 4.

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

☑ That the defendant be incarcerated at an FCI or a facility as close to Elkins, West Virginia as possible;

☑ and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;

☑ including the 500-Hour Residential Drug Abuse Treatment Program.

☐ That the defendant be incarcerated at _____ or a facility as close to his/her home in _____ as possible;

☐ and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;

☐ including the 500-Hour Residential Drug Abuse Treatment Program.

☐

☑ That the defendant be given credit for time served since November 30, 2018.

☑ That the defendant be allowed to participate in any educational or vocational opportunities while incarcerated, as determined by the Bureau of Prisons.

☑ Pursuant to 42 U.S.C. § 14135A, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons, or at the direction of the Probation Officer.

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

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

☐ at ☐ a.m. ☐ p.m. on .

☐ as notified by the United States Marshal.

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

☐ before 12:00 pm (noon) on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐ on _____, as directed by the United States Marshals Service.

☐

RETURN

I have executed this judgment as follows:

Defendant delivered on to

at , with a certified copy of this judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: ROBERT MICHAEL JUNKINS
CASE NUMBER: 2:18CR30

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 3 years as to each of Counts 1 and 4, and 5 years as to Count 2, all such terms to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ROBERT MICHAEL JUNKINS
CASE NUMBER: 2:18CR30

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You shall not commit another federal, state or local crime.
4. You shall not unlawfully possess a controlled substance. You shall refrain from any unlawful use of a controlled substance. You shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the probation officer.
5. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
6. You must answer truthfully the questions asked by your probation officer.
7. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
9. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
10. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
11. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
12. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
13. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
14. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
15. You shall not purchase, possess or consume any organic or synthetic intoxicants, including bath salts, synthetic cannabinoids or other designer stimulants.
16. You shall not frequent places that sell or distribute synthetic cannabinoids or other designer stimulants.
17. Upon reasonable suspicion by the probation officer, you shall submit your person, property, house, residence, vehicle, papers, computers, or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
18. You are prohibited from possessing a potentially vicious or dangerous animal or residing with anyone who possess a potentially vicious or dangerous animal. The probation officer has sole authority to determine what animals are considered to be potentially vicious or dangerous.
19. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature Date

DEFENDANT: ROBERT MICHAEL JUNKINS
CASE NUMBER: 2:18CR30

SPECIAL CONDITIONS OF SUPERVISION

1) You must participate in an outpatient substance abuse treatment program. The probation officer will supervised your participation in the program (provider, location, modality, duration, intensity, etc.).

2) You must not use or possess any controlled substances without a valid prescription. If you do have a valid prescription, you must disclose the prescription information to the probation officer and follow the instructions on the prescription.

3) You must submit to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods.

4) You must not use or possess alcohol.

5) You must not knowingly enter any bar or tavern without first obtaining permission from the probation officer.

6) You must not got to, or remain at, any place where you know controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: ROBERT MICHAEL JUNKINS
CASE NUMBER: 2:18CR30

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 300	$	$	$	$

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

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

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

The victim's recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victim receives full restitution.

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

TOTALS $ $

☐ See Statement of Reasons for Victim Information

☐ Restitution amount ordered pursuant to plea agreement $

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

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

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

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: ROBERT MICHAEL JUNKINS
CASE NUMBER: 2:18CR30

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 300 due immediately, balance due

☐ not later than , or
☑ in accordance with ☐ C ☐ D, ☐ E, ☑ F, or ☐ G below; or

B ☑ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☑ F, or ☐ G below); or

C ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:
Financial obligations ordered are to be paid while the defendant is incarcerated, and if payment is not completed during incarceration, it is to be completed by the end of the term of supervised release; or

G ☐ Special instructions regarding the payment of criminal monetary penalties:
The defendant shall immediately begin making restitution and/or fine payments of $_____ per month, due on the first of each month. These payments shall be made during incarceration, and if necessary, during supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to Clerk, U. S. District Court, Northern District of West Virginia, P.O. Box 1518, Elkins, WV 26241.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
See Page 9

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6B — Schedule of Payments

Judgment—Page 9 of 9

DEFENDANT: ROBERT MICHAEL JUNKINS
CASE NUMBER: 2:18CR30

ADDITIONAL FORFEITED PROPERTY

1. One (1) Smith and Wesson, model M&P 9c, 9 millimeter caliber pistol;
2. Forty-two (42) rounds of 9 millimeter caliber ammunition;
3. Sixteen (16) rounds of assorted 9 millimeter caliber ammunition found loaded; and
4. 54 rounds of 9 millimeter ammunition

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

UNITED STATES OF AMERICA,

Plaintiff,

v. **CRIMINAL NO. 2:18-CR-30 (BAILEY)**

ROBERT JUNKINS,

Defendant.

ORDER DENYING MOTION FOR NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL

Pending before this Court is the defendant's Motion for New Trial and Motion for Judgment of Acquittal [Doc. 89]. On June 18, 2019, this defendant was convicted by a jury on Counts 1 through 5 of the Indictment. Count 1 charged the defendant with Intent to Distribute Methamphetamine; Count 2 charged Possession of a Firearm During and in Relation to a Drug Offense; Count 3 charged Unlawful Possession of a Firearm; Count 4 charged Possession with Intent to Distribute Methamphetamine; and Count 5 charged Unlawful Possession of a Firearm.

Defendant moves for a new trial pursuant to Federal Rule of Criminal Procedure 33 on the following grounds:

1. The denial of defendant's Motion to Suppress was erroneous.
2. The grant of the Government's Motion for Protective Order was erroneous.
3. The grant of the Government's Motion *in Limine* was erroneous.
4. The Government's failure to obtain certain evidence denied defendant a fair

trial, specifically the Government's failure to obtain the McDonald's and GoMart recordings.

5. The Government's failure to produce evidence denied defendant a fair trial.

6. Defendant is entitled to a new trial for any errors apparent from the record.

7. The cumulative errors denied defendant a fair trial.

Motion for a New Trial

A district court "'should exercise its discretion to grant a new trial sparingly,' and ... should do so 'only when the evidence weighs heavily against the verdict.'" ***United States v. Perry,*** 335 F.3d 316, 320 (4th Cir. 2003) (quoting ***United States v. Wilson,*** 118 F.3d 228, 237 (4th Cir. 1997)) (internal quotation marks omitted). The Court of Appeals reviews the denial of a Rule 33 motion for abuse of discretion. ***United States v. Smith,*** 451 F.3d 209, 216-17 (4th Cir. 2006).

A. The Denial of Defendant's Motion to Suppress

First, defendant Junkins asserts he is entitled to a new trial because this Court erred in denying his Motion to Suppress Evidence [Doc. 28]. He relies on the briefing on the Motion. For the reasons previously stated in this Court's Order Adopting the Report and Recommendation [Doc. 58], this Court affirms its decision.

B. The Grant of the Government's Motion for Protective Order

Defendant asserts he is entitled to a new trial because this Court granted the Government's Motion for Protective Order [Doc. 68]. Defendant relies on his previous arguments in opposition to the Motion [Doc. 72]. Essentially, defendant argued–without citing any law–that the Government failed to make a showing that the blanket restriction

requested in the Motion was necessary. Defendant wholly fails to provide any specific reason he believes this Court's ruling affected the trial in any way, and this Court likewise sees no reason.

The protective order [Doc. 73] is consistent with Fed. R. Crim. P. 16(d)(1) and generally prohibits defense counsel from allowing copies of some of the discovery material to leave counsel's possession. As noted by Judge Thomas Johnston:

> Rule 16(d)(1) provides, in pertinent part: "At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." This rule vests district courts with broad discretion to "limit," "condition," or "absolutely prohibit" the disclosure of discovery materials in criminal cases if doing so is "in the interests of witness security." ***United States v. Roberts***, 793 F.2d 580, 587 (4th Cir. 1986), *vacated on other grounds*, 811 F.2d 257 (4th Cir. 1987). Cf. ***Weatherford v. Bursey***, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and ***Brady*** did not create one."). Court-imposed restrictions on discovery may not go so far as to restrict a defendant's right to meaningful communication with his attorney, ***United States v. Lee***, 374 F.3d 637, 652 (8th Cir. 2004), nor may they abrogate the Government's duty to provide exculpatory evidence to a defendant, ***United States v. Yousef***, 327 F.3d 56, 168 (2d Cir. 2003). It is appropriate, however, to employ Rule 16(d) protective orders to curtail the public dissemination of sensitive discovery materials that may endanger witnesses or informants. *See* ***United***

States v. Fine, 413 F.Supp. 740 (W.D. Wisc. 1976); *see also* ***United States v. Rivera***, 153 F. App'x 758 (2d Cir. 2005) (unpublished disposition).

United States v. Barbeito, 2009 WL 3645063, *1 (S.D. W.Va. Oct. 30, 2009).

As the Government notes in its response [Doc. 94], the purpose of the protective order was based upon a valid concern for the safety of a Government witness who had provided information to law enforcement–including information about the defendant–as part of a cooperation requirement contained in a plea agreement. The Fourth Circuit recently stated "the protection of a witness is a compelling basis for a protective order." ***United States v. Navarro***, 770 F. App'x 64, 65 (4th Cir. 2019).

Further, as previously noted, the defendant and counsel had access to all discovery; they simply could not make copies. Defendant can show no prejudice as a result of this Court's Order. This portion of the defendant's motion is denied.

C. The Grant of Government's Motion *in Limine*

Next, defendant asserts he is entitled to a new trial because this Court erred in granting the Government's Amended Motion *in limine* to Prohibit Self-Serving Out of Court Statements [Docs. 65 and 69]. This Court permitted the Government to introduce six portions of a recorded interview of the defendant, which represented approximately six minutes of the forty-five minute interview. Gov't Exhs. 2a-2f. Defendant rehashes his previous argument that this Court should have either played the entire recording or should have required the Government to play the omitted portions silently. Defendant concedes that this Court instructed the jury that these were only portions of a much longer interview; however, he argues "people who speak for a living understand that filling thirty-nine minutes

involves a lot of talking–an average juror does not understand just how much was being omitted." [Doc. 89 at 3].

In its previous ruling on this issue, this Court stated

> if the Government is permitted to introduce only the portions identified in its Motion *in Limine*, the defendant seeks to introduce the entire recording pursuant to the rule of completeness and FRE 106, which states: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part–or any other writing or recorded statement–that in fairness ought to be considered at that time." Defendant wisely qualified his assertion with ***United States v. Lentz***, 525 F.3d 501, 526 (4th Cir. 2008), for the proposition that the rule of completeness does not "render admissible . . . evidence which is otherwise inadmissible under the hearsay rules." Nevertheless, defendant asserts the balance of the recording is not hearsay because it is not being offered for the truth of the matter.
>
> Next, in the event this Court ruled that only certain portions would be played–as it has done–defendant requests that the unintroduced portions be played silently. This Court will not waste the jury's time playing dead air; rather, it will properly instruct the jury that only portions of the approximately forty-five (45) minute interview were played.
>
> Finally, the Government's request that Junkins not be permitted to testify that he made out-of-court, self-serving statements is **GRANTED**.

[Doc. 75 at 1-2].

This Court stands by its previous ruling on which portions were admissible as well as its decision not to play forty minutes of silence. The jury was properly instructed that the portions played at trial were part of a much longer interview. This portion of the Motion is denied.

D. The Government's Failure to Obtain Certain Evidence

Defendant next argues that the failure of the Government to perform basic investigative techniques deprived defendant of his due process right to assert a full defense at trial. Defendant points to two specific issues: (1) the Government's failure to obtain the surveillance footage from the Shinnston McDonald's and (2) its failure to obtain surveillance footage from the GoMart. Without citing any law, defendant asserts this failure denied defendant a fair trial.

For a ***Brady*** violation to occur, the defendant must show that the evidence "was (1) favorable to him; (2) material; (3) in the possession of the prosecution before trial; and (4) not disclosed to him upon request." ***Watkins v. Rubenstein***, 802 F.3d 637, 642 (4th Cir. 2015).

First, the defendant's statements about what the video footage might have shown is self-serving and purely speculative. The footage sought by defendant may just as well have corroborated the evidence rather than exonerate him.

Further, the Due Process Clause is not violated when police fail to use a particular investigatory tool. *See* ***Arizona v. Youngblood***, 488 U.S. 51, 58-59 (1998)("Unless a criminal defendant can show bad faith on the part of the police, failure to preserve

potentially useful evidence does not constitute a denial of due process of law.").

In this Court's instructions to the jury [Doc. 82], it instructed that:

> Specific investigative techniques, such as DNA and fingerprints, are not required to be presented in order for you to find the defendant guilty of the charges in this case. In short, law enforcement or investigative techniques are simply not your concern. Rather, your concern is whether the evidence which was admitted proved the defendant's guilt beyond a reasonable doubt.

In ***United States v. Mason***, 954 F.2d 219 (4th Cir. 1992), *cert. denied* 513 U.S. 1064 (1994), the Fourth Circuit upheld a strikingly similar instruction. The instruction accurately explains the law and expressly allowed the jury to consider the manner of the investigation in weighing the evidence presented or not presented.

Further, the defendant cannot show that the Government ever possessed either of the videos. In fact, the testimony at trial established that the Government did not possess the videos. Finally, the defendant never established that he ever requested the videos prior to trial. This portion of the Motion is therefore denied.

E. The Government's Failure to Produce Evidence

Next, defendant asserts that by failing to return a DVR recording from defendant's own home surveillance of a September 20, 2017, search, he was denied a fair trial. Defendant was indicted on December 18, 2018, and was tried and convicted exactly seven (7) months later. At no point in time did defendant raise the issue of the home surveillance footage until the final pretrial conference, at which he alleged the footage would show ATF Special Agent Steve Worthy force his way into defendant's home without permission.

Agent Worthy testified that "After a minute or two, Lisa Junkins, the wife of Robert Junkins, opened the door and permitted officers to enter the residence."

In a bizarre turn of events, the Government was unable to access the footage because it was password protected. Various passwords were provided and failed. Lisa Junkins, who was supposedly the person who knew the password, was present for jury selection, but left thereafter and never returned. The DVR was never accessed to this Court's knowledge, and nobody knows what it shows. Defendant failed to move to continue the trial until such time as it could be accessed. Moreover, defendant failed to call Lisa Junkins as a witness, who could have testified as to the encounter.

Furthermore, any footage contained on the DVR would have only related to Counts Six and Seven of the Indictment, which were dismissed prior to trial [Doc. 37]. The Government did not attempt to present any evidence to the jury related to these dismissed counts. For these reasons, this portion of the Motion is denied.

F. Defendant is Entitled to a New Trial for any Errors Apparent from the Record

Under this heading, defendant makes no argument at all. It simply goes straight to heading G. As this Court finds no errors apparent from the record, this portion is denied.

G. The Cumulative Errors Denied Defendant a Fair Trial

Here, defendant asserts that the cumulative effect of the asserted errors argued above contributed to defendant's convictions on counts for which there was insufficient evidence and denied him a fair trial. Defendant cites to ***United States v. Basham***, 561 F.3d 302 (4th Cir. 2009), for the proposition that "the cumulative effect of two or more

individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." Having found no individually harmless errors at all, this portion is denied.

Motion for Judgment of Acquittal

Federal Rule of Criminal Procedure 29(c) provides that, on a defendant's motion, a court may "set aside" a jury verdict and "enter an acquittal." A defendant who challenges the sufficiency of the evidence under this Rule faces an "imposing burden." ***United States v. Martin***, 523 F. 3d 281, 288 (4th Cir. 2008) (citing ***United States v. Beidler***, 110 F. 3d 1064, 1067 (4th Cir. 1997)). In order to grant the motion, the defendant must establish that "the record demonstrates a lack of evidence from which a jury could find guilt beyond a reasonable doubt." ***Martin***, 523 F.3d at 288 (citing ***United States v. Burgos***, 94 F.3d 849, 862 (4th Cir. 1996) (en banc)). The Court must uphold the jury's verdict if there is sufficient evidence from which "any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt" when viewed in the light most favorable to the Government. ***United States v. Wilson***, 118 F. 3d 228, 234 (4th Cir. 1997).

In evaluating the sufficiency of the evidence, the Court may not engage in jury functions such as "weigh[ing] the evidence or review[ing] the credibility of the witnesses." ***Id.*** Rather, the Court must "assume the jury resolved all contradictions in the testimony in favor of the government." ***United States v. Sun***, 278 F.3d 302, 313 (4th Cir. 2002) (citing ***United States v. Romer***, 148 F.3d 359, 364 (4th Cir. 1998)).

It is well established that the question of witness credibility is solely within the province of the jury and not susceptible to review. ***United States v. Saunders,*** 886 F.2d

56, 60 (4th Cir. 1989); ***Johnson v. United States***, 271 F.2d 596, 597 (4th Cir. 1959) ("[I]t is the duty of the trier of facts to hear the evidence, to determine the credibility of the witnesses and to determine the weight to be accorded to the testimony of each witness.").

Thus, while in defendant's eyes the witnesses' credibility was fatally damaged, it would appear that the jury thought otherwise, and defendant can offer nothing except his own subjective speculation as to the effectiveness of his cross-examination.

This Circuit's precedent, however, is designed to eliminate just such speculation by not permitting a defendant or the Court to go behind the jury's determination of the facts. ***United States v. Shipp***, 409 F.2d 33, 37 (4th Cir. 1969). The Court in ***Shipp*** determined that while the witness had been impeached, the witness's version "was not inherently impossible or against some law of physical nature." The Court said:

> [Q]uite properly the appellant brought to the jury's attention all of the factors bearing on the [witness's] credibility. [Appellant's] own credibility was likewise in issue, and the jury believed the [witness]. The fact that guilt or innocence here turned upon the veracity of a single witness does not warrant a redistribution of the respective responsibilities of the jury, the trial judge and the appellate judges.

409 F.2d at 37.

The defendant claims that there was insufficient evidence to support the jury's verdict. In ***United States v. Cameron***, 573 F.3d 179 (4th Cir. 2009), the Fourth Circuit stated that:

> In a criminal case tried by a jury, we must sustain a guilty verdict "'if there is

substantial evidence, taking the view most favorable to the Government, to support it.'" ***United States v. Burgos***, 94 F.3d 849, 862 (4th Cir. 1996) (en banc) (quoting ***Glasser v. United States***, 315 U.S. 60, 80 (1942)). In this context, "substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." ***Id***. To that end, this Court "must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." ***United States v. Tresvant***, 677 F.2d 1018, 1021 (4th Cir. 1982); *accord* ***United States v. Harvey***, 532 F.3d 326, 333 (4th Cir. 2008).

While conceding that this Court "is not entitled to assess the credibility of witnesses, but rather 'must assume that the jury resolved all contradictions ... in favor of the Government,'" ***United States v. Brooks***, 524 F.3d 549, 563 (4th Cir.), *cert. denied* 555 U.S. 1008 (2008), the defendant bases his argument on a challenge to the credibility of Government witness Clarissa Adkins. This Court was, of course, present and heard all the testimony. The jury obviously found Clarissa Adkins to be a credible witness. As listed above, there was sufficient evidence to support the conviction in this case.

In assessing denial of a Rule 29 motion, the appellate court considers "circumstantial as well as direct evidence, and allow[s] the Government the benefit of all reasonable inferences from the facts proven to those sought to be established." ***Tresvant***, 677 F.2d at 1021.

As to how much evidence is enough, the Fourth Circuit has found the uncorroborated testimony of a single witness–even when that witness is an accomplice, co-defendant, or informant–to be sufficient. *See e.g.,* ***United States v. Wilson***, 115 F.3d 1185, 1189-90 (4th Cir. 1997) (finding uncorroborated testimony of accomplice is sufficient).

Defendant's entire argument in support is as follows:

> In the Shinnston traffic stop, the other occupant of the car was Clarissa Adkins who is not only the girlfriend of convicted drug dealer Rocky Idleman, but admitted to possessing guns and distributing methamphetamine with him just weeks before 1 August 2017. The methamphetamine was found in an eye case-Government Exhibit 26 -which was on the console, not the person of Defendant or on his side of the car. The Ruger pistol-Government Exhibit 4, et seq.-was in a case in the trunk. While a magazine was loaded, the chamber was not.
>
> In the Elkins traffic stop, the other occupant of the car was Karlie Gregory. The methamphetamine-Government Exhibit 11-was found either underneath Ms. Gregory's seat or behind it (Patrolman Summerfield testified inconsistently about which). It is true that there was a container-Government Exhibit 17-with about 1 gram of methamphetamine around Defendant's neck, but that is a use quantity rather than a distribution quantity as testified to by Deputy Vanmeter upon cross-examination. Moreover, Patrolman Boatwright testified that the person leaning into the car when the police arrived-Steven Boni-was found in possession of a gun and baggies. Finally, while the S&W

pistol-Government Exhibit 8-was near Defendant, no shell was chambered.

While police seized a number of cell phones during both traffic stops-Government Exhibits 19 & 24-the Government did not introduce any communications from Defendant at all, certainly none dealing with drug-dealing, and no calls to numbers connected with drug-dealing. That is in marked contrast to Clarissa Adkins from the Shinnston stop, who acknowledged her texts to other Parties offering "cream," which she said meant methamphetamine, and offering another Party to trade methamphetamine for a gun.

This case did not involve any controlled buys. Deputy VanMeter admitted he had never heard of Defendant until 30 November 2018 when he interviewed him. Deputy Ankrom admitted he did not know Defendant until 1 August 2017 when he received the evidence seized. SA Worthy admitted he only heard of Defendant through his investigation of Clarissa Adkins.

[Doc. 89 at 8-9].

The defendant's arguments can be summed up as follows:

Both times the defendant was pulled over, methamphetamine, tools of the drug trade, and guns were found in the vehicle, but not necessarily on his person. There was no bullet in the chamber of the gun. Defendant carried a gram of methamphetamine around his neck. There was a women passenger in each of the respective stops, who may not have been upstanding citizens. And there were no controlled buys.

Defendant obviously glosses over a few key pieces of evidence. Let it be

remembered that the defendant possessed a drug ledger. Then there was the November 30 audio-recorded interview in which defendant admitted he owned and possessed the firearm, that he obtained the firearm by trading methamphetamine for it, and that the methamphetamine in the vehicle was his. And while no bullet was in the chamber, the magazine itself was loaded; a distinction of little consequence. The jury heard the testimony of the officers from the traffic stops. They also heard the testimony of Clarrisa Adkins. And while the two women in the respective stops may not have been model citizens, the defendant is the common denominator. The fact that there were no controlled buys is not important as the jury was properly instructed that law enforcement does not need to implement such techniques. After hearing the witness testimony, reviewing the evidence, and being properly instructed on the law, the jury returned a verdict of guilty on all counts.

Sufficiency of evidence is a jury question and a defendant bears the very heavy burden in such challenge. ***Jackson v. Virginia***, 443 U.S. 307, 319 (1979) (A conviction may be reversed for insufficient evidence only if, viewed in the light most favorable to the Government, the evidence was so insubstantial that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."); ***United States v. Beidler***, 110 F.3d 1064, 1067 (4th Cir. 1997), *citing* ***Glasser***; ***United States v. Hoyte***, 51 F.3d 1239, 1245 (4th Cir. 1995); and ***United States v. Murphy***, 35 F.3d 143, 148 (4th Cir. 1994).

The jury here, as evidenced by its verdict, found that the Government met its burden. That finding should not be disturbed unless defendant can demonstrate that "the

evidence adduced at trial could [not] support any rational determination of guilty beyond a reasonable doubt." ***United States v. Powell***, 469 U.S. 57, 67 (1984). It is the jury's view of the sufficiency of the evidence which controls and the findings of the jury must be afforded deference. ***Burks v. United States***, 437 U.S. 1, 17 (1978) (noting that reversal for insufficient evidence is reserved for the rare case "where the prosecution's failure is clear"); ***United States v. Stewart***, 256 F.3d 231, 249 (4th Cir. 2001) ("In evaluating the sufficiency of the evidence, the jury verdict must be upheld if there exists substantial evidence, including circumstantial and direct evidence, to support the verdict, viewing the evidence in the light most favorable to the government"); ***Burgos***, 94 F.3d at 862.

Viewing the case in the light most favorable to the Government, the direct and circumstantial evidence, and the reasonable inferences which could be drawn therefrom, supporting defendant's conviction on the five counts is sufficient to justify the Court's denial of defendant's motion for judgment of acquittal as well as the jury's guilty verdict.

For the reasons stated above, the Motion for New Trial and Motion for Judgment of Acquittal **[Doc. 89]** is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record.

DATED: August 21, 2019.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

UNITED STATES OF AMERICA,

Plaintiff,

v. **Criminal Action No. 2:18-CR-30 (BAILEY)**

ROBERT JUNKINS,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day, the above-styled matter came before this Court for consideration of the Report and Recommendation Recommending that Defendant's Motion to Suppress be Denied [Doc. 41]. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Michael John Aloi for submission of a proposed report and recommendation ("R&R"). Magistrate Judge Aloi filed his R&R on March 1, 2019. In that filing, the magistrate judge recommended that this Court deny the defendant's Motion to Suppress [Doc. 28]. This Court has also reviewed the briefs on the Motion as well as the transcript of the February 11, 2019, hearing. For the reasons that follow, this Court **ADOPTS** the R&R.

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or

recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140, 150 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo* review and the right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); ***Snyder v. Ridenour***, 889 F.2d 1363, 1366 (4th Cir. 1989); ***United States v. Schronce***, 727 F.2d 91, 94 (4th Cir. 1984). Here, objections to Magistrate Judge Aloi's R&R were due within fourteen (14) days of receipt, pursuant to 28 U.S.C. § 636(b)(1). After this Court granted an extension of time, defendant timely filed his objections on May 18, 2019 [Doc. 56]. Accordingly, this Court will review the portions of the R&R to which objection was made under a *de novo* standard of review. The remaining portions of the R&R will be reviewed for clear error.

I. Factual and Procedural History

After conducting a hearing on the Motion to Suppress on February 11, 2019, Magistrate Judge Aloi made certain findings of fact that this Court hereby adopts [*See* Doc. 41 at 3-12]. This Court does not find it necessary to rehash them.

The defendant was charged with three counts of possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), possession of a firearm during and in relation to a drug offense in violation of 21 U.S.C. §§ 841(a) and 924(c)(1)(A)(I), and three counts of unlawful possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) [Doc. 2 at 1-8].

On January 31, 2019, the defendant filed a Motion to Suppress [Doc. 28], requesting this Court to suppress all of the Government's evidence related to two incidents occurring on August 1, 2017, and November 30, 2018. In support of the motion, the defendant

argues that the detention waiting for a K-9 dog sniff was unreasonable and that the defendant was subjected to questioning following this detention in which defendant allegedly made incriminating statements, which he argues are statements obtained as fruit of an illegal traffic stop. Second, defendant argues the November 30, 2018, search of his vehicle was illegal and beyond the scope of the stop.

On February 8, 2019, the Government filed its Response in Opposition to Defendant's Motion to Suppress [Doc. 34]. In its opposition, the Government argues that the August 1, 2017, traffic stop was initiated following two violations–littering and obstruction of a license plate, which created probable cause that the defendant had committed a traffic infraction. Additionally, the Government argues that the dog sniff occurred during the traffic stop and the stop was not unreasonably extended. As to the November 30, 2018, stop, the Government argues probable cause existed because the license plate had expired, the vehicle was parked immediately off the main road and the engine still running, which indicated the vehicle had traveled to the parking spot.

On March 1, 2019, Magistrate Judge Michael John Aloi entered his R&R, in which he found that all the evidence seized by the police is admissible and recommended that this Court deny the Motion to Suppress [Doc. 41 at 22]. On May 18, 2019, the defendant timely filed his objections to the magistrate judge's R&R [Doc. 56].

II. Applicable Law

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A vehicle stop without articulable, reasonable suspicion violates an individual's Fourth Amendment rights. ***United States v. Wilson***, 205 F.3d 720, 724 (4th

Cir. 2000). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." ***Whren v. United States***, 517 U.S. 806, 810 (1996) (internal citations omitted). "Any ulterior motive [that] a police officer may have for making the traffic stop is irrelevant." ***United States v. Digiovanni***, 650 F.3d 498, 506 (4th Cir. 1992) (citing ***Whren***, 517 U.S. at 810). Under the objective test adopted by the Fourth Circuit Court of Appeals ("Fourth Circuit"), when a police officer observes unlawful conduct, such as a traffic offense, the police officer's subsequent traffic stop is reasonable for purposes of analysis under the Fourth Amendment; this is true regardless of any subjective motives or suspicions that the police officer may have regarding unrelated criminal activity by the occupants of the vehicle. ***United States v. Hassan El***, 5 F.3d 726, 730-31 (4th Cir. 1993).

The reasonableness of a traffic stop is analyzed under a two prong analysis. ***Id.*** (relying on ***Terry v. Ohio***, 392 U.S. 1 (1968)). The Court must analyze whether the police officer's conduct was justified at the time of the stop and whether the subsequent actions taken by the police officer were "reasonably related in scope to the circumstances that justified the stop." ***Id.*** A police officer's observation of a traffic violation provides sufficient justification for detainment of "the offending vehicle for as long as it takes to perform the traditional incidents of a routine traffic stop." ***Branch***, 537 F.3d at 335 (internal citations omitted).

Having a trained dog sniff the perimeter of a vehicle that has been lawfully stopped in a public space is not a search for purposes of Fourth Amendment analysis. ***United States v. Place***, 462 U.S. 696, 707 (1983). However, an "alert" by a trained narcotics dog

constitutes probable cause for a search. ***United States v. Jeffus***, 22 F.3d 554, 557 (4th Cir. 1994). Such a canine sniff, even if the K-9 Unit is called to the scene of a routine traffic stop, is "constitutionally acceptable if performed within 'the time reasonably required' to issue a traffic citation." ***Branch***, 537 F.3d at 335. The Fourth Circuit has specifically held that a fifteen minute time period between a traffic stop and a search of the vehicle based upon probable cause from an "alert" by a trained narcotics dog "[does] not constitute an unlawful seizure in violation of the Fourth Amendment." ***Jeffus***, 22 F.3d at 557.

Under the "automobile exception" to the Fourth Amendment's warrant requirement, once probable cause to search a vehicle that is readily mobile has been established, police officers may conduct a warrantless search of the vehicle. ***Maryland v. Dyson***, 527 U.S. 465 (1999). Such a warrantless search may be "as thorough as a magistrate judge could authorize in a warrant 'particularly describing the place to be searched.'" ***United States v. Ross***, 456 U.S. 798, 800 (1982). This includes a search of any compartments or containers in the vehicle. ***Wyoming v. Houghton***, 526 U.S. 295, 302 (1999).

III. Discussion

A. August 1, 2017, Stop

Defendant argues the August 1, 2017, traffic stop was infirm because no officer witnessed the defendant affirmatively committing the misdemeanor violation of littering; rather, he asserts this was merely a pretext for officers to search defendant's vehicle. This argument is disingenuous insofar as it only tells half the story. Chief Carlson testified that he received notice of a complaint regarding two individuals in a red Ford Mustang who had been passed out and came to in the McDonald's parking lot. Chief Carlson arrived

approximately five minutes later. Upon fully driving around McDonald's, Carlson saw a red Mustang pull out of the parking lot and travel North on Route 19. At this point Chief Carlson saw the litter come from the car. *Additionally*, he testified that there was a piece of what he believed to be metal obstructing a portion of the license plate, which made it impossible to make out the characters of the license plate. He then initiated the traffic stop and conveyed the unobstructed characters of the license plate to dispatch to run the plate. The stop was proper. Subsequently, a K-9 Unit arrived and alerted at the driver's side door.[1] An "alert" by a trained narcotics dog constitutes probable cause for a search. ***United States v. Jeffus***, 22 F.3d 554, 557 (4th Cir. 1994). Thus, the search was proper and any items seized therefrom are admissible. Accordingly, defendant's Objection is **OVERRULED**.

B. November 30, 2018, Stop

Defendant Objects to the November 30, 2018, stop, asserting that the "Magistrate Judge endorsed an inferential leap by the officers." Here, the officers noticed that the defendant's vehicle had an expired registration sticker. While the vehicle was parked in a private establishment, the Go-Mart, the vehicle had to have been operated on a public highway to reach the location where it was parked. Finally, the defendant was presumably the driver personally responsible for operating the vehicle. Defendant asserts the magistrate judge has "strung together those inferences to conclude that defendant Junkins was guilty of a misdemeanor civil traffic offense." [Doc. 56 at 5]. Defendant relies on the

[1]Although the defendant's objections do not address the issue of whether the traffic stop was impermissibly extended to allow the K-9 Unit to arrive, this Court adopts the magistrate judge's finding that the traffic stop was not unlawfully extended to allow the K-9 Unit to arrive.

language of West Virginia Code § 17A-3-1, *et seq*., which includes language that appears to restrict issuing a citation for expired registration to instances where the vehicle is "driven or moved upon a highway". Id. at § 17A-3-2(a).

The traffic stop is reasonable based upon the officer's observation of the defendant's traffic offense. *See* ***Hassan El***, 5 F.3d at 730-31. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." ***Whren***, 517 U.S. at 810 (1996) (internal citations omitted). "Any ulterior motive [that] a police officer may have for making the traffic stop is irrelevant." ***Digiovanni***, 650 F.3d at 506 (citing ***Whren***, 517 U.S. at 810). Under the objective test adopted by the Fourth Circuit, when a police officer observes unlawful conduct, such as a traffic offense, the police officer's subsequent traffic stop is reasonable for purposes of analysis under the Fourth Amendment; this is true regardless of any subjective motives or suspicions that the police officer may have regarding unrelated criminal activity by the occupants of the vehicle. ***United States v. Hassan El***, 5 F.3d at 730-31.

Here, officers testified that they were familiar with the area and knew there was only one entrance to the Go-Mart, which lead onto a public road, on which the vehicle must have traveled. Even more, the officers testified that the engine was running, rather than it being broken down or stored there. This Court finds that the officers had probable cause to believe that the vehicle had been driven or moved upon a highway, thus a traffic violation occurred. Accordingly, this Court agrees with the R&R that while the officers did not witness the traffic infraction occur, probable cause existed that a traffic infraction did occur and the stop was justified.

The traffic stop was also sufficiently limited in scope and duration. A traffic stop must be "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." ***Florida v. Royer***, 460 U.S. 491, 500 (1983). "With regard to scope, 'the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.'" ***United States v. Guijon-Ortiz***, 660 F.3d 757 (4th Cir. 2011)(quoting ***Florida v. Royer***, 460 U.S. at 500). The analysis to determine whether the scope and duration of the stop was sufficiently limited is "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." ***Guijon-Ortiz***. 660 F.3d at 764. For a traffic stop to be extended beyond what is required during a routine traffic stop, there must be additional justification other than the original justification for the traffic stop. ***Id***. During a traffic stop, officers may order a driver of the vehicle to exit the car "without violating the Fourth Amendment's proscription of unreasonable searches and seizures." ***Ohio v. Robinette***, 519 U.S. 33 (1996)(citing ***Pennsylvania v. Mimms***, 434 U.S. 106, 111 (1997)).

Patrolman Sayre testified that when he asked the defendant to exit the vehicle due to erratic behaviors he had displayed, he observed a syringe and a smoking device on the floorboard of the driver's seat. Patrolman Sayre patted defendant down and found a large sum of cash in the defendant's right pocket. He was then detained, and Patrolman Sayre conducted a search of the vehicle, at which time he found a firearm, drug paraphernalia, and a bag of crystal methamphetamine. Accordingly, this Court finds that the magistrate judge's recommendation on this issue should be **ADOPTED** and the defendant's objection

on this issue **OVERRULED**.

IV. Conclusion

Upon careful review of the report and recommendation, it is the opinion of this Court that the magistrate judge's Report and Recommendation **[Doc. 41]** should be, and is, hereby **ORDERED ADOPTED** for the reasons more fully stated in the magistrate judge's report. As such, the defendant's Motion to Suppress **[Doc. 28]** is hereby **DENIED**. Furthermore, the defendant's Objections **[Doc. 56]** are **OVERRULED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: May 29, 2019.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v. **Criminal Action No.: 2:18-CR-30**
JUDGE BAILEY

ROBERT JUNKINS,

Defendant.

REPORT AND RECOMMENDATION RECOMMENDING THAT DEFENDANT'S MOTION TO SUPPRESS BE DENIED

This matter is before the undersigned pursuant to a Motion to Suppress filed by Defendant, by and through counsel, on January 31, 2019. (ECF No. 28). This matter is now ripe for a report and recommendation to the Honorable John Preston Bailey. Accordingly, the undersigned **RECOMMENDS** that the Motion be **DENIED** for the foregoing reasons.

I. PROCEDURAL BACKGROUND

a. Motion to Suppress

On January 31, 2019, Defendant, by and through counsel, filed a Motion to Suppress Evidence seeking the suppression of evidence of two incidents—September 1, 2017 and November 30, 2018.[1] As to the September 1, 2017 incident, Defendant argued that his detention waiting for a K9 dog sniff was unreasonable and that Defendant was subject to questioning following this detention in which defendant allegedly made incriminating statements. Defendant

[1] A third request for suppression of evidence was stemming from a third incident on September 20, 2017. Following the filing of the Motion, the Government moved to dismiss Counts Six and Seven of the Indictment, which if granted would render that portion of the Motion moot. On February 13, 2019, Judge Bailey granted the Motion and dismissed those counts, rendering the argument as to Counts Six and Seven in the Motion moot. Accordingly, the undersigned does not address the argument for suppression as to Counts Six and Seven.

argued that these statements were fruit of an illegal traffic stop and should be suppressed as a result.

On November 30, 2018, Defendant argued that the search of Defendant's vehicle was illegal and beyond of the scope of the stop. According to the Motion, law enforcement pulled behind Defendant's vehicle that was legally parked in a parking space at the Go-Mart in Elkins, West Virginia and was turned off and stationary. According to the Motion, the officers approached the vehicle to issue a citation for an expired license plate and subsequently conducted a search, well beyond the scope of the stop, because officers viewed alleged drug paraphernalia on the floor of the vehicle. Following Defendants arrest as a result of the search, Defendant made alleged incriminating statements that Defendant is arguing is fruit of an illegal search.

b. Government's Response

On February 8, 2019, the Government filed its Response. (ECF No. 34). The Government argues that the August 1, 2017, traffic stop was initiated following two violations—littering and obstruction of a license plate—which created probable cause that Defendant committed a traffic infraction. Furthermore, the Government argued that the dog sniff occurred during the traffic stop and the stop was not unreasonably extended for the dog sniff but that officers were still executing the traffic stop when the dog sniff occurred. The Government further argued that the November 30, 2018 traffic stop was supported by probable cause because of the expired license plate on a vehicle that was parked in a parking spot immediately off the main road with its engine still running, indicating to the officers that the vehicle had traveled to the parking lot. The Government argued there was probable cause to initiate a traffic stop and once Defendant was asked to exit the vehicle, drug paraphernalia was seen in the vehicle which gave officers

probable cause to search the vehicle. The Government added from there, the items found during the search and any statements made following were not fruits of an illegal seizure and should not be suppressed.

c. The Testimony

i. August 1, 2017

The Government called Shinnston Police Chief Jason Carlson to testify regarding the August 1, 2017 traffic stop. (February 11, 2019 Motion Hearing Recording, Time: 11:05 a.m.)[2]. Chief Carlson testified that he received notice of a complaint regarding two individuals, located in a vehicle parked at McDonald's, who were passed out, who had woken up, and were taking pictures. (11:05). The Complainant identified the individuals to be driving a red Ford Mustang. (11:05). Chief Carlson testified that he was dispatched, along with Deputy Chief Goad, to the McDonald's for a welfare check and arrived approximately five minutes later. (11:06). Chief Carlson stated that he drove around the building but was unable to find the red Mustang that the complainant had described. (11:06). Upon fully driving around the building, Chief Carlson testified that he saw the red Mustang pull out of the parking lot and travel North on Route 19. (11:07).

Chief Carlson testified that he followed the vehicle and stated that he saw something white (presumably a straw wrapper) come out of the passenger's side window. (11:08). Chief Carlson also testified that there was a piece of what he believed to be metal obstructing a portion of the license plate and he could not make out all of the characters of the license plate. (11:08). Chief Carlson testified that he initiated a traffic stop and conveyed the unobstructed characters of the license plate to dispatch in order to run the license plate. (11:09). Chief Carlson testified that

[2] This citation is shortened throughout.

he approached the driver's side and advised the driver (hereinafter "Defendant") of why the traffic stop was initiated—for littering and the obstructed license plate. (11:09).[3]

Chief Carlson testified that at this time the driver became belligerent and animated and kept slapping his hands against the steering wheel and stated that he did not litter. (11:10). After a request for Defendant's information, Defendant Junkins gave Chief Carlson his driver's license, a temporary registration card, and document that detailed a transfer of registration plates, but stated he did not have his proof of insurance on him. (11:12). Chief Carlson stated that he told Defendant Junkins that he could tow his car for not having a valid proof of insurance, but if Defendant could provide him with an older card, he could then use it to call and verify the insurance. (11:12). Defendant Junkins said that he could call his wife and get a picture of the card. (11:12). Chief Carlson said that this was fine and that he could call and verify the insurance once he had that information. (11:16).

Chief Carlson stated that he went to return to his car to run the full registration and noticed that Defendant's inspection sticker was expired. (11:17). When questioned, Defendant Junkins stated that he was on his way to get his vehicle inspected. (11:17). Chief Carlson stated that he then ran the full license plate, which came back "not on file." (11:19). Chief Carlson testified that this process usually takes approximately 3 minutes, but could take longer depending on how busy dispatch was that day. (11:19). Chief Carlson stated that because the vehicle's license plate came back "not on file," he then ran the vin number of the vehicle and was advised that the license plate was valid. (11:19-20).

[3] Chief Carlson testified that in addition to the litter and obstructed license plate, the reasoning for the stop also included checking the welfare of the driver. Defense Counsel goes in to further detail during cross-examination and Chief Carlson reversed what he previously testified and stated that the reason for the stop included only the litter and obstruction of the license plate. Chief Carlson clarified this upon cross-examination that upon pulling up to the vehicle, he was able to check the welfare of the driver. The undersigned is aware of this inconsistency and took it into consideration during the analysis.

Chief Carlson stated that he then returned to Defendant's vehicle and explained to Defendant that a complaint was filed regarding individuals passed out in a red Mustang. (11:22). Chief Carlson testified that Defendant stated that that did not occur and was agitated (11:22). Chief Carlson stated that he asked if he could search the vehicle and stated that Defendant Junkins ignored the requests. (11:23). Chief Carlson went back to his vehicle and requested a K-9 Unit. (11:24). Chief Carlson still had not received the proof of insurance. (11:23). Several minutes later, Defendant Junkins signaled to officers that he had the insurance information. (11:24). The information that was provided was for an Econoline van; Chief Carlson stated that because the insurance was for a different vehicle than the vehicle being driven, he would have to call and verify the insurance. (11:26). See ECF 36-5 (a screenshot of the insurance card for an Econoline van). Chief Carlson called Defendant Junkins's insurance company to verify his insurance. (11:26).

While Chief Carlson was on the phone, which he described as a lengthy telephone call, the K-9 Unit showed up. (11:28). During the dog sniff, the K-9 alerted on the driver's side door. (11:29). Chief Carlson stated that during the dog sniff, he confirmed the proof of insurance and began writing citations, but was not done writing citations at that time. (11:31). Upon opening the door, Chief Carlson testified that Officers Lawless and Goad found a black zip up bag containing narcotics. (11:31). Once narcotics were discovered Chief Carlson stated that he stopped writing citations because he could no longer write a citation through the city as a result of this search. (11:32).

A further search of the vehicle rendered a stolen firearm and drug paraphernalia. (11:32). Chief Carlson also testified regarding the CAD sheets, Government's Exhibits 6 and 7. (11:39) (ECF No. 36-6,7). Chief Carlson explained that Exhibit 6 contains a call log which states that the

call to dispatch occurred at 2:52 p.m. which was for the original complaint regarding two individuals passed out in a vehicle, the officers arrived at the McDonald's at 2:58 p.m., and notified dispatch at 2:59 p.m. that they could not see the vehicle. (11:41-42). Government's Exhibit 7 indicates that at 2:59 p.m. the officers saw the vehicle and initiated the traffic stop, and the K-9 Unit was *en route* approximately 16 minutes later. (11:43-44). Chief Carlson testified that the K-9 Unit arrived at 3:29 p.m. (11:44).

Upon cross-examination, Chief Carlson testified that he did not stop the red mustang for a welfare check, but rather for the littering and obstructed registration. (11:47-49). Chief Carlson further stated that he did not believe that he needed to see someone throw the trash out the window, nor did he see anyone throw trash out of the window, in order for the infraction to qualify as litter, in regard to Defense Counsel's questioning regarding strict liability. (11:49-50). Chief Carlson also testified that he would not have pulled over the red mustang but for the two infractions. (11:52).

Shinnston Police Officer Lee Goad testified that at the time of the traffic stop, he was the Deputy Chief of Police, and had worked as a law enforcement officer for approximately nine years. (12:03 p.m.). Deputy Chief Goad testified that he reported to McDonalds following a complaint that a male and female passenger that were passed out in a red Mustang. (12:03). Deputy Chief Goad testified that after seeing the red mustang pull out of the McDonald's parking lot, he and Chief Carlson began to follow the red Mustang. (12:04). Deputy Chief Goad testified that while following the vehicle, he noticed a straw wrapper fly out of the window. (12:04). The officers also noticed that there was a piece of metal obstructing the license plate (12:05).

After following the red mustang, Deputy Chief Goad testified that a traffic stop was initiated based on littering and an obstructed license plate. (12:06). Deputy Chief Goad stated that he approached the passenger side where a female was seated. (12:06-08). Deputy Chief Goad testified that Chief Carlson requested Defendant's driver's license, registration, and proof of insurance. (12:08). Defendant Junkins said he had valid insurance, but his wife had the insurance card. (12:09). Deputy Chief Goad testified that both officers returned to the vehicle to run the registration. (12:09). Deputy Chief Goad returned to Defendant's vehicle to inquire whether he had a smart phone and could get the insurance information. (12:11).

Upon being provided with insurance information, Deputy Chief Goad testified that Chief Carlson then called to confirm his insurance coverage, which was a very long telephone call. (12:14). Deputy Chief Goad testified that a K-9 Unit was requested when Chief Carlson was on the phone inquiring about the insurance. Deputy Chief Goad testified that when the K-9 Unit arrived, Chief Carlson was still on the phone inquiring about the insurance. (12:15). Upon the K-9 Unit's arrival, Deputy Chief Goad testified that he approached the K-9 Unit and explained the circumstances for the traffic stop. (12:16). Deputy Chief Goad testified that the K-9 Unit initiated a dog sniff and alerted on the driver's side, just past the driver's side door. (12:18). Deputy Chief Goad testified that Chief Carlson was still attempting to verify the insurance on the phone, to his knowledge, and writing citations. (12:18). Deputy Chief Goad testified that he was told about the verification of the insurance while the dog sniff was occurring. (12:19). Following the dog's alert, Deputy Chief Goad testified that narcotic items were found immediately within the vehicle. (12:21).

Upon cross-examination, Defense Counsel questioned Deputy Chief Goad regarding Exhibit 6, Paragraph 6 on Page 1. (ECF No. 35-13). Following the return of Deputy Chief Goad

from Defendant Junkins's vehicle with the insurance vehicle information, Paragraph 6 states that the insurance information verification then occurred. Deputy Chief Goad testified that the verification did not happen immediately, and actually occurred during the dog sniff. (12:27). He did concede that the Report does seem to indicate that the verification occurred immediately and prior to the dog sniff. (12:28).

b. November 30 Traffic Stop

The Government called Patrolmen Sayre to testify regarding his involvement in the November 30 traffic stop. Patrolmen Sayre testified that he had been working with the Elkins Police Department since 2015 and this had been his only law enforcement experience post-basic training. (9:37 a.m.). Patrolmen Sayre testified that he does receive annual training and is current in his certification. (9:38). He testified that at approximately 6:00 a.m. on November 30, 2018, he and Officer Summerfield were traveling in his vehicle and were patrolling the area. (9:38-9:39). Patrolmen Sayre testified that he observed a black mercury parked in a Go-Mart parking spot at the front of the store but on the right side of the building. (9:40). He stated that he observed a male was standing outside the vehicle and leaning inside the driver's side window. (9:40).

The vehicle was parked, if looking at the store, on the right side but in front of the store, in a parking spot. (9:42). Patrolmen Sayre testified that he noticed that the car's registration was expired because the color of the sticker located on the license plate and the first number on the license plate—expiring in June 1, 2018. (9:40-41). Patrolman Sayre testified that as he drove by the vehicle, he ran the tag and was given confirmation that the vehicle tag was expired. (9:43). As he drove by, a store clerk, who was standing outside, pointed at the black mercury. (9:43). Patrolman Sayre testified that he "doubled back" and parked behind the black mercury. (9:43).

By this time, the male that was leaning in the window had gone inside the store. (9:44). Patrolman Sayre testified that he and Officer Summerfield exited their patrol car and approached the black mercury, whose engine was still on, and the male was no longer at the window. (9:44).

Patrolman Sayre testified that he noticed erratic movements, the individuals (male driver, later identified as Defendant Junkins (10:03) and a female passenger) inside the vehicle turned around in their seats to look at the policemen, and leaned forward and reached to the floorboards. (9:45-46). Patrolman Sayre testified that both he and Officer Summerfield identified themselves as officers and requested Defendant identify himself—he stated his name was "Mickey" but did not have his wallet.[4] (9:46-47). Patrolman Sayre testified that Defendant was nervous, frantic, and was shuffling around trying to find his identification card. (9:48). Patrolman Sayre testified that he requested that Defendant to exit the vehicle, due to the behaviors he was exhibiting, and he explained to the Defendant why the he was being stopped. (9:49). Patrolman Sayre testified that he observed a syringe and a smoking device on the floorboard of the driver's seat as Defendant exited the vehicle. (9:49). Patrolman Sayre patted Defendant down and found a large sum of cash in the Defendant's front right pocket and placed it on top the black mercury. (9:49).

Patrolman Sayre testified that he asked Defendant regarding the items that he had seen in the vehicle, but Defendant Junkins said that there nothing was in the vehicle and became irate. (9:50). At this time, Defendant Junkins grabbed the large sum of cash and put it back in his pockets. (9:50). Patrolman Sayre attempted to detain Defendant Junkins for "officer safety," based on his actions and aggression towards officers, and asked Defendant Junkins to place his hands behind his back. (9:51). Patrolman Sayre testified that Defendant Junkins grabbed a hold

[4] The Driver was eventually identified as Defendant Robert Junkins. Although chronologically in the officer's testimony, the driver had not been identified as Defendant Junkins. For clarity of the record, the undersigned refers to the driver as Mr. Junkins for the remainder of the testimony regarding the November 20, 2018 traffic stop testimony.

on the windshield wiper so the officers would have difficulty getting Defendant Junkins's hands behind his back. (9:51). At this time, a third officer arrived at the scene, and Patrolman Junkins administered OC spray (pepper spray) to gain control of Defendant Junkins. (9:52).

Following the use of the OC spray, Defendant Junkins was compliant and Patrolman Sayre was able to place Defendant Junkins in to a police cruiser. (9:52-53). Patrolman Sayre testified that at that time, they removed the female passenger and detained her with no issues. (9:53). Patrolman Sayre testified that following the detention of Defendant Junkins and the female passenger, he began searching the vehicle based on the syringe and smoking device that Patrolman Sayre testified that he saw upon Defendant Junkins's exit of the vehicle. (9:55). Patrolman Sayre searched the driver's side and found a syringe, a smoking device, and a firearm. (9:55-56). Patrolman Sayre also testified that clear plastic sandwich sized baggies and scales were found in the vehicle (9:57), along with a backpack containing Defendant Junkins's ID and a tube. (9:57).

Patrolman Sayre also testified that a bag of crystal methamphetamine was found located under the front passenger's seat (9:59), along with $723.00 in United States currency, located in Defendant's pocket. (9:59). Patrolman Sayre testified that he found a cylinder-like necklace was around Defendant Junkins's neck and contained a crystal-like substance. (9:58).[5] [6] Patrolman Sayre testified that he exited his vehicle at 6:12 a.m., according to the CAD sheet (ECF No. 36-1), and the OC spray was used at 6:14 a.m. (10:07-08). Patrolman Sayre testified that during the initiation of the stop, he was unable to even check the information provided. (10:08).

[5] Patrolman Sayre testified that through his experience as a police officer, he believed this substance to be methamphetamine. (10:00).

[6] Following the discussion of the search of the vehicle, Patrolman Sayre testified regarding the encounter with the male that was previously leaning in to the vehicle. The undersigned is not summarizing this testimony as further interactions with this individual have no relevance to the undersigned's review of the validity of the stop because this encounter occurred following the search of the vehicle.

On cross-examination, Patrolman Sayre testified that his patrol vehicle's lights were not on when he pulled in behind Defendant Junkins's car (10:08), which was parked approximately ten to fifteen feet from the mercury. (10:00). Patrolman Sayre testified that he believed Defendant Junkins was able to back his vehicle up to leave but could not drive forward. (10:00). Patrolman Sayre testified that the store clerk told him that the vehicle had been parked in the Go-Mart parking lot for one hour and that he believe the vehicle to have been running all that time. (10:13).

Upon questioning from Defense Counsel, Patrolman Sayre stated that he patted Defendant Junkins down for weapons and could not tell if the folded cash in Defendant's pockets was a weapon and only felt something hard in Defendant's pocket, but nothing sharp. (10:14). Patrolman Sayre testified that he is not always able to tell whether money folded in such a way is a weapon and has found weapons in a similar form in the past and stated, "I don't want to get poked by a needle."(10:24). Defense Counsel also questioned Patrolman Sayre regarding difference between the description of the running vehicle in Defense Exhibits 1 and 2. (10:10). Patrolman Sayre stated that he drafted Exhibit 1 as a "rough draft" and had other officers go over the draft prior to the production of Exhibit 2, which contained the added language that the vehicle was "running." (10:12-13).

The Government also called Officer Summerfield as a witness who testified that on November 30, 2018, he worked the 6:00 a.m. to 2:00 p.m. shift. (10:30). Officer Summerfield testified that Patrolman Sayre noticed a vehicle that had an expired registration due to the color of the stick on the license plate and the first number on the license plate. (10:31). Officer Summerfield testified that he and Patrolman Sayre circled around the block and initiated a traffic stop, in which they both exited their vehicle and approached a black mercury. (10:32). Officer

Summerfield testified that the registration was confirmed to be expired. (10:32). Officer Summerfield testified that prior to approaching the vehicle, he noticed the two occupants leaning forward. (10:32).

Officer Summerfield testified that the encounter was a traffic stop and the patrol vehicle was parked so that the black mercury could not exit the parking lot. (10:34). Officer Summerfield testified that there was only one exit/entrance to the Go-Mart. (10:35). Officer Summerfield testified that he approached the front passenger side of the vehicle to where, a later identified, Carly Gregory was seated. (10:36). Officer Summerfield stated that there were artificial lights in the area but used his flashlight to assist him in "watching hands" inside the vehicle. (10:33-10:35).

Officer Summerfield stated that he stayed on the passenger side until Defendant Junkins became irate and latched on to the hood of the car. (10:37). Officer Summerfield moved over to the driver's side of the vehicle when Defendant grabbed the cash off the car and Patrolman Sayre pepper sprayed Defendant Junkins. (10:38). Officer Summerfield testified that a large sum of cash, methamphetamine and a blue smoking device were recovered upon the search of the vehicle, but did not personally see these items until after all parties were detained. (10:40). Officer Summerfield also found a quantity of crystal like substance behind the passenger's seat in a medium-sized baggie, a blue smoking device on the floor board, and a needle on the driver's side. (10:40-10:41).

II. ANALYSIS

A. November 30, 2018 Seizure

Defendant first challenges the seizure during the November 30, 2018 encounter. For the foregoing reasons, the undersigned finds that Defendant was seized during the November 30,

2018 encounter pursuant to a traffic stop based on probable cause and the stop was not unlawfully extended except upon the existence of drug paraphernalia in plain view.

i. The stop was a seizure pursuant to a traffic stop.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures." U.S. Const. amend. IV. However, this guarantee does not extend to all police-citizen encounters. Rather, as the United States Supreme Court has instructed, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968). If "a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual." Id. For example, police officers are able to approach individuals and ask questions without having seized said individual. Florida v. Bostick, 501 U.S. 429 (1991). If an encounter is consensual, no reasonable suspicion is required. Id. Until an encounter "loses its consensual nature," Fourth Amendment scrutiny will not apply to any encounter. During traffic stops, for instance, an individual is deemed "seized," even if only for a brief time and for a limited purpose. Whren v. United States, 517 U.S. 806 (1996). However, sometimes whether a seizure occurred is not so readily determinable.

"[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Bostick, 501 U.S. at 439. The Fourth Circuit has followed the standard set forth in United States v. Mendenhall, 446 U.S. 544 (1980) (plurality op.), asking "whether 'in view of all [of] the circumstances surrounding the

incident, a reasonable person would have believed that he was not free to leave.'" United States v. Gray, 883 F.2d 320, 322 (4th Cir. 1989) (quoting Mendenhall, 446 U.S. at 554 (plurality op.)).

This "reasonable person" standard "is an objective one," thus "its proper application is a question of law." United States v. Weaver, 282 F.3d 302, 309 (4th Cir. 2002) (quoting United States v. Sullivan, 138 F.3d 126, 133 (4th Cir. 1998)). A court considers a number of factors in determining whether an officer's conduct would convey to a reasonable person that he is not free to leave. *See* United States v. Jones, 678 F.3d 293 (4th Cir. 2012). These factors "include, but are not limited to, the number of police officers present during the encounter, whether they were in uniform or displayed their weapons, whether they touched the defendant, whether they attempted to block his departure or restrain his movement, whether the officers' questioning was non-threatening, and whether they treated the defendant as though they suspected him of 'illegal activity rather than treating the encounter 'routine' in nature.'" Jones, 678 F.3d at 299-300 (quoting Gray, 883 F.2d at 322-23).

With these governing principles in mind, the Court considers the "totality of the circumstances" to analyze the initial encounter. See Jones, 678 F.3d at 300. While neither party argued that this stop was not a seizure, the undersigned, regardless, examines whether the stop began as a consensual encounter, a traffic stop based on probable cause that a traffic violation occurred, or an investigatory stop based upon reasonable articulable suspicion that criminal activity was occurring. This encounter with police officers is a unique one. While the vehicle was running with the driver in the driver's seat, the vehicle was also stopped and legally parked in a parking spot. Notably, there was only one entrance/exit to the parking lot, connecting to a major road, and while the Go-Mart is private property, it is located in the middle of "downtown" Elkins, West Virginia. This encounter does not neatly qualify as a run-of-the-mill "routine"

traffic stop (usually a police officer stopping a moving vehicle on the road). The stop also does not neatly qualify as investigatory stop based on the officer's initially exiting the vehicle to cite Defendant for a civil traffic infraction rather than suspected criminal activity. The stop's circumstances contain aspects of both. The undersigned finds this distinction particularly important when considering Defendant's argument: can an alleged civil traffic infraction that officers did not witness be considered in the reasonable articulable suspicion analysis if an investigatory stop occurred, or in the alternative, whether that same alleged traffic violation could provide the probable cause when officers can only infer that the traffic violation occurred.

The undersigned finds that the officer's conduct indicated to Defendant Junkins that he was not free to leave following the officer's approach of the car--disqualifying this encounter as consensual. The officers first enter the parking lot of the Go-Mart and drive past the vehicle. The officers then drive around the parking lot, "circling back," and park behind the vehicle. The undersigned notes that Patrolman Sayre testified that the police vehicle was not blocking Defendant Junkins's vehicle while Officer Summerfield testified that the police officer's vehicle was blocking the Defendant's vehicle and it was unable to move. Furthermore, upon approaching the vehicle, Patrolman Sayre verbally instructed Defendant Junkins that he was being stopped for the outdated registration tag on his vehicle. If there was any question regarding whether a traffic stop had occurred at this time, it is certainly demonstrated that Defendant Junkins submitted to the authority of Patrolman Sayre and Officer Summerfield and was seized. Defendant Junkins did not attempt to leave, complied by answering questions presented by the officers, and exited the vehicle when Patrolman Sayre requested he do so. Accordingly, the undersigned finds that Defendant Junkins was seized.

The reason the officer's stopped and approached the vehicle is based on the expired registration plate. While the officers testified that they witnessed a man leaning in the window and speaking with Defendant and the store clerk motioned at the vehicle, these suspicious behaviors occurred after the officers had first driven passed Defendant's vehicle and was running his license plate to confirm their belief that the registration plate was expired. The officers approached the car and explained to Defendant that he was being stopped as a result of the expired registration plate. Accordingly, the undersigned finds that the seizure was initially made pursuant to a traffic stop and any other suspicious behavior only constituted justification for further investigation. Because the traffic stop occurred, there needs to be sufficient justification for the initiation of the stop.

ii. There was probable cause to initiate a traffic stop justifying the stop at its inception.

The "[t]emporary detention of individuals during [a] stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure." Whren v. United States, 517 U.S. 806, 809 (1996). Because an individual is seized during any traffic stop, the traffic stop must then be reasonable under the circumstances. Id. at 810. Thus, the consideration of the "dual inquiry," introduced in Terry v. Ohio, "governs the legality of police conduct in routine traffic stops." United States v. Harvey, 901 F. Supp. 2d 681 (N.D.W. Va. 2012). To survive "judicial scrutiny," the traffic stop must first be "justified at its inception," and, second, "sufficiently limited in scope and duration." Id. at 686. Generally, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. Id. While an officer witnessing a traffic infraction occur provides probable cause, United States v. Hason El, 5. F.3d 726 (4th. Cir. 1993), the undersigned has not discovered any

mandatory source that says probable cause cannot be provided absent the officer's witnessing the infraction.

The specific statute states:

> Every motor vehicle, *when driven or moved upon a highway*, is subject to the registration and certificate of title provisions of this chapter. W. Va. Code Ann. § 17A-3-2(a) (West 2018). It is unlawful for any person *to drive or move upon any highway* any vehicle of a type required to be registered under this article which is not registered or for which a certificate of title has not been issued. W. Va. Code Ann. § 17A-3-1(a). Any person violating the provisions of this article is guilty of a misdemeanor. W. Va. Code Ann. § 17A-3-1(b).

While the statute renders the operation of the vehicle on a highway or road with an expired registration illegal, the undersigned finds that there are sufficient objective findings to provide probable cause that the traffic infraction occurred.

Firstly, Patrolman Sayre noticed that the license plate was expired based on the color of the sticker (which contains the year that the license plate expires) and the first number contained on the license plate (indicating the month that the registration expires). Second, Patrolman Sayre ran the license plate via his office's database to determine whether the license plate was expired—and it was confirmed it was. Third, the officers were familiar with the area and testified at the hearing that there was only one entrance to the Go-Mart, which lead onto a public road, on which the vehicle must have traveled to arrive at the location. Lastly, the officers both testified that the vehicle was running, indicating that its capable of moving and was likely driven to that spot. The undersigned also considers the fact that the Go-Mart is located in downtown Elkins and that the car was parked in a parking spot up front at the gas station. The vehicle was not parked in the corner of a parking lot, seemingly broken down, or located on a private residential property. Accordingly, while the undersigned considered Defendant's argument that officers did not witness the traffic infraction occur, probable cause existed that a traffic infraction did occurred and the stop was justified at the initiation.

iii. The traffic stop was sufficiently limited in scope and duration.

A traffic stop must also be "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." "With regard to scope, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." United States v. Guijon-Ortiz, 660 F.3d 757 (4th Cir. 2011). The analysis to determine whether the scope and duration of the traffic stop was sufficiently limited is "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." Id. at 764. For a traffic stop to be extended beyond what is required during a routine traffic stop, there must be additional justification other than the original justification for the traffic stop. Id. Furthermore, during a traffic stop, officers may order a driver of the stopped vehicle to exit to car "without violating the Fourth Amendment's proscription of unreasonable searches and seizures." Ohio v. Robinette, 519 U.S. 33 (1996) (citing Pennslyvania v. Mimms, 434 U.S. 106, 111 (1977).

Patrolman Sayre approached the vehicle on the driver's side to question Defendant and began by asking his name. Upon notification of the reasoning of the stop, Patrolman Sayre requested that Defendant exit the vehicle. Requesting this information is consistent with a routine traffic stop and consistent with information that would be gathered during a traffic stop for an expired registration. As Defendant was exiting the vehicle, Patrolman testified that he saw what appeared to be a smoking device and syringe. At this point, the officers had sufficient justification to extend the traffic stop beyond the traffic violation. The undersigned finds that the seizure was based on probable cause and the officers' actions while executing the traffic stop

were sufficiently limited in scope until there was sufficient justification to extend and expand the stop.

B. August 1, 2017 Traffic Stop

Defendant's main contention with the August 1, 2017 traffic stop concerns whether the traffic stop was impermissibly extended in order to allow time for K-9 Unit to arrive and conduct a dog sniff. For the foregoing reasons, the undersigned finds that the traffic stop was not impermissibly extended to allow a K-9 Unit to arrive at the scene and the K-9 dog sniff was permitted.

When an officer observes a traffic violation, there is "sufficient justification" to detain a vehicle for as long as needed to perform the "traditional incidents of a routine traffic stop." United States v. Branch, 537 F.3d 328, 335 (4th Cir. 2008). "Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop and attend to related safety concerns." Rodriquez v. United States, 135 S. Ct. 1609, 1614 (2015) (citing Caballes, 543 U.S. at 407).

An officer's authority to detain terminates when its "no longer necessary to effectuate th[at] purpose." Rodriguez, 135 S. Ct. at 1614. The acceptable length of a routine traffic stop cannot be measured with "mathematical precision." United States v. Branch, 537 F.3d 328, 336 (2008). "[O]nce the driver has demonstrated that he is entitled to operate his vehicle, and the police officer has issued the requisite warning or ticket, [however] the driver 'must be allowed to proceed on his way.'" Id. at 336.

During a traffic stop, an officer "may conduct certain unrelated checks during an otherwise lawful traffic stop," such as a dog sniff. Id. at 1615 (citing Arizona v. Johnson, 555 U.S. 323 (2009)). Dog sniffs may be conducted during a lawful traffic stop without implicating

the Fourth Amendment as unreasonable. Illinois v. Caballes, 543 U.S. 405 (2005). When conducted during a regular traffic stop for traffic infractions and lacking a close connection to roadway safety, a dog is not considered part of the traffic stop's "mission." Rodriguez, at 1615. Thus, a dog sniff may not prolong a traffic stop absent reasonable articulable suspicion for the dog sniff or the party's consent. United States v. Williams, 808 F.3d 238, 246 (4th Cir. 2015).

The purpose, or "mission," of this traffic stop was to address the alleged traffic infractions—littering and obstructed license plate. The extent of the traffic stop was to initiate the stop, gather the driver's license, registration, and proof of insurance, and then to issue a citation/ticket for the traffic infractions, if necessary. During the majority of the traffic stop, Chief Carlson and Officer Goad were attempting to confirm the existence of Defendant's valid insurance, which is required under West Virginia Code Section § 17D-2A-3.[7]

Upon notification by Defendant that he did have valid insurance but would have to contact his wife to obtain that information, Chief Carlson and Officer Goad waited to obtain that information instead of immediately writing a citation against Defendant or towing his vehicle. Following the receipt of the insurance information, which was notably for a different vehicle, Chief Carlson then verified the information using an automated number for the insurance. During the time needed to obtain verification, the K-9 Unit arrived and conducted a dog sniff, in which the dog alerted as to the presence of narcotics.

Defense Counsel questioned Officer Goad regarding his police report. The Report, as admitted in to evidence, contained an explanation, seemingly to be in chronological order, of the

[7] Chief Carlson and Officer Goad were permitted to inquire as to Defendant's insurance:

> At any time . . . when a vehicle is stopped by a law-enforcement officer for reasonable cause, the officer of the agency making the investigation shall inquiry of the operator of any motor vehicle involved . . . as to the existence upon the vehicle or vehicles of the evidence of insurance or other security required by the provisions of this code

W. Va. Code § 17D-2A-6.

events leading to the dog sniff. Of specific interest, paragraph six delineates the confirmation of proof of insurance. The paragraphs states:

> This officer then returned to the patrol car and gave the information to Chief Carlson. While looking into the insurance on the vehicle both officers noted that the insurance card that was sent was for a Ford Econoline Van. The Chief then called the insurance company regarding coverage for the mustang. The insurance company advised that there was current coverage on the mustang.

Def's Ex. 6, at 1.

This paragraph is of importance in the undersigned's opinion because, based on the Report's structure, the Report indicated that the confirmation of proof of insurance occurred well before the K-9 Unit arrived, as explained in Paragraph 10. This would indicate that the officers had all the information they needed and should have ended the traffic stop. During the Motion Hearing, however, Deputy Chief Goad testified that while filling out the Report, he "got ahead of himself" and stated that Defendant's insurance was confirmed but did not occur prior to the arrival of the K-9 Unit. In addition, both Chief Carlson and Officer Goad testified during the Motion Hearing and stated that Chief Carlson was in the vehicle verifying the insurance and completing the citations for the traffic infractions when the K-9 Unit arrived.

Based upon the testimony presented during the Motion Hearing, and in consideration of Deputy Chief Goad's Report, the undersigned finds that Chief Carlson was attempting to provide the opportunity of Defendant to provide proof of insurance, which Defendant stated he could provide by contacting his wife, and did not purposely slow down the performance of the traffic stop in order for the K-9 Unit to arrive.

Defense Counsel also questioned Chief Carlson, based on the language of the West Virginia statute prohibiting littering from a motor vehicle, whether Chief Carlson knew whether the statute was strict liability—referring to whether Chief Carlson witnessed the occupants of the

vehicle drop, remove, somehow place the trash outside of the vehicle.[8] Defense Counsel's point that Chief Carlson only saw a piece of trash come out of the vehicle and there was no indication that said trash was purposely displaced from the vehicle by the passengers is well taken.[9] However, the officer's belief that the Defendant littered is not the only justification for conducting a traffic stop that was provided by officers so the argument does not disrupt the undersigned's determination of the validity of the traffic stop. The second reason—driving with an obstructed license plate[10] shown in Government's Exhibit 2—is a justifiable reason for the initiation of a traffic stop. Because there is a second justification that renders the initiation of a traffic stop valid, regardless of what the officer saw, there are issues with the justification behind the stop. Accordingly, the undersigned finds that the traffic stop was not unlawfully extended to allow a K-9 to arrive on scene to conduct a dog sniff and that the evidence found was lawfully obtained.

III. RECOMMENDATION

For the reasons set forth herein, the undersigned **RECOMMENDS** that the Defendants' Motion to Suppress (ECF No. 28) is **DENIED**.

Any party may, on or before Wednesday March 6, 2019,[11] file with the Clerk of Court written objections identifying the portions of the Report and Recommendation to which

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[8] The West Virginia Code states:

> [I]t is unlawful for any driver or passenger of a motor vehicle or other conveyance to place, deposition, dump, throw or cause to be placed, deposited, dumped or thrown, any little from a motor vehicle or other conveyance in or upon any public or private highway, road, street or alley.

W. Va. Code § 17C-14-14.

[9] Base on the plain language of the statute, it is unclear how the phrase "*cause to be* place, deposited, dumped, or thrown" is interpreted.

[10] The West Virginia Code states:

> Every registration plate shall at all times be . . . in a place and position to be clearly visible and shall be maintained free from foreign materials and in a condition to be clearly legible.

[11] "Although parties are typically given fourteen days to respond to a Report and Recommendation, see 28 U.S.C. § 636(b)(1), this allowance is a maximum, not a minimum, time to respond, and the Court may require a response within a shorter period if exigencies of the calendar require. United States v. Barney, 568 F.2d 134, 136 (9th Cir.1978)." United States v. McDaniel, 1:16-CR-52 (ECF No. 32 at 14-15, at footnote). See also United States v.

objection is made, and the basis for such objection. A copy of such objections should also be submitted to the Honorable John Preston Bailey, United States District Judge. Failure to timely file objections to this Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon the Report and Recommendation. 28 U.S.C. § 636(b)(1); United States v. Schronce, 717 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208; Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985).

The Clerk of Court is DIRECTED to provide a Copy of this Report and Recommendation to counsel of record, as provided in the Administrative Procedures for Electronic Case Filing in the United States District Court for the Northern District of West Virginia.

Date: March 1, 2019

MICHAEL JOHN ALOI
UNITED STATES MAGISTRATE JUDGE

Cunningham, 2011 WL 4808176, n. 1 (N.D. W. Va., Oct. 6, 2011); United States v. Mason, 2011 WL 128566, n. 7 (N.D.W. Va. Jan. 7, 2011). In this case, the final pretrial conference is set before the Honorable District Judge John Bailey on March 14, 2019 and Jury Selection and Trial is set for March 28, 2019. The resulting calendar exigency thus warrants shortening the period with which to file objections to the Report and Recommendation and will be due by March 6, 2019.