

# Appendix

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Still more, the investigating officer, Deputy Commandant, and Commandant all found that Mr. Turner's conduct violated the Academy's rules. *See* J.A. at 29-30, 50, 53-54. Mr. Turner does not allege that these findings were improperly influenced by the Superintendent. And, as discussed above, neither the Commandant nor any of the other officers in Mr. Turner's chain of command had the final authority to order separation. Instead, that power is vested in the Secretary of the Navy, who relies on the recommendation of the Superintendent. So it is unsurprising that the Board "did not find evidence of unlawful command influence." J.A. 237. The record does not permit the Court to find that a disinterested observer would have substantial doubts about the fairness of the proceedings. J.A. 237.

In short, Mr. Turner received a fair and thorough review process conducted in accordance with the Navy's regulations and applicable law. He had ample opportunity to present his defenses, to attack the Commandant's recommendations, and to offer any other arguments or responses he desired. Thus, applying the high degree of deference due to military corrections boards, the Court affirms the denial of Mr. Turner's appeal.

#### IV.

For these reasons, the Defendants' Cross-Motion for Summary Judgment will be granted, and the Plaintiff's Motion for Summary Judgment will be denied. A separate order will issue.



UNITED STATES of America, Plaintiff

v.

Ivan CRUZ-RIVERA and Carlos Jimenez, Defendants.

CRIMINAL ACTION No. 16-40025-TSH

United States District Court,  
D. Massachusetts.

Signed 08/14/2018

**Background:** Defendants charged with multiple drug offenses filed motions to suppress cash that had been seized and statements that had been made during motor vehicle stop, as well as out-of-court photo identification.

**Holdings:** The District Court, Timothy S. Hillman, J., held that:

- (1) stop and search of motor vehicle had been supported by probable cause;
- (2) *Miranda* warnings had not been required during stop; and
- (3) photo identification was sufficiently reliable.

Motions denied.

##### 1. Arrest $\Leftrightarrow$ 60.3(1)

Under the Fourth Amendment, an officer may effectuate a vehicle stop if there is probable cause to believe that the driver has committed a traffic offense, even if the officer has an ulterior motive for the stop. U.S. Const. Amend. 4.

##### 2. Arrest $\Leftrightarrow$ 60.3(2, 3)

Under collective knowledge doctrine, police officer had probable cause to stop and search motor vehicle of defendants ultimately charged with multiple drug offenses, where officer was instructed to stop vehicle by investigators who had seen vehicle spend two hours in garage after arriving around time that garage controller had told investigators' confidential

source that he had expected heroin delivery, and who had learned from confidential source that after vehicle had left, he had been able to buy heroin from garage controller, who told him that he had been processing heroin. U.S. Const. Amend. 4.

**3. Arrest** ~~60.2(9), 63.4(11)~~

Under the collective knowledge doctrine, for Fourth Amendment purposes law enforcement officials cooperating in an investigation are entitled in making a stop or arrest to rely on each other's knowledge of facts that form a conclusion that a suspect is committing or has committed a crime. U.S. Const. Amend. 4.

**4. Arrest** ~~60.2(9), 63.4(11)~~

**Searches and Seizures** ~~38~~

The collective knowledge doctrine permits an officer under the Fourth Amendment to stop, search, or arrest a suspect at the direction of another officer, or police agency, even if the officer himself does not have first-hand knowledge of facts that amount to the necessary level of suspicion for the given action. U.S. Const. Amend. 4.

**5. Arrest** ~~60.2(9), 63.4(11)~~

**Searches and Seizures** ~~38~~

There is no Fourth Amendment violation if the officer directing a stop, search, or arrest, or the collective knowledge of the agency for which he works, has sufficient probable cause. U.S. Const. Amend. 4.

**6. Arrest** ~~60.2(9), 63.4(11)~~

**Searches and Seizures** ~~38~~

In order for the collective knowledge doctrine to apply, the officer making the stop, search, or arrest subject to the Fourth Amendment must act in objective reliance on information received, the officer providing the information, or the agency for which he works, must have facts supporting the level of suspicion required,

and the action must be no more intrusive than would have been permissible for the officer requesting it. U.S. Const. Amend. 4.

**7. Arrest** ~~60.2(10, 20)~~

A *Terry* stop must be objectively reasonable in terms of the initial stop and actions taken during the stop, and must be reasonably related in scope to the stop itself unless the police have a basis for expanding their investigation. U.S. Const. Amend. 4.

**8. Criminal Law** ~~411.25~~

*Miranda* was not implicated by police officer's stop of motor vehicle of defendants ultimately charged with multiple drug offenses; officer had been instructed to stop vehicle by investigators who had seen vehicle spend two hours in garage after arriving around time that garage controller had told investigators' confidential source that he had expected heroin delivery, and who had learned from confidential source that after vehicle had left, he had been able to buy heroin from garage controller, who told him that he had been processing heroin, and officer ultimately stopped vehicle upon seeing vehicle change lanes without signaling and then follow another vehicle too closely. U.S. Const. Amend. 5.

**9. Criminal Law** ~~411.25~~

A *Terry* stop can morph into "custody" for *Miranda* purposes where the totality of the circumstances shows a reasonable person would understand that he is being held to the degree associated with a formal arrest. U.S. Const. Amend. 5.

**10. Criminal Law** ~~411.2, 411.4~~

The purpose of *Miranda* is to address those situations involving custodial interrogations; accordingly, *Miranda* does not ordinarily apply outside the context of the

inherently custodial interrogation for which it was designed. U.S. Const. Amend. 5.

#### 11. Criminal Law $\approx$ 411.25

Since a *Terry* stop does not ordinarily rise to the level of intimidation attendant to a formal arrest, the ultimate inquiry as to the applicability of *Miranda* in the context of such a stop is whether there was a formal arrest or a restraint on freedom of movement associated with the formal arrest. U.S. Const. Amend. 5.

#### 12. Criminal Law $\approx$ 411.23

The “quick and dirty” inquiry into whether a suspect was in custody for purposes of *Miranda* is typically whether the suspect would have felt free to leave. U.S. Const. Amend. 5.

#### 13. Criminal Law $\approx$ 411.23

Courts determining whether a suspect was in custody for purposes of *Miranda* are required to focus on a number of factors, including (1) whether the suspect was questioned in familiar or at least neutral surroundings, (2) the number of law enforcement officers present at the scene, (3) the degree of physical restraint placed upon the suspect, and (4) the duration and character of the interrogation. U.S. Const. Amend. 5.

#### 14. Criminal Law $\approx$ 339.7(3, 4)

Confidential witness’s out-of-court photo identification of defendant charged with multiple drug offenses was not impermissibly suggestive and was sufficiently reliable to avoid suppression, although identification used single photograph, where witness had spent almost two hours with defendant on an occasion prior to identification, during which time witness and defendant had engaged in conversations.

#### 15. Criminal Law $\approx$ 339.6

A court’s role in considering whether to suppress an identification of a defendant in a prosecution is to determine whether or not the identification procedure was impermissibly suggestive.

#### 16. Criminal Law $\approx$ 339.7(4)

The use of a single photograph is permissible for future identification of a defendant in a prosecution, provided the identification is reliable under the circumstances.

#### 17. Criminal Law $\approx$ 339.6

If an identification of a defendant in a prosecution is impermissibly suggestive, then in considering whether to suppress the identification the court must look to whether the identification is reliable given the totality of the circumstances.

#### 18. Criminal Law $\approx$ 339.6

To determine the reliability of identifications of defendants in prosecutions, courts are instructed to focus on five factors: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s entire description of the criminal, (4) the level of certainty demonstrated by the witness’s confrontation, and (5) the length of time between the crime and the confrontation.

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FINDINGS AND ORDER ON  
DEFENDANT'S MOTION  
TO SUPPRESS

TIMOTHY S. HILLMAN, DISTRICT  
JUDGE

Introduction

The Defendants are charged with multiple drug offenses. They seek to suppress from introduction into evidence at trial, cash that was seized and certain statements that were made during a motor vehicle stop that occurred on October 4, 2013. Defendant Jimenez also seeks to suppress an out-of-court single photo identification. For the reasons set forth, these motions are denied.

Facts

Beginning in 2012, a Drug Enforcement Agency ("DEA") task force operating in the Worcester area began an investigation into the drug trafficking activities of Miguel Rivera. Between May 2012 and October 2013, several purchases of heroin from Mr. Rivera took place through the use of a confidential source ("CS"). While Mr. Rivera was the initial target, it was learned early in the investigation that his probable source of supply was another individual named Segundo Gutierrez.

During several controlled purchases of heroin, Mr. Rivera arrived in a motor vehicle that was rented under the name of Segundo Gutierrez. During those transactions, Mr. Rivera visited two garage bays, located at 105-107 Union Street, in Leominster, Massachusetts, that were controlled by Gutierrez. It was believed by the authorities that Mr. Rivera would get heroin from Gutierrez at those garages before selling it to the CS.

By October 4, 2013, the task force had decided to attempt to deal directly with Gutierrez at 105-107 Union Street. On that date, shortly after noon, the CS, accompanied by an undercover police officer, drove

to the Union Street location in a vehicle that had been outfitted with audio and video recording devices. This interaction between the CS and Gutierrez was set up without any prior notice to the Gutierrez. Prior to contact, the police had set up surveillance of the garage complex and surrounding neighborhood. Task Force Officer, Sergeant John Maki, observed the undercover vehicle pull up to the garage complex and watched the CS exit the vehicle and go to the garage where he was met by Gutierrez. Thereafter, Gutierrez and the CS went into a garage bay. When the CS returned to the car he told the undercover officer that a "big batch was coming" and that he was to call back in 15-20 minutes (specifically, Gutierrez told the CS "you will have it in your hands by 1:30"). At approximately 12:15 p.m., the undercover vehicle left the Union Street address and met with the surveillance team. During this debriefing session the CS reported that while he was negotiating for the heroin, Gutierrez had received a phone call during which he gave directions on how to get to the garages on Union Street.

Approximately three minutes after the undercover vehicle left the garage, the surveillance units that had remained at Union Street reported that Gutierrez left the garage area and walked out to Union Street talking on his cellphone. They observed him wave a grayish blue Lexus with New Jersey license plates into the driveway at Union Street. That vehicle entered the 105-107 address and drove to the far end of the garage bays.

While the undercover vehicle was at the Union Street garage, Gutierrez had given specific instructions to the CS to contact Miguel Rivera before he came back. The CS finally made contact with Miguel Rivera via cellphone at 2:20 p.m. and they discussed price. After that phone call, the authorities instructed the officer and CS to

return to Union Street and wait at the garages. The Lexus was in the garage area from approximately 12:20 p.m. until shortly after 2:00 p.m.

While the Lexus was in the garages, it parked in the rear of the bay furthest from the street, where it was joined by Gutierrez's truck (driven by an unknown male). When the Lexus left the garage after 2:00 p.m. it apparently got lost in the neighborhood, and was directed to the highway by Gutierrez, who went out to Union Street to point it in the right direction. Massachusetts State Police Officer and Task Force Agent Jamie Vitale was assigned to follow the vehicle and make an 'identification stop' away from the area of investigation, so as not to compromise the investigation.

When the undercover vehicle returned to the garages at 2:20 p.m. the CS purchased 125 grams of a substance believed to be heroin for \$7,500.00. This purchase was made after the undercover vehicle waited at the garages for 20-30 minutes. Thereafter the CS and the undercover officer were met by the Task Force Officers at approximately 2:55 p.m.

Trooper Vitale followed the vehicle and reported that there were two male individuals in the vehicle with darker skin. Because Task Force Officer Maki had requested that he stop the vehicle and identify the occupants, he called the Sturbridge Massachusetts Barracks to determine whether a patrol car assigned to Route 84 was available to assist. His phone call was passed on to Trooper David DiCrescenzo. Trooper Vitale and Trooper DiCrescenzo had previously collaborated to stop motor vehicles under similar circumstances. Trooper Vitale told Trooper DiCrescenzo that he was following the target vehicle on the Massachusetts Turnpike and that they were west of Auburn. He told Trooper DiCrescenzo the license plate number, the vehicle de-

scription, and that it was occupied by two Spanish men. Trooper Vitale told him he was looking to identify the occupants of the vehicle with regards to a drug investigation but that Trooper DiCrescenzo would have to develop his own probable cause if he wanted to access the inside of the vehicle.

At approximately 3:15 p.m., Trooper DiCrescenzo intercepted the vehicle at the median strip just west of a tollbooth on Route 84. He followed it for a couple of miles and when he observed the vehicle change lanes and follow another vehicle too closely, he pulled the vehicle over. Trooper DiCrescenzo approached the vehicle and asked the operator for his license and registration. The trooper identified the operator of motor vehicle as the defendant, Carlos Jimenez. He observed that both of the individuals in the vehicle were extremely nervous. The operator's hands were physically shaking and the passenger in the motor vehicle was seen staring straight ahead, avoiding eye contact with the officer and nervously fidgeting in his seat. Trooper DiCrescenzo asked Jimenez if he had ever been stopped before and he responded that he had not been stopped and that he follows the law. Trooper DiCrescenzo thought that answer was a little strange. In addition to producing his license and registration Jimenez, produced or made visible, a firefighter's badge. After receiving the license and registration, Trooper DiCrescenzo asked the occupants where they were coming from. Jimenez responded that they were coming from Lawrence, Massachusetts, that they had left New Jersey that morning, and were returning when he stopped them. According to Trooper DiCrescenzo, this raised concerns because it is a long trip from New Jersey to Lawrence to spend two hours and then return.

Because of the nervousness exhibited by the occupants and the unlikely travel plans, Trooper DiCrescenzo said he suspected criminal activity was involved and asked the passenger in English for identification. The passenger produced his identification, and in the DiCrescenzo's opinion, he had no difficulty understanding. After receiving this information, DiCrescenzo returned to the vehicle and asked the operator to step out so that he could question the driver and the passenger separately. While DiCrescenzo was waiting for State Police dispatch to return license and warrant information, he learned through his own inquiries that there was a recent query on the license plate earlier that day in Worcester, which wasn't consistent with the driver's story that they were coming from Lawrence, Massachusetts. He also learned that the operator's license in New Jersey was active and that there was no outstanding warrants for either occupants.

When the DiCrescenzo had separated the two defendants he first asked the defendant Jimenez who he went to visit in Lawrence. Jimenez responded that he had gone to visit his cousin, but when asked his cousin's name he could not produce that information and changed his story to say that he was visiting his brother-in-law. When asked, he didn't know his brother-in-law's name either. He stated that they had met at a store in the Lawrence area and that they had not made any stops on their trip from New Jersey to Lawrence and back. DiCrescenzo asked Jimenez if there were any weapons or drugs in the car, to which he responded "no." He asked if there were large sums of cash in the car and he responded, "I think he has some cash" referring to the passenger. When he asked why there was a large amount of cash in the car, Jimenez responded that they were looking at a truck to purchase. After he completed his initial questioning of Jimenez, he placed him in the back seat

of his cruiser and then spoke with the passenger, Ivan Cruz-Rivera.

Trooper DiCrescenzo asked Cruz-Rivera to step out of the motor vehicle and questioned him in English. According to Trooper DiCrescenzo, he asked the passenger the same questions that he had asked the driver. When he advised Cruz-Rivera that the driver said that there was a large sum of cash in the car Cruz-Rivera reached into his pocket and pulled out a small sum of money. When the trooper asked if that was all the cash that was in the vehicle, the passenger responded that he did not understand. Because of that answer, DiCrescenzo called Trooper Luis DeJesus, a fluent Spanish speaking trooper who worked at the Sturbridge Barracks, and asked him to translate the conversation over the cellphone. DiCrescenzo put his cellphone on speaker mode, and as he spoke into the phone Trooper DeJesus translated what was said. DiCrescenzo, with the help of DeJesus, again asked Cruz-Rivera about the large sum of cash in the vehicle. Cruz-Rivera answered that there was \$1,000.00 in the car. When Trooper DiCrescenzo asked Mr. Cruz-Rivera to show him the money, Cruz-Rivera went to the backseat of the vehicle and attempted to open a black bag that was on the seat. Cruz-Rivera attempted to use his body to shield the trooper's view of the bag and the trooper asked him to step aside so that he could have a clear view of the bag for his own safety. Because Cruz-Rivera ignored him he pushed him to the side so that he could view inside the bag which contained a large sum of United States currency.

Once DiCrescenzo saw the large amount of cash, he had Cruz-Rivera stand to the side of the vehicle and again questioned Jimenez about why there was some much cash in the vehicle. Jimenez replied that they were looking for a truck to pur-

chase. DiCrescenzo also asked Jimenez for permission to search his vehicle and, according to the DiCrescenzo, Jimenez consented. Around this time Trooper Bolland arrived at the scene and after being briefed on the events of the motor vehicle stop called for a canine to continue search of the vehicle. The troopers' further search of the vehicle recovered no further contraband, however two cellphones were found under the passenger's front seat.

The Defendants called Dr. Michael O'Laughlin, as a witness. Dr. O'Laughlin, is the Director of Interpreter Training at Boston University and he conducted a language proficiency examination of Mr. Cruz-Rivera. Dr. O'Laughlin conducted three standardized tests; Spanish reading comprehension, English reading comprehension, and oral proficiency.<sup>1</sup> It was Dr. O'Laughlin's opinion that Cruz-Rivera's language skills would enable him to make short answers, usually to known questions, if the questions are simple. He testified that Cruz-Rivera can sometimes understand a question if it is put to him very directly and that his language level would not permit him to understand idiomatic expressions. Dr. O'Laughlin also opined that Cruz-Rivera's Spanish proficiency levels were very low, including his ability to read and comprehend written Spanish.

The defendant Cruz-Rivera testified that he resides in Puerto Rico and that he came to the United States to buy a pickup truck to assist him in his business selling shampoo for horses. He testified that on October 4, 2013 he drove with Jimenez from New Jersey to Jimenez's relative's house in Lawrence, Massachusetts. On their way back from Lawrence they stopped at Gutierrez's house in Leominster because he

1. Test one, the Spanish comprehension test, is formally known as the Spanish Reading Comprehension Test. The second test of English reading proficiency is CASAS form 80 which

knew about a flatbed truck that was being sold that he was interested in purchasing. Cruz-Rivera testified that he, Gutierrez, and Jimenez went to several places in Leominster to find the person who was selling the flatbed truck and thereafter left to return to New York/New Jersey.

Sometime after the events of October 4, 2013, a cooperating witness ("CW") identified Jimenez as the driver of the car from a single photograph he was shown during a jailhouse interview. During the hearing on the Motion To Suppress, Sergeant Maki was questioned about that identification by Jimenez's counsel. After that cross-examination by Jimenez's counsel, the new case agent DEA Task Force Officer Jeffrey Thibodeau again interviewed Gutierrez and again showed him a single photograph which he identified as Jimenez. This interview took place while the Motion to Suppress was pending and before all of the testimony had been completed.

#### Discussion

The defendants argue that Trooper DiCrescenzo's stop of the motor vehicle violated the Fourth Amendment to the United States Constitution. Specifically, that there was no reasonable and articulable objective reason to suspect that the vehicle, or its inhabitants were involved in drug trafficking. They further argue that once the vehicle was stopped, both subjects were "in custody" and should have not been interrogated without being Mirandized.

I will first deal with the stop of the Lexus. Trooper DiCrescenzo testified that he and Trooper Vitale had a prior relationship going back several years and that he was tasked with identifying the occupants

is an abilities test that covers reading and listening and other languages aspects as well. The third test of oral proficiency is referred by its BEST.

of the vehicle. Trooper DiCrescenzo was also told by Trooper Vitale that the investigation was interested in the vehicle with regards to “a drug investigation and that my information would not be the basis of the stop . . . I further stated that access to the inside of the vehicle would not be based upon my information either that he would have to develop his own probable cause if he went in that direction.”

[1] Trooper DiCrescenzo testified that he saw the Lexus change lanes without signaling, and then follow too closely. The Defendants argue that the stop was pretextual, however there was no evidence presented at the hearing, via affidavit or otherwise, contesting the validity of the motor vehicle violation. An officer may effectuate a vehicle stop if there is probable cause to believe that the driver has committed a traffic offense, even if the officer had an ulterior motive for the stop. *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1966).

#### The Collective Knowledge Doctrine

[2,3] The United States argues that DiCrescenzo’s stop was supported by the “collective knowledge” doctrine. This “collective knowledge” or “pooled knowledge” principle has been used to arrest in two ways; (1) by tracing the arresting officer’s knowledge back to an individual in a law enforcement agency who possessed information sufficient to establish probable cause and (2) by finding that the directing agency as a whole possessed the necessary facts. Under this rubric, law enforcement officials cooperating in an investigation are entitled to rely on each other’s knowledge of facts that form a conclusion that a suspect is committing or has committed a crime. *United States v. Ventresca*, 380 U.S. 102, 111, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

[4-6] The collective knowledge doctrine permits an officer to stop, search, or arrest a suspect at the direction of another officer, or police agency, even if the officer himself does not have first-hand knowledge of facts that amount to the necessary level of suspicion to the given action. *United States v. Hemsley*, 469 U.S. 221, 232-33, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). There is no Fourth Amendment violation if the officer directing the stop, search, or arrest, or the collective knowledge of agency for which he works has sufficient probable cause. *United States v. Harris*, 585 F.3d 394, 400 (7th Cir. 2009). In order for the collective knowledge document to apply the officer taking the action must act in objective reliance on the information received and the officer providing the information, or the agency for which he works, must have facts supporting the level of suspicion required, and the stop must be no more intrusive than would have been permissible for the officer requesting it. *United States v. Nafzger*, 974 F.2d 906, 911 (7th Cir. 1992).

[7] Based upon the collective knowledge doctrine there was more than ample probable cause to order the stop of the Lexus and to search it. Further, because of the perceived motor vehicle violations, Trooper DiCrescenzo was justified in stopping the vehicle and conducting a *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A *Terry* stop must be objectively reasonable in terms of the initial stop and actions taken during the stop, and “must be reasonably related in scope to the stop itself unless the police have a basis for expanding their investigation” *United States v. Ruidiaz*, 529 F.3d 25, 28-29 (1st Cir. 2008). The task force officers involved in the investigation of the events in Leominster possessed reasonable and articulable suspicion that the occupants of the vehicle were engaged in

criminal activity, and that there was probable cause to believe that the motor vehicle contained drugs or money.

The defendants argue that the collective knowledge doctrine cannot apply because Trooper Vitale counselled Trooper DiCrescenzo that he needed to find his own probable cause in an effort not to compromise the investigation. The Government's position is that Vitale's instructions to DiCrescenzo to develop his own basis for stopping the vehicle was not a prohibition on using the information imparted to him, rather it was an attempt to conceal the ongoing investigation.

Trooper DiCrescenzo's instructions to find his own probable cause rather than relying on collective knowledge of the officers in an effort not to compromise the investigation is unaffected by the officers' disguise as a mere traffic stop. *United States v. Ramirez*, 473 F.3d 1026, 1038 (9th Cir. 2007). Disguising the stop is a valid law enforcement tactic and did not change the nature of the stop, or the fact that the stop was made at the direction of an officer who had probable cause under the collective knowledge doctrine.

The parties have devoted a lot of energy to the issue of whether the collective knowledge doctrine was sufficient to give Officer DiCrescenzo sufficient reason to stop the motor vehicle. I find that the collective knowledge doctrine provided sufficient reason to stop the motor vehicle and to search it. At the time that the Lexus was stopped, the DEA had been involved in investigation spanning over seventeen months during which six controlled purchases of heroin had taken place from an individual whom the task force believed was being supplied by Gutierrez, from the Union Street address. The CS went to that address and attempted to purchase 125 grams of heroin. Gutierrez told the CS that he was expecting a deliv-

ery by 1:30 p.m. The Task Force observed him on his cellphone giving directions, and shortly thereafter surveillance saw the Lexus enter the garages and leave 2 hours later. When the CS returned to the garage shortly after the Lexus left, he bought heroin and was told by Gutierrez that the marks on his face were from the mask that he was wearing while he processed the heroin. These facts provide ample probable cause for the stop and search.

Whether the defendants should have been Mirandized

[8-10] The defendants argue that Trooper DiCrescenzo's roadside conduct was a defacto arrest thus requiring the trooper to provide them with *Miranda* warnings. In focusing on *Terry* stops courts have consistently recognized that as "a general rule *Terry* stops do not implicate the requirements of *Miranda* because *Terry* stops, though inherently somewhat coercive, do not usually involve the type of police dominated, or compelling, atmosphere which necessitates *Miranda* warnings." *United States v. Striefel*, 781 F.2d 953, 958 (1st Cir. 1986). This is not to say however that a *Terry* stop cannot morph into "custody" for *Miranda* purposes, "where the totality of the circumstances shows a reasonable person would understand that he was being held to 'the degree associated with a formal arrest.'" *United States v. Fornia-Castillo*, 408 F.3d 52, 63 (1st Cir. 2005) (citations omitted). The purpose of *Miranda* is to address those situations involving "custodial" interrogations. Accordingly, *Miranda* does not ordinarily apply outside the context of the inherently custodial interrogation for which it was designed. The Courts have consistently held "custody, for the purposes of *Miranda*, must be narrowly circumscribed to effectuate the purpose of the warning". *United States v. Campbell*, 741 F.3d 251, 265 (1st Cir. 2013); *see also Minnesota v.*

*Murphy*, 465 U.S. 420, 430, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

[11-13] Since a *Terry* stop does not ordinarily rise to the level of intimidation attendant to a formal arrest, “[t]he ultimate inquiry” is whether there was a formal arrest or a restraint on freedom of movement associated with the formal arrest. *Thompson v. Keoheng*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (citations omitted)).<sup>2</sup> Thus, Courts are required to focus on a number of factors, including:

- (1) Whether the suspect was questioned in familiar or at least neutral surroundings;
- (2) The number of law enforcement officers present at the scene;
- (3) The degree of physical restraint placed upon the suspect;
- (4) The duration and character of the interrogation.

I am of the opinion that the officers had probable cause to arrest the Defendants and to search the vehicle. I say this with the belief that regardless of what the defendants said or did during the stop, Trooper DiCrescenzo was going to search the motor vehicle. His plan has no bearing on the question of whether the defendants were in custody. Because there was, at a minimum, articulable and reasonable suspicion that the defendants were engaged in criminal activity, the authorities were entitled to stop the vehicle, detain the occupants, and pursue a means of investigation that was likely to confirm or dispel their suspicion.

2. While the “quick and dirty” inquiry is typically whether the defendant would have *felt*

#### The Identification of Jimenez

[14] Finally, the Defendant, Jimenez, has moved to suppress his identification by a CW as an impermissibly suggestive single photo presentation on the grounds that it is unfair and unreliable. Additionally, he has moved to strike the testimony of DEA Task Force Officer Jeffrey Thibodeau. Jimenez argues that the CW’s identification should be stricken because the CW identified Jimenez after having seen him only once, during the alleged event of October 4<sup>th</sup>. Furthermore, as Sergeant Maki reported, when the CW was shown the single photograph of Jimenez during a proffer session, he “was pretty sure” that Jimenez was the driver of the Lexus.

[15-17] The court’s role in considering whether to suppress the identification is to determine whether or not the identification procedure was impermissibly suggestive. The use of a single photograph is permissible for future identification, provided the identification is reliable under the circumstances. If an identification is impermissibly suggestive, then the court must look to whether the identification is reliable given the totality of the circumstance. *United States v. Arthur*, 764 F.3d 92, 99-100 (1st Cir. 2014).

[18] To determine the reliability of identifications, courts are instructed to focus on five factors:

- (1) the opportunity of the witness to view the criminal at the time of crime;
- (2) the witness’s degree of attention;
- (3) the accuracy of the witness’s entire description of the criminal;
- (4) level of certainty demonstrated by the witness’s confrontation;

*free to leave. See Streifel*, 781 F.2d at 960-62.

(5) the length of time between the crime and the confrontation.

*United States v. Henderson*, 320 F.3d 92, 100 (1st Cir. 2002).

While the parties appear to agree that the CW had not met Jimenez prior to the October 4<sup>th</sup> event, they were together at the garage on Union Street for almost two hours. In that time they had conversations and Jimenez allegedly boasted to the CW that he had his firefighter's credentials with him so that if they were stopped by police the police would leave him alone. For the reasons set forth above I find that the single photo identification was not impermissibly suggestive and the identification was sufficiently reliable.

### Conclusion

For the foregoing reasons,

1. Defendant Jimenez's Motion to Suppress (Docket No. 57) is denied.
2. Defendant Cruz-Rivera's Motion to Suppress (Docket No. 63) is denied.



**Norma EZELL, Leonard Whitley, and Erica Biddings, on behalf of themselves and all others similarly situated, Plaintiffs,**

v.

**LEXINGTON INSURANCE COMPANY; American International Group, Inc.; AIG Assurance Company; AIG Insurance Company; AIG Property Casualty Company; AIG Specialty Insurance Company; American General Life In-**

surance Company; National Union Fire Insurance Company of Pittsburg, P.A.; AGC Life Insurance Company; American General Annuity Service Corporation; and AIG Domestic Claims, Inc., Defendants.

### Civil Action No. 17-10007-NMG

United States District Court,  
D. Massachusetts.

Signed 09/27/2018

**Background:** Beneficiaries of structured settlement agreements with settling party funded through the purchase of annuities with respect to underlying personal injury, wrongful death, and workers' compensation claims against non-parties, brought putative class action against settling party, other insurers, and insurers' subsidiaries, alleging claims of fraudulent misrepresentation and violation of civil Racketeer Influenced and Corrupt Organizations Act (RICO) with respect to certain commissions charged by non-party brokers in connection with annuity payments. Defendants moved to dismiss for failure to state a claim.

**Holdings:** The District Court, Nathaniel M. Gorton, J., held that:

- (1) complaint failed to establish an association-in-fact enterprise, as required to state civil RICO claim;
- (2) beneficiaries failed to plead with requisite particularity fraudulent misrepresentation claim; and
- (3) beneficiaries failed to allege how alleged misrepresentation would have affected their choice of taking structured settlements, as required to plead the materiality prong of common-law fraud.

Motion granted.

mended the matter be referred to Wal-Mart's legal team, who, according to HR Manager Gottwald, ultimately made the final decision to terminate Benson. In short, whether or not Bradstreet knew of the contents of the e-mail is not fatal to Benson at this stage.

[25] With the *prima facie* case in Benson's favor, we move on to the legitimate non-discriminatory reason and pretext aspects of the claim. Because we have already concluded that Benson can sustain an argument that Wal-Mart's proffered reason for her termination was pretextual, we need not go any further.

#### IV. Conclusion

For the foregoing reasons, we reverse the district court's judgment entered on April 3, 2020, and remand for further proceedings consistent with this opinion. Costs awarded to Benson.



UNITED STATES of America,

Appellee,

v.

Ivan CRUZ-RIVERA, Defendant,  
Appellant.

e-mail, Benson testified that she had sent it to him. Whether HR Manager Gottwald read the e-mail or not is a matter of credibility best suited for a jury. See *Ahmed v. Johnson*, 752 F.3d 490, 502 (1st Cir. 2014) ("Determining which view more accurately reflects reality requires factfinding and credibility judgments

United States of America, Appellee,

v.

Carlos Jimenez, Defendant, Appellant.

No. 19-1465, No. 19-1509

United States Court of Appeals,  
First Circuit.

September 15, 2021

**Background:** Defendants were convicted in the United States District Court for the District of Massachusetts, Timothy S. Hillman, J., of conspiracy to possess with intent to distribute and to distribute one hundred grams or more of heroin and one count of possession with intent to distribute and distribution of heroin, and they appealed.

**Holdings:** The Court of Appeals, Katzmann, United States Court of International Trade, sitting by designation, held that:

- (1) state trooper had reasonable suspicion of a drug offense that supported warrantless traffic stop of defendants' vehicle;
- (2) after initial traffic stop of defendants, trooper's reasonable suspicion that defendants were involved in drug trafficking had ripened into probable cause, such that the resulting warrantless search of defendants' vehicle was permissible;
- (3) officer's traffic stop of defendants' vehicle lacked the coercive element necessary to convert it into a *de facto* arrest or custodial interrogation for purposes of *Miranda*;

that are properly the task of a jury."); *United States v. Sepúlveda-Hernández*, 752 F.3d 22, 30 (1st Cir. 2014) ("[I]t is the jury's role—not the role of an appellate court—to determine the weight to be given to a witness's testimony and to assess the witness's credibility.").

- (4) district court did not violate confrontation clause by limiting defendant's cross-examination of witness; and
- (5) district court did not misstate the law when responding to question regarding conspiracy that was asked by jury during deliberations.

Affirmed.

#### **1. Criminal Law $\Leftrightarrow$ 1158.12**

On appeal, Court of Appeals rehearses the facts as found by the district court (explicitly or implicitly) at the suppression hearing, consistent with record support.

#### **2. Criminal Law $\Leftrightarrow$ 1144.12, 1158.12**

Court of Appeals reviews suppression court's findings of fact for clear error and accepts all reasonable inferences that it has drawn.

#### **3. Criminal Law $\Leftrightarrow$ 1139**

Court of Appeals reviews suppression court's legal conclusions *de novo*.

#### **4. Criminal Law $\Leftrightarrow$ 1139**

When Court of Appeals reviews district court's suppression ruling, the district court's legal conclusions, including its answers to the ultimate questions of reasonable suspicion and probable cause to make a warrantless search, are reviewed *de novo*. U.S. Const. Amend. 4.

#### **5. Criminal Law $\Leftrightarrow$ 1139, 1158.13**

When Court of Appeals reviews whether defendant was in custody for *Miranda* purposes, factual questions are reviewed for clear error and the ultimate legal question *de novo*.

#### **6. Criminal Law $\Leftrightarrow$ 1134.60, 1144.12**

Court of Appeals reviews the record evidence in the light most favorable to district court's suppression ruling and can affirm on any basis apparent in the record.

#### **7. Criminal Law $\Leftrightarrow$ 1134.49(4)**

When reviewing district court's suppression ruling, Court of Appeals must proceed circumspectly and with regard for district court's superior vantage point.

#### **8. Searches and Seizures $\Leftrightarrow$ 62**

Automobile exception to the Fourth Amendment's warrant requirement permits officers to seize and search an automobile prior to obtaining a warrant when they have probable cause to believe that the automobile contains contraband. U.S. Const. Amend. 4.

#### **9. Searches and Seizures $\Leftrightarrow$ 40.1**

Probable cause to search exists when the facts and circumstances as to which police have reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that evidence of a crime will be found. U.S. Const. Amend. 4.

#### **10. Searches and Seizures $\Leftrightarrow$ 62**

Warrantless search of a motor vehicle pursuant to automobile exception to warrant requirement requires particular facts indicating that, at the time of search, the vehicle or a container within it carried contraband, evidence of crime, or other seizable matter. U.S. Const. Amend. 4.

#### **11. Arrest $\Leftrightarrow$ 60.4(1)**

Temporary detention of an individual during a vehicle stop by police constitutes a "seizure" to which the protections of the Fourth Amendment apply. U.S. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

#### **12. Automobiles $\Leftrightarrow$ 349(2.1, 14.1)**

Warrantless traffic stop must not be unreasonable under the circumstances. U.S. Const. Amend. 4.

**13. Automobiles** **349(2.1)**

Decision by police to stop an automobile without warrant is reasonable when the police have probable cause to believe that a traffic violation has occurred. U.S. Const. Amend. 4.

**14. Automobiles** **349(1)**

Warrantless traffic stop is a relatively brief encounter intended to address the traffic violation that warranted the stop. U.S. Const. Amend. 4.

**15. Automobiles** **349(18)**

Warrantless traffic stop may include checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. U.S. Const. Amend. 4.

**16. Automobiles** **349(17)**

Although relatively brief, warrantless traffic stop can be extended where there is reasonable suspicion of further criminal wrongdoing. U.S. Const. Amend. 4.

**17. Automobiles** **349(2.1)**

There is no simple, mechanical formula for reasonable suspicion for warrantless traffic stop. U.S. Const. Amend. 4.

**18. Automobiles** **349(2.1)**

Reasonable suspicion for warrantless traffic stop is less than probable cause and more than a naked hunch. U.S. Const. Amend. 4.

**19. Automobiles** **349(1)**

Courts must gauge presence of reasonable suspicion for warrantless traffic stop in a commonsense, case-by-case way, taking in the whole picture. U.S. Const. Amend. 4.

**20. Automobiles** **349(2.1)**

Reasonable suspicion for warrantless traffic stop is based on the totality of the circumstances. U.S. Const. Amend. 4.

**21. Arrest** **63.4(11)****Searches and Seizures** **41**

Reasonable suspicion or probable cause for search or seizure may be based on collective knowledge of several officers. U.S. Const. Amend. 4.

**22. Arrest** **63.4(11)****Searches and Seizures** **41**

When determining if there is reasonable suspicion or probable cause for search or seizure, courts look to the collective information known to the law enforcement officers participating in the investigation, rather than isolating the information known by the individual arresting officer. U.S. Const. Amend. 4.

**23. Criminal Law** **1134.60**

Court of Appeals can sustain district court's ruling based on alternate grounds not articulated by the district court, so long as there is persuasive support for that analysis in the record.

**24. Automobiles** **349(2.1), 349.5(3)**

Officer can stop a car without a warrant if he sees a driver commit a traffic offense, even if the stop is just an excuse to investigate something else. U.S. Const. Amend. 4.

**25. Arrest** **60.3(2)**

State trooper had reasonable suspicion of a drug offense that supported warrantless stop of defendants' vehicle; trooper's colleague had specifically told trooper that defendants' vehicle came from drug distribution area and likely had been involved in drug transaction, trooper's knowledge of this information was relevant to his assessment of traffic stop and his investigation therefrom, trooper's training and experience in narcotics investigations and in detecting indicators of criminal activity informed his judgments, trooper

knew that defendants were traveling on known drug-trafficking thoroughfare and were coming from drug distribution area, and upon approaching vehicle, trooper witnessed both defendants acting visibly nervous and that nervousness persisted throughout the stop. U.S. Const. Amend. 4.

**26. Automobiles**  $\Leftrightarrow$ 349(2.1)

When determining if officer had reasonable suspicion for warrantless traffic stop, appellate court's task is not to perform a "divide-and-conquer analysis," which approach is counter to appellate court's charge to look to the totality of the circumstances when determining reasonable suspicion. U.S. Const. Amend. 4.

**27. Automobiles**  $\Leftrightarrow$ 349.5(7)

After initial traffic stop of defendants, state trooper's reasonable suspicion that defendants were involved in drug trafficking had ripened into probable cause, such that the resulting warrantless search of defendants' vehicle was permissible; in questioning defendants, trooper was shown bag in the car, but bag revealed not the \$1,000 that defendants stated was present in the vehicle, but tens of thousands of dollars in bundles secured with elastic bands that, based on his training and experience, trooper associated with narcotics trafficking. U.S. Const. Amend. 4.

**28. Arrest**  $\Leftrightarrow$ 60.2(9), 60.3(1)

Reasonable suspicion for vehicle stop is considered based on the totality of the circumstances presented to a law enforcement officer, with measurable deference given to the officer's view of the situation, and this includes his knowledge of the vehicle based on statements made directly to him by another officer and his own observations of defendant's behavior. U.S. Const. Amend. 4.

**29. Criminal Law**  $\Leftrightarrow$ 411.93

Incriminating statements obtained during a custodial interrogation, where a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, must be excluded from criminal prosecutions unless defendant has waived the Fifth Amendment privilege after being warned of the right to remain silent. U.S. Const. Amend. 5.

**30. Criminal Law**  $\Leftrightarrow$ 411.23

Custodial inquiry, for purposes of *Miranda*, is an objective, suspect-focused examination that is informed by court's assessment of the reasonableness of the detaining officer's actions in response to developing conditions.

**31. Criminal Law**  $\Leftrightarrow$ 411.23

A finding of custody, for purposes of *Miranda*, depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.

**32. Arrest**  $\Leftrightarrow$ 60.2(17, 20)

Where an investigatory stop is justified at its inception, it will generally not morph into a de facto arrest as long as the actions undertaken by the officers following the stop are reasonably responsive to the circumstances justifying the stop in the first place as augmented by information gleaned by the officers during the stop. U.S. Const. Amend. 4.

**33. Criminal Law**  $\Leftrightarrow$ 1134.49(3)

On appeal, appellate court's task is to determine whether the facts of a specific case indicate a situation more akin to a routine traffic stop, at which point *Miranda* warnings are not required, or indicate that detention has escalated such that suspect has been subjected to restraints comparable to those associated with a for-

mal arrest, at which point *Miranda* warnings are required.

#### 34. Criminal Law $\approx$ 411.23

Need for *Miranda* warning turns on whether defendant was in custody.

#### 35. Criminal Law $\approx$ 411.23

To ascertain whether reasonable person would have felt he was not at liberty to terminate the interrogation and leave, such that he was in custody for purposes of *Miranda*, courts look to the following factors, but no single factor dictates the outcome of court's custody analysis: whether the suspect was questioned in familiar or at least neutral surroundings; number of law enforcement officers present at scene; degree of physical restraint placed upon the suspect; and the duration and character of the interrogation.

#### 36. Criminal Law $\approx$ 411.23

Fact that highway is not *per se* police dominated in the same way that interrogation room in police station house is does not mean that highway is *per se* neutral, which is one factor for determining if police questioning of defendant on highway constitutes custody for purposes of *Miranda*.

#### 37. Criminal Law $\approx$ 411.26

Based on totality of the circumstances, officer's traffic stop of defendants' vehicle lacked the coercive element necessary to convert it into a *de facto* arrest or custodial interrogation, and because circumstances were not inherently coercive, no *Miranda* warning was required; defendants were questioned by one officer, and although one defendant was physically locked in back of state trooper's cruiser and unable to let himself out, his physical restraint was inconsequential because defendant's statements were made prior to being placed in patrol car, trooper's questioning lasted only a few minutes for each

defendant, and there was no indication that the traffic stop lasted for an inappropriately long period of time or that trooper acted with hostility toward the defendants. U.S. Const. Amend. 4.

#### 38. Criminal Law $\approx$ 411.23

Suspect's lack of freedom to go away does not necessarily mean that police questioning of suspect is custodial interrogation for purposes of *Miranda*.

#### 39. Criminal Law $\approx$ 411.23

Whether suspect's freedom of movement was curtailed is just the first step in the analysis of whether suspect was in custody for purposes of *Miranda*, not the last step.

#### 40. Criminal Law $\approx$ 411.23

When determining whether the environment in which police question suspect presents the same inherently coercive pressures as the type of police station house questioning at issue in *Miranda*, courts focus on whether a person would reasonably find the circumstances coercive enough that the concern that drove *Miranda* comes into play, namely, whether there was enough pressure on a person to sufficiently impair his free exercise of his privilege against self-incrimination. U.S. Const. Amend. 5.

#### 41. Criminal Law $\approx$ 411.23

Whether there is enough pressure on a person to sufficiently impair his free exercise of his privilege against self-incrimination is the crux of appellate court's custody analysis because *Miranda* does not apply outside the context of the inherently coercive custodial interrogations for which it was designed. U.S. Const. Amend. 5.

#### 42. Criminal Law $\approx$ 411.23

Custody, for purposes of *Miranda*, must be narrowly circumscribed to effectu-

ate the precise purpose of the *Miranda* warnings.

**43. Criminal Law**  $\Leftrightarrow$ 1139

The Court of Appeals considers *de novo* whether the strictures of the confrontation clause have been met. U.S. Const. Amend. 6.

**44. Criminal Law**  $\Leftrightarrow$ 1153.18(2)

Where there has been no violation of the confrontation clause, the Court of Appeals reviews limitations placed on cross-examination for an abuse of discretion. U.S. Const. Amend. 6.

**45. Criminal Law**  $\Leftrightarrow$ 662.7

Sixth Amendment's confrontation clause protects the right of defendants to cross-examine witnesses who testify against them, within reasonable limits to avoid harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant. U.S. Const. Amend. 6.

**46. Criminal Law**  $\Leftrightarrow$ 662.7

Violation of the confrontation clause exists where a jury might have received a significantly different impression of the witness's testimony or credibility if the defendant had been permitted full cross-examination. U.S. Const. Amend. 6.

**47. Criminal Law**  $\Leftrightarrow$ 662.7

District court did not violate confrontation clause by limiting defendant's cross-examination of witness to avoid witness testifying about the contents of sentencing guidelines or his out-of-court conversations and to prevent potential juror confusion; defendant was able to elicit witness's testimony about his understanding that his cooperation with investigators could result in reduced sentence for his drug-trafficking offenses, and in closing argument, defendant argued that jury should not find witness's testimony credible, in part, because

witness knew that his cooperation with the government would result in him getting a lesser sentence, and thus, there was no harm to defendant because witness's potential bias was exposed through his testimony even though defendant did not get to ask every question desired. U.S. Const. Amend. 6.

**48. Criminal Law**  $\Leftrightarrow$ 662.7

**Witnesses**  $\Leftrightarrow$ 372(2)

District court's concern regarding the potential for juror confusion did not constitute an abuse of discretion, or violate Confrontation Clause, when determining if defendant's cross-examination of witness, whose cooperation with the government resulted in him getting a lesser sentence, should be limited to avoid witness testifying about the contents of the sentencing guidelines or his out-of-court conversations. U.S. Const. Amend. 6.

**49. Criminal Law**  $\Leftrightarrow$ 2089, 2103

In making closing arguments, a prosecutor cannot refer to facts not in evidence, but may ask jurors to draw reasonable inferences from the evidence.

**50. Criminal Law**  $\Leftrightarrow$ 1139

Where a timely objection is lodged to a statement made by the government in closing argument, the Court of Appeals reviews *de novo* whether the challenged portion of the government's closing argument is improper and, if so, whether it is harmful.

**51. Criminal Law**  $\Leftrightarrow$ 1171.1(2.1)

Court of Appeals may reverse defendant's convictions on the basis of the prosecutor's remarks during closing argument only if prosecutor's comments are both inappropriate and prejudicial.

**52. Criminal Law**  $\Leftrightarrow$ 1171.1(2.1)

When examining whether prosecutor's remarks during closing argument so poi-

sioned the well that the trial's outcome was likely affected, thus warranting a new trial, appellate courts examine: (1) whether prosecutor's conduct was isolated and/or deliberate; (2) whether trial court gave a strong and explicit cautionary instruction; and (3) whether it is likely that any prejudice surviving trial court's cautionary instruction could have affected outcome of the case.

#### 53. Criminal Law $\approx$ 2089

Prosecutor's statement during closing argument regarding witness's reference to "centro," which witness claimed was a nickname for a person based on where that individual lived, did not introduce facts not in evidence, and thus, prosecutor's statement was not improper; during closing, prosecutor's stating that witness was talking about "centro," not the center translation, but "centro," a location, a place for drug dealing, a person, was a summary of witness's testimony that was not clearly incorrect in a way that rose to the level of introducing facts not in evidence.

#### 54. Criminal Law $\approx$ 2083, 2089

Caption on video aide that was used by prosecutor during closing argument was a summary of witness's testimony and did not refer to facts not in evidence, and thus, there was no error; video aide was from government's surveillance of a controlled purchase by confidential source from the witness who was a known heroin dealer.

#### 55. Criminal Law $\approx$ 2089, 2111

Prosecutor's suggestion to the jury during closing argument that it interpreted witness's testimony regarding "the truck from there" as a reference to drugs coming from Puerto Rico was not a statement of facts not in evidence, or a statement of fact at all, and instead, prosecutor was asking jury to make an inference based on the evidence that was presented

in drug prosecution, namely that witness was a known heroin dealer who rented garage bay and that defendant claimed to have gone with witness to find truck, and as such, there was no error by prosecutor.

#### 56. Criminal Law $\approx$ 2095

Prosecutor's contention during closing argument in drug prosecution that the jury should conclude that witness, who was known heroin dealer, and defendants had not left witness's garage, as one of the defendants claimed, based on surveillance team's observations was not clearly a misstatement of the facts in evidence and, thus, was not improper; while the government's evidence identified the presence of two trucks at witness's garages during the surveillance, the government addressed this confusion through additional questioning of the testifying officers to clarify that the surveillance team confirmed that the second truck spotted was not witness's truck as defendant claimed.

#### 57. Criminal Law $\approx$ 1171.1(3), 2200

Even if it was a misstatement of the facts in evidence, prosecutor's contention during closing argument in drug prosecution that the jury should conclude that witness, who was a known heroin dealer, and defendants had not left witness's garage, as one of the defendants claimed, based on surveillance team's observations was harmless; this one arguable misstatement was isolated, district court instructed the jury that closing arguments were not evidence, and prosecutor's statement was far from so poisoning the well as to warrant a new trial.

#### 58. Criminal Law $\approx$ 863(2)

District court did not misstate the law when responding to question regarding conspiracy that was asked by jury during deliberations, and after initially being instructed on the elements of conspiracy of

and possession with intent to distribute at least 100 grams of heroin, because the jury's question was inherently fact-bound; during deliberations, jury asked whether defendant was willful participant in conspiracy agreement if defendant was aware that money confiscated during traffic stop was illegal drug money and defendant participated in the attempted retrieval of the confiscated money, district court sufficiently explained to jury that a finding of conspiracy depended on its factual findings and did not abuse its discretion in answering the jury's question, and district court correctly exercised caution when answering question that might have been dispositive to the jury's decision.

**59. Criminal Law**  $\Leftrightarrow$ 1139, 1152.21(1)

When evaluating preserved challenges to district court's instructions, Court of Appeals considers *de novo* whether the district court misstated the law and reviews for abuse of discretion whether the district court adequately explained the law.

**60. Criminal Law**  $\Leftrightarrow$ 863(2)

In response to jury's question during deliberations, district court's answer that wades into the facts impermissibly intrudes on the jury's constitutional responsibility to determine the facts and to apply the law to those facts.

**61. Controlled Substances**  $\Leftrightarrow$ 100(2)

**Sentencing and Punishment**  $\Leftrightarrow$ 66

Plain language of statute mandating a five-year minimum sentence for drug offense involving 100 grams or more of heroin requires the government to prove only that the offense involved a particular type and quantity of drug, not that the defendant knew that he was distributing that particular drug type and quantity. Comprehensive Drug Abuse Prevention and

Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(B).

**62. Courts**  $\Leftrightarrow$ 89

The law of precedent is bedrock to judicial system of adjudication.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Timothy S. Hillman, U.S. District Judge]

Syrie D. Fried, with whom Good Schneider Cormier & Fried was on brief, for appellant Cruz-Rivera.

Jamesa J. Drake, with whom Drake Law LLC was on brief, for appellant Jimenez.

Andrew C. Noll, Criminal Division, Appellate Section, U.S. Department of Justice, with whom Robert A. Zink, Acting Deputy Assistant Attorney General, Michelle L. Dineen Jerrett and Donald C. Lockhart, Assistant United States Attorneys, Brian C. Rabbitt, Acting Assistant Attorney General, and Andrew E. Lelling, United States Attorney, were on brief, for appellee.

Before Howard, Chief Judge, Thompson, Circuit Judge, and Katzmann,\* Judge.

KATZMANN, Judge.

A jury convicted defendants Ivan Cruz-Rivera ("Cruz-Rivera") and Carlos Jimenez ("Jimenez") each of one count of conspiracy to possess with intent to distribute and to distribute one hundred grams or more of heroin, in violation of 21 U.S.C. § 846, and one count of possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. § 841(a)(1). Defendants now appeal, assigning error by the district court. Before us are claims that (1) evidence obtained during a traffic stop should have been suppressed, (2) the

\* Of the United States Court of International

Trade, sitting by designation.

district court erroneously limited cross-examination of a witness for the government at trial, (3) the prosecutor unfairly misconstrued or misstated facts not in evidence during closing arguments, (4) the district court incorrectly instructed the jury in response to a question, and (5) the district court erred in applying the mandatory minimum sentence to Jimenez. We affirm.

## I. BACKGROUND

### A. Facts

[1] The facts are largely undisputed. "We rehearse the facts as found by the district court (explicitly or implicitly) at the suppression hearing, consistent with record support." United States v. Arnott, 758 F.3d 40, 41 (1st Cir. 2014) (citing United States v. Gonzalez, 609 F.3d 13, 15 (1st Cir. 2010)). On October 4, 2013, the DEA's Central Massachusetts Federal Drug Task Force set up a surveillance of a controlled purchase by a confidential source at 105-107 Union Street in Leominster, Massachusetts, a property with several individual garage bays, as part of an investigation into heroin distribution in the Worcester, Massachusetts area. Equipped with audio-visual recording equipment, body- and dash-cams, officers witnessed Jimenez, accompanied by Cruz-Rivera, drive to the Union Street garages in a gray Lexus. There, according to the government, they visited Segundo Gutierrez, a known heroin dealer in Central Massachusetts, who rented a garage bay at Union Street. Cruz-Rivera and Gutierrez exchanged messages and phone calls on October 4, and in the days prior.

Earlier on October 4, a confidential source working with the Task Force visited Gutierrez's garage bay seeking to purchase heroin. Gutierrez told the source that he did not have heroin but would a short time later. The confidential source left the garage. Task Force agents then

witnessed Gutierrez wave a gray Lexus with a New Jersey license plate into the Union Street garages. The men spent nearly two hours at the garage, and left shortly after 2:00 p.m. During this time, several other cars came and went from the Union Street garages. Upon exiting the Union Street garages, Gutierrez directed the gray Lexus towards the highway. The confidential source then returned to the garage, where Gutierrez sold him over 125 grams of heroin in exchange for \$7,500.

An officer on the surveillance team, Massachusetts State Trooper Jake Vitale, followed the Lexus after it left the Union Street garages in the officer's unmarked vehicle. Vitale communicated with the lead officer of the DEA investigation and received instructions to stop the Lexus via a "walled-off" stop, a stop not based on any information connected to the visit at the Union Street garages. Trooper Vitale followed the Lexus for an hour until it approached Route 84, and then, via the Massachusetts State Police, informed State Trooper David DiCrescenzo of his pursuit and investigation at the Union Street garages. Trooper Vitale instructed Trooper DiCrescenzo to stop the vehicle in order to identify the occupants, but to do so based on his own development of probable cause. Trooper DiCrescenzo was trained to conduct motor vehicle stops and criminal investigations and to detect indicators of criminal activity, and had conducted a number of narcotics investigations. After waiting in the median of Route 84 -- a road which Trooper DiCrescenzo testified was a known drug-trafficking thoroughfare, -- he spotted and followed the Lexus until, at about 3:15 p.m., he observed the Lexus change lanes without using a turn signal within two to three lengths of a vehicle in the middle lane. Trooper DiCrescenzo then stopped the Lexus and identified the driver as Jimenez with Cruz-Rivera as passen-

ger. Trooper DiCrescenzo then questioned defendants, during which time he witnessed defendants acting “extremely nervous” and “physically shaking.” After running the license plate of the Lexus and driver’s license numbers for defendants in state databases, Trooper DiCrescenzo asked Jimenez to step out of the vehicle for further questioning by a guardrail, which lasted a couple of minutes. The vehicle was coming from a known drug distribution area. Jimenez provided inconsistent testimony about his whereabouts that day and explained that he and Cruz-Rivera had cash in the car for the purpose of purchasing a truck. After he finished questioning Jimenez, Trooper DiCrescenzo placed Jimenez in the back of his patrol car, informing him that it was for his safety (as well as for Trooper DiCrescenzo’s safety) and that he was not under arrest. Trooper DiCrescenzo then asked Cruz-Rivera to step out of the car for further questioning, part of which was done via translation by another, Spanish-speaking officer over the phone. Cruz-Rivera indicated that there was \$1,000 in the car, and pointed Trooper DiCrescenzo to a black bag on the back seat, in which Trooper DiCrescenzo then witnessed bundles of cash secured with elastic bands. Jimenez then consented to a search of the vehicle. Upon searching the Lexus, officers discovered \$44,000 in bundles of cash and three cell phones. Other officers arrived at the scene to assist with the search, including a K-9 unit. The officers seized the black bag containing the cash and one cell phone, and two additional cell phones found under the front passenger seat. Cruz-Rivera and Jimenez were then permitted to leave in the Lexus. Gutierrez and Jimenez exchanged several phone calls that afternoon and evening. The next day, Cruz-Rivera and Jimenez went to retrieve a receipt for the \$44,000 in cash seized during the stop.

## B. Proceedings

In June 2016, Cruz-Rivera and Jimenez were charged by a grand jury each of one count of conspiracy to possess with intent to distribute and to distribute heroin, in violation of 21 U.S.C. § 846, and one count of possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. § 841(a)(1). Prior to trial, Cruz-Rivera and Jimenez each moved to suppress evidence seized and statements made to law enforcement officers during the October 4, 2013, traffic stop. The district court denied the motions to suppress. The case proceeded to trial where the jury heard testimony from several witnessing officers and Gutierrez, and reviewed body- and dash-cam footage and cell phone records. Cruz-Rivera also testified in his defense, claiming that the money seized by police was his own and that his visit to Gutierrez was for the purposes of finding a truck that he could purchase. The parties then presented closing arguments and the jury deliberated, after which it found both Cruz-Rivera and Jimenez guilty of conspiracy involving one hundred grams or more of heroin (count 1) and possession with intent to distribute heroin (count 2). The district court sentenced Cruz-Rivera to seventy-six months of imprisonment, followed by supervised release, and Jimenez to sixty months of imprisonment, followed by supervised release.

## II. DISCUSSION

[2, 3] We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We review the district court’s findings of fact for clear error and accept all reasonable inferences that it has drawn. See United States v. Coombs, 857 F.3d 439, 445–46 (1st Cir. 2017) (citing United States v. Zapata, 18 F.3d 971, 975 (1st Cir. 1994); then citing United States v. Paneto, 661 F.3d 709, 711 (1st Cir. 2011)). We recount

the facts here “in the light most favorable to the suppression ruling” as one of the challenges addressed in this opinion is to the admissibility of certain key evidence. Arnott, 758 F.3d at 43 (first citing United States v. McGregor, 650 F.3d 813, 823–24 (1st Cir. 2011); and then citing United States v. Owens, 167 F.3d 739, 743 (1st Cir. 1999)). We review the district court’s legal conclusions de novo. Id.

#### A. Suppression Ruling

[4–7] First, defendants challenge the district court’s pre-trial rulings denying their motions to suppress evidence. Specifically, they challenge the admission of evidence collected as a result of the search of the car -- the bundled cash and cell phones -- and challenge the admission of their statements during the traffic stop into evidence. When reviewing a suppression ruling, the district court’s findings of fact are reviewed for clear error and “the court’s legal conclusions, including its answers to ‘the ultimate questions of reasonable suspicion and probable cause to make a warrantless search’” are reviewed de novo. Id. (quoting Ornelas v. United States, 517 U.S. 690, 691, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)). Similarly, when reviewing whether a defendant was in custody for Miranda purposes, factual questions are reviewed for clear error and the ultimate legal question de novo. United States v. Campbell, 741 F.3d 251, 265 (1st Cir. 2013) (citing United States v. Hughes, 640 F.3d 428, 435

(1st Cir. 2011)). Furthermore, we review “the record evidence in the light most favorable to the suppression ruling,” and we can affirm “on any basis apparent in the record.” Arnott, 758 F.3d at 43. “Given the textured nature of these inquiries, appellate courts must proceed circumspectly and with regard for the district court’s superior vantage point.” United States v. Espinoza, 490 F.3d 41, 46 (1st Cir. 2007) (citing Zapata, 18 F.3d at 975 (instructing that, when reviewing the outcome of a motion to suppress, appellate courts must “exhibit great respect for the presider’s opportunity to hear the testimony, observe the witnesses’ demeanor, and evaluate the facts at first hand”)).

#### 1. Evidence Seized During the Traffic Stop

##### a. The district court ruling.

The district court, relying on Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), concluded that the traffic stop was lawful in nature because Trooper DiCrescenzo observed two traffic violations prior to stopping the Lexus. The district court found that “the collective knowledge doctrine provided sufficient reason to stop the motor vehicle and to search it.”<sup>1</sup> The court determined that the DEA Task Force Officers surveilling the Union Street garages possessed “ample probable cause” to believe that defendants were engaged in criminal activity,

##### 1. The court found that

[a]t the time that the Lexus was stopped, the DEA had been involved in investigation spanning over seventeen months during which six controlled purchases of heroin had taken place from an individual whom the task force believed was being supplied by Gutierrez, from the Union Street address. The CS [confidential source] went to that address and attempted to purchase 125 grams of heroin. Gutierrez told the CS that he was expecting a delivery by 1:30 p.m.

The Task Force observed him on his cell-phone giving directions, and shortly thereafter surveillance saw the Lexus enter the garages and leave 2 hours later. When the CS returned to the garage shortly after the Lexus left, he bought heroin and was told by Gutierrez that the marks on his face were from the mask that he was wearing while he processed the heroin. These facts provide ample probable cause for the stop and search.

that the car contained related drugs and money, that this knowledge was imputed to Trooper DiCrescenzo under the collective knowledge doctrine, which allowed the evidence produced by the eventual stop to be seized and admitted at trial.

**b. Basic principles.**

[8–10] The automobile exception to the Fourth Amendment’s warrant requirement permits officers to “seize and search an automobile prior to obtaining a warrant where they have probable cause to believe that the automobile contains contraband.” United States v. Silva, 742 F.3d 1, 7 (1st Cir. 2014) (first citing Robinson v. Cook, 706 F.3d 25, 31–32 (1st Cir. 2013); and then citing Florida v. White, 526 U.S. 559, 563–64, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999)). Police have probable cause to search “where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” Ornelas, 517 U.S. at 696, 116 S.Ct. 1657; United States v. Azor, 881 F.3d 1, 8 (1st Cir. 2017). “Probable cause exists when ‘the facts and circumstances as to which police have reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that evidence of a crime will be found.’” Silva, 742 F.3d at 7 (quoting Robinson, 706 F.3d at 32). Search of a motor vehicle requires “particular facts indicating that, at the time of search, the vehicle or a container within it carried contraband, evidence of crime, or other seizable matter.” United States v. Infante-Ruiz, 13 F.3d 498, 502 (1st Cir. 1994).

[11–20] A temporary detention of an individual during a traffic stop by police constitutes a seizure to which the protections of the Fourth Amendment apply. Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (first

citing United States v. Martinez-Fuerte, 428 U.S. 543, 556–58, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); then citing United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); and then citing Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). A warrantless traffic stop must “not be ‘unreasonable’ under the circumstances.” Whren, 517 U.S. at 810, 116 S.Ct. 1769. “[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” Id. (citing Prouse, 440 U.S. at 659, 99 S.Ct. 1391). A traffic stop is a “relatively brief encounter” intended to “address the traffic violation that warranted the stop” and may include “checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.” Rodriguez v. United States, 575 U.S. 348, 354–55, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015) (first quoting Knowles v. Iowa, 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998); then citing Illinois v. Caballes, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); then citing Prouse, 440 U.S. at 658–60, 99 S.Ct. 1391). However, such a stop can be extended where there is reasonable suspicion of further criminal wrongdoing. United States v. Lee, 317 F.3d 26, 33 (1st Cir. 2003) (citing United States v. Velez-Saldana, 252 F.3d 49, 53 (1st Cir. 2001); United States v. Martinez-Molina, 64 F.3d 719, 727–30 (1st Cir. 1995)). “No simple, mechanical formula tells us what reasonable suspicion is, though we know that it is less than probable cause and more than a naked hunch . . . . [C]ourts must gauge its presence in a commonsense, case-by-case way, taking in the whole picture.” McGregor, 650 F.3d at 821. We have said that the reasonableness “determination . . . entails a measurable degree of deference to the perceptions of

experienced law enforcement officers.” United States v. Ruidiaz, 529 F.3d 25, 29 (1st Cir. 2008) (citing Ornelas, 517 U.S. at 699, 116 S.Ct. 1657; United States v. Chhien, 266 F.3d 1, 8 (1st Cir. 2001)). Reasonable suspicion is based on the totality of the circumstances. Florida v. Harris, 568 U.S. 237, 244, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013); Infante-Ruiz, 13 F.3d at 502.

[21, 22] Reasonable suspicion or probable cause may be based on the collective knowledge of several officers. United States v. Hensley, 469 U.S. 221, 231–32, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985); United States v. Barnes, 506 F.3d 58, 62–63 (1st Cir. 2007). In such cases, we “look to the collective information known to the law enforcement officers participating in the investigation rather than isolat[ing] the information known by the individual arresting officer.” Azor, 881 F.3d at 8 (citing Illinois v. Andreas, 463 U.S. 765, 772 n.5, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983); United States v. Fiasconaro, 315 F.3d 28, 36 (1st Cir. 2002)); Barnes, 506 F.3d at 62.

### c. Analysis.

[23] Both Cruz-Rivera and Jimenez argue that the district court’s conclusion that probable cause supported the traffic stop, search, and detention of defendants was erroneous, viewed either through Trooper DiCrescenzo’s own reasonable suspicion during the traffic stop or when considered in conjunction with the collective knowledge imparted to Trooper DiCrescenzo. Thus, they each contend that the physical evidence collected and statements made during the stop should have been suppressed. The government counters that the district court did not err and that in any event there was an alternative ground to sustain the denial of the motion to suppress -- namely, that the reasonable suspicion that supported the traffic stop evolved

and ripened into probable cause to search the vehicle as Trooper DiCrescenzo evaluated defendants’ actions and responses during the stop. We agree with the outcome reached by the district court, but for reasons different from those articulated in the suppression decision. Given that we can sustain a ruling based on alternate grounds not articulated by the trial court, so long as there is persuasive support for that analysis in the record, we will do so here, particularly where that route is more direct to the “same destination.” Arnott, 758 F.3d at 43.

[24] First, defendants’ argument that it is important to consider the differences between the “walled-off” stop here and a traffic stop that begins without an “investigatory motive,” is unavailing. Under our case law, as defendants acknowledge, “[a]n officer can stop a car if he sees a driver commit a traffic offense, even if the stop is just an excuse to investigate something else.” McGregor, 650 F.3d at 820 (citing Whren, 517 U.S. at 810, 116 S.Ct. 1769); see also id. at 822 (“[C]ourts do not ‘plumb[ ]’ an officer’s ‘actual motive’ in performing a reasonable-suspicion analysis.” (second alteration in original) (quoting Bolton v. Taylor, 367 F.3d 5, 7 (1st Cir. 2004))); Ruidiaz, 529 F.3d at 29 (reasonableness in the traffic-stop context is “not dependent on an individual officer’s subjective motives”). Defendants acknowledge that Trooper DiCrescenzo had a sufficient basis to initiate the traffic stop based on the traffic violation.

[25, 26] Regardless of the collective knowledge of all officers involved, Trooper DiCrescenzo alone had reasonable suspicion of a drug offense from the outset of the traffic stop because Trooper Vitale specifically told him that the vehicle came from Leominster and likely had been involved in a drug transaction. Trooper DiCrescenzo’s knowledge of this information

was relevant to his assessment of the traffic stop and his investigation therefrom. His training and experience in narcotics investigations and in detecting indicators of criminal activity informed his judgments, and, as noted, we give weight to them accordingly. See Ruidíaz, 529 F.3d at 29. While every case turns on its own facts, we are informed by our decisions which have identified factual elements similar to those present here in affirming reasonable suspicion determinations. As has been noted, Trooper DiCrescenzo knew that defendants were travelling on a known drug-trafficking thoroughfare and were coming from a drug distribution area. Upon approaching the vehicle, Trooper DiCrescenzo witnessed both defendants acting visibly nervous, and Jimenez's hands "physically shaking." Defendants were more nervous than ordinary motorists, and that nervousness persisted throughout the stop. See United States v. Dion, 859 F.3d 114, 126-27 (1st Cir. 2017) (pointing to a defendant's persistent nervousness, odd travel route and stated purpose of travel along a drug-trafficking corridor to support reasonable suspicion determination, and collecting cases doing the same); Arnott, 758 F.3d at 44-45 (affirming determination that reasonable suspicion arose when a suspected drug dealer was monitored for a few weeks, an officer was told to undertake a traffic stop after an apparent drug purchase, and the driver appeared "unduly nervous" and his "hands were shaking"). Furthermore, Trooper DiCrescenzo's run of Jimenez's driver's license and license plate showed that the license had also been run by the Worcester Police Department, consistent with Trooper Vitale's information about the vehicle's earlier whereabouts and contrary to Jimenez's statement at the beginning of the traffic stop that defendants had been visiting family in Lawrence. Upon questioning Jimenez outside the Lexus, Trooper DiCrescenzo

learned that Jimenez, providing inconsistent answers, first could not name the members of his family that he claimed to have visited and then claimed that he and Cruz-Rivera were in Massachusetts to buy a truck for which there was cash in the car. See United States v. Clark, 879 F.3d 1, 5 (1st Cir. 2018) (affirming reasonable suspicion where defendant provided dates of birth that were "inconsistent with" initial date provided to officer); United States v. Molina-Gómez, 781 F.3d 13, 20 (1st Cir. 2015) (affirming reasonable suspicion where defendant "could not remember the last name" of a "friend he was visiting"); United States v. Lamela, 942 F.2d 100, 102 (1st Cir. 1991) (affirming reasonable suspicion where defendant provided "inconsistent responses to routine questions relating to the purpose of his travel"). Trooper DiCrescenzo observed that the purported travel plans "were inconsistent with the normal family trip" — "a very long trip, about 200 miles to visit with a relative for two hours in Lawrence . . . [,] a known drug distribution area," only "to turn around and drive 200 miles back . . . seems strange." See United States v. Ramdihall, 859 F.3d 80, 92 (1st Cir. 2017) (relying in part on odd explanation of travel plans to support reasonable suspicion); Dion, 859 F.3d at 126-27 (same). Taken in isolation, any one of these facts would not necessarily support reasonable suspicion, see, e.g., Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), but our task is not to perform a "divide-and-conquer analysis," which would be counter to our charge to look to the totality of the circumstances, United States v. Arvizu, 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). See also Ruidíaz, 529 F.3d at 30 (observing that "a fact that is innocuous in itself may in combination with other innocuous facts take on added significance"). Thus, at this point in the stop, there was a sufficient basis for Trooper

DiCrescenzo to have reasonable suspicion of wrongdoing that supported his continued detention and questioning of defendants.

[27] Next, Trooper DiCrescenzo's further investigations ripened his reasonable suspicion into probable cause. See Martinez-Molina, 64 F.3d at 726 ("[P]robable cause is a fluid concept -- turning on the assessment of probabilities in particular factual contexts.") (quoting Illinois v. Gates, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Trooper DiCrescenzo's reasonable suspicion prompted him to pursue questioning that would allow him "to investigate potential narcotics trafficking." In questioning Cruz-Rivera, Trooper DiCrescenzo again heard that defendants had travelled only to Lawrence and was shown the black bag in the car; however, that bag revealed not the \$1,000 that Cruz-Rivera stated was present in the vehicle, but "obviously tens of thousands of dollars" in bundles secured with elastic bands that based on his training and experience Trooper DiCrescenzo associated with narcotics trafficking. Taking a reasonable and lawful measure to protect himself from possible harm, Trooper DiCrescenzo moved Cruz-Rivera to the side when he obscured his view into the bag. See United States v. Acosta-Colon, 157 F.3d 9, 18 (1st Cir. 1998) (officers "must be permitted to take measures . . . they believe reasonably necessary to protect themselves from harm, or to safeguard the security of others"). Indeed, looking at the totality of the circumstances -- as we must -- a reasonable view of the record evidence supports the conclusion that, at this point, Trooper DiCrescenzo's reasonable suspicion that defendants were involved in drug trafficking had ripened into probable cause, such that the resulting search of the vehicle -- which Trooper DiCrescenzo believed would yield evidence of criminal wrongdoing --

was permissible. See Lee, 317 F.3d at 33; id. at 32 ("Probable cause often accretes gradually as an investigation progresses . . . . [T]he circumstances giving rise to reasonable suspicion . . . and the developments that unfolded during the Terry stop furnished probable cause for the appellant's arrest."); Dion, 859 F.3d at 133 (collecting cases where probable cause provided by various facts including conflicting or inconsistent stories about travel plans, and nervousness); United States v. Maldonado, 356 F.3d 130, 137 (1st Cir. 2004) (implausible explanations and incredible travel tale supported probable cause).

[28] Defendants' attempts to explain away Trooper DiCrescenzo's basis for his reasonable suspicion and later probable cause are unsuccessful. First, as we have noted, reasonable suspicion is considered based on the totality of the circumstances presented to a law enforcement officer, Harris, 568 U.S. at 244, 133 S.Ct. 1050, with measurable deference given to the officer's view of the situation, Ruidíaz, 529 F.3d at 29. This includes his knowledge of the vehicle based on statements made directly to him by another officer and his own observations of defendants' behavior. Defendants' efforts to parse actions and statements in isolation are unavailing. See Terry, 392 U.S. at 22, 88 S.Ct. 1868 (explaining that each act may be "perhaps innocent in itself," but taken together, the acts "warranted further investigation"); see also District of Columbia v. Wesby, — U.S. —, 138 S. Ct. 577, 588, 199 L.Ed.2d 453 (2018) ("[P]robable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts."). We find unpersuasive defendants' reliance on Rodriguez v. United States, where the Court stated that if a seizure is "justified only by a police-observed traffic violation," officers may not prolong a stop "absent the reasonable suspicion ordinarily demanded

to justify detaining an individual.” 575 U.S. at 350, 355, 135 S.Ct. 1609 (emphasis added). Contrary to defendants’ claims, and taking the facts in the light most favorable to the suppression ruling, the traffic stop here was not unreasonable because, far more than suspicion of just a traffic infraction, Trooper DiCrescenzo had sufficient reasonable suspicion of criminal activity to prolong the stop based on Trooper Vitale’s statement that the vehicle had been involved in a drug transaction and subsequent investigation.

In short, we affirm the district court’s decision not to suppress evidence that resulted from the search of the vehicle because we conclude that the officer had the requisite reasonable suspicion to initiate the stop and that reasonable suspicion ripened into probable cause based on additional investigation. We find no reason to reach the applicability of the collective knowledge doctrine.

## 2. Statements Made During the Traffic Stop

Defendants also argue that, because the stop exceeded a routine traffic stop, the questioning by Trooper DiCrescenzo was a custodial interrogation requiring Miranda warnings. They contend that their statements (including Jimenez’s consent to the search of the vehicle and subsequently obtained evidence) made during the traffic stop should have been suppressed because Trooper DiCrescenzo did not administer Miranda warnings to either defendant.

Noting that “defendants argue that Trooper DiCrescenzo’s roadside conduct was a de facto arrest thus requiring the trooper to provide them with Miranda warnings[,]” the district court did not make an explicit ruling on whether those warnings were required. Observing that a Terry stop can “morph into ‘custody’ for Miranda purposes,” and setting forth the

factors that a court must consider to determine whether there was “restraint on freedom of movement associated with the formal arrest,” the court stated that “regardless of what the defendants said or did during the stop, Trooper DiCrescenzo was going to search the motor vehicle. His plan has no bearing on the question of whether the defendants were in custody.” In the district court’s view, there was sufficient probable cause to make an arrest and search of the car and, “[b]ecause there was, at a minimum, articulable and reasonable suspicion that the defendants were engaged in criminal activity, the authorities were entitled to stop the vehicle, detain the occupants, and pursue a means of investigation that was likely to confirm or dispel their suspicion.” Hence, the district court ruled defendants’ statements made during that stop should not be suppressed but were admissible at trial.

[29-32] We conclude that Miranda warnings were not required. Incriminating statements obtained during a custodial interrogation, where “a person has been taken into custody or otherwise deprived of his freedom of action in any significant way,” must be excluded from criminal prosecutions unless a defendant has waived the Fifth Amendment privilege after being warned of the right to remain silent. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The custodial inquiry is an “objective, suspect-focused” examination that is “informed by our assessment of the reasonableness of the detaining officer[s] . . . actions in response to developing conditions.” United States v. Chaney, 647 F.3d 401, 409 (1st Cir. 2011). A finding of custody “depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.” United States v. Melo, 954

F.3d 334, 340 (1st Cir. 2020) (quoting Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam)). And “[w]here an investigatory stop is justified at its inception [(and we have just observed this one was indeed justified)], it will generally not morph into a de facto arrest as long as ‘the actions undertaken by the officer[s] following the stop were reasonably responsive to the circumstances justifying the stop in the first place as augmented by information gleaned by the officer[s] during the stop.’” Chaney, 647 F.3d at 409 (quoting United States v. Trueber, 238 F.3d 79, 92 (1st Cir. 2001)).

[33] In Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Supreme Court ruled that Miranda warnings are not required in “ordinary” traffic stops. However, as we have had occasion to observe, “[n]otably, despite its holding that, generally, law enforcement officers are not required to give Miranda warnings at traffic stops, the [Berkemer] Court established no categorical rule. Indeed, it held that Miranda warnings would be required ‘as soon as a suspect’s freedom of action is curtailed to ’a degree associated with formal arrest.’” Campbell, 741 F.3d at 266 (emphasis in original) (first quoting Berkemer, 468 U.S. at 440, 104 S.Ct. 3138, and then quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam)). Our task here is, as was set forth in Campbell, “to determine whether the facts of a specific case indicate a situation more akin to a routine traffic stop, at which Miranda warnings are not required,” or indicate that detention has escalated such that “a suspect has been ‘subjected to restraints comparable to those associated with a formal arrest,’ at which point Miranda warnings are required.” Id.

(quoting Berkemer, 468 U.S. at 441, 104 S.Ct. 3138).

[34] The need for a Miranda warning turns on whether defendants here were in custody, but that determination is a two-step process. See, e.g., Melo, 954 F.3d at 339 (observing that the “inquiry into ‘whether an individual’s freedom of movement was curtailed, however, is simply the first step in the analysis, not the last,’” and “[o]nce we complete the freedom-of-movement step, we must still ask ‘the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in Miranda.’” (quoting Howes v. Fields, 565 U.S. 499, 509, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012))).

[35] For the first step, to “ascertain whether . . . a ‘reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave[,]’” Howes, 565 U.S. at 509, 132 S.Ct. 1181 (alteration in original) (quoting Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)), we look to a number of factors “relevant to this aspect of our custody analysis,” Melo, 954 F.3d at 340. These include “whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation.” Id. (quoting United States v. Masse, 816 F.2d 805, 809 (1st Cir. 1987)). In “evaluating all of the circumstances surrounding the incident . . . [,] no single element dictates the outcome of this analysis.” United States v. Jones, 187 F.3d 210, 218 (1st Cir. 1999) (quoting the Masse factors in an analysis of traffic stop and custody).

[36, 37] We turn to the application of the custodial factors. As to the first factor in our freedom of movement analysis -- whether the questioning took place in familiar or at least neutral surroundings -- we note that here it was Route 84. On this record, it seems clear that these surroundings were not familiar to the out-of-state defendants. Our case law often describes highways and roadsides as neutral. See, e.g., Jones, 187 F.3d at 218 ("Although the location apparently was not familiar to [the defendant] and the area was not well-lit, a public highway is a neutral setting that police officers are not in a position to dominate as they are, for example, an interrogation room at a jailhouse."); Berkemer, 468 U.S. at 421, 104 S.Ct. 3138 ("[T]he typical traffic stop is conducted in public, and the atmosphere surrounding it is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in Miranda and subsequent cases in which Miranda has been applied."). However, that a highway is not *per se* police-dominated in the same way that the interrogation room in a station house is does not mean that it is *per se* neutral. Where, as here, the police are controlling the situation the neutrality of the site is arguably brought into question.

With respect to the second factor -- the number of officers -- under our case law, the presence here was not excessive. For the relevant time frame, defendants were questioned by one officer, Trooper DiCrescenzo, although briefly aided by another translating officer via telephone. See, e.g., Campbell, 741 F.3d at 267 (finding four or five police officers questioning three defendants not to be a custodial interrogation); United States v. Crooker, 688 F.3d 1, 12 (1st Cir. 2012) (determining a suspect was not in custody when "no more than two agents were in direct conversation" with the suspect at one time).

Regarding the third factor, the degree of physical restraint placed on the suspects, we note that after Trooper DiCrescenzo had finished questioning Jimenez, he placed Jimenez in the back seat of his cruiser, informing him that he was not under arrest but was being placed in the vehicle for his safety (and also for the trooper's). The result was that Jimenez was physically locked in the back of the trooper's cruiser and unable to let himself out, and Cruz-Rivera, deprived of his driver, was thereby impacted. While Jimenez was in the back of the cruiser, Trooper DiCrescenzo questioned Cruz-Rivera and continued his investigation. Notably, because Jimenez's statements were made prior to being placed in the patrol car, his physical restraint is arguably inconsequential. In any event, the cases analyzing physical restraint in motor vehicle stop cases are, of course, fact dependent. See, e.g., United States v. McCarthy, 77 F.3d 522, 532 (1st Cir. 1996) (although detention issue was "exceptionally close," stop was not "needlessly intrusive" where defendant, who was placed in back of the officer's vehicle, was never handcuffed, there was no evidence that the officer ever drew a gun, and where officers informed defendant that "although he was not free to leave, he was not under arrest, and they were detaining him for investigative purposes because a car identical to his . . . had been involved in a bank robbery earlier that day"); United States v. Dunbar, 553 F.3d 48, 56 (1st Cir. 2009) ("the fact that [defendant] 'was placed in the back of a police cruiser does not elevate the detention beyond a Terry stop'") (quoting Flowers v. Fiore, 359 F.3d 24, 30 (1st Cir. 2004)); Ruidíaz, 529 F.3d at 32 ("When a Terry stop is effected in connection with a traffic violation and an officer's concern for his own safety is implicated, it is within the officer's authority to order a passenger out of the car as a security measure"; "an

officer may issue such an order as a matter of course; he does not need to have an independent fear for his safety.”) (citations omitted).

As for the final factor -- the duration and character of interrogation -- the duration was not excessive under our case law. See, e.g., United States v. Hughes, 640 F.3d 428, 437 (1st Cir. 2011) (characterizing a ninety-minute interview as “relatively short”). The questioning was complete just over a half-hour after the initiation of the stop (regardless of the longer duration of the stop in its entirety). Further, Trooper DiCrescenzo’s questioning lasted only a few minutes for each defendant. There is no testimony suggesting the trooper was hostile or made shows of force during the stop). In sum, “[t]here is no indication that the stop lasted for an inappropriately long period of time or that the officers acted with hostility toward the defendants.” Campbell, 741 F.3d at 267.

[38–42] Although we have just surveyed the various custodial factors, we need not tote up how defendants fare as to them. In this case, we need not resolve the first step question of whether defendants’ freedom-of-movement was curtailed, because even assuming arguendo that it was, we conclude that defendants do not prevail with respect to the requisite second step of the custody analysis. “[A] suspect’s lack of freedom to go away does not necessarily mean that questioning is custodial interrogation for purposes of Miranda.“ United States v. Ellison, 632 F.3d 727, 729 (1st Cir. 2010). As we have noted, “whether an individual’s freedom of movement was curtailed” is just “the first step in the analysis, not the last.” Melo, 954 F.3d at 339 (quoting Howes, 565 U.S. at 509, 132 S.Ct. 1181)). We still need to turn to “the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station

house questioning at issue in Miranda.” Id. (quoting Howes, 565 U.S. at 509, 132 S.Ct. 1181); see also Maryland v. Shatzer, 559 U.S. 98, 113, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010) (“[T]he freedom-of-movement test identifies only a necessary and not a sufficient condition for Miranda custody.”). The focus here is whether a person would reasonably find the circumstances coercive enough that the concern that drove Miranda comes into play, Ellison, 632 F.3d at 729, i.e., whether there is enough pressure on a person to sufficiently impair his free exercise of his privilege against self-incrimination. This inquiry is the crux of our analysis because Miranda “does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.” Minnesota v. Murphy, 465 U.S. 420, 430, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (quoting Roberts v. United States, 445 U.S. 552, 560, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980)); see also Campbell, 741 F.3d at 265 (quoting Murphy, 465 U.S. at 430, 104 S.Ct. 1136).

Bearing all of this in mind, the stop here, “given the facts as found by the district court, ‘lacked the coercive element necessary to convert it into something more draconian,’ based on the totality of the circumstances.” United States v. Fornia-Castillo, 408 F.3d 52, 65 (1st Cir. 2005) (quoting Lee, 317 F.3d at 32). In this regard, we are informed by comparing the circumstances before us with the many other cases where we have deemed more restrictive settings noncustodial. See, e.g., Jones, 700 F.3d at 625 (1st Cir. 2012) (“[P]olice officers may use multiple vehicles, multiple officers, handcuffs and drawn weapons without turning a Terry stop into a *de facto* arrest.”); Fornia-Cas-

tillo, 408 F.3d at 64-65 (concluding that a suspect was not in custody when a single officer stopped the suspect on a busy public road, drew his gun in a defensive position, handcuffed the suspect for ten to fifteen minutes, frisked the suspect, and questioned the suspect while he was handcuffed); United States v. Maguire, 359 F.3d 71, 79 (1st Cir. 2004) (finding, on balance, no *de facto* arrest because even though police had wrestled suspect to the ground and an officer drew his weapon, the suspect hadn't been "detained in a manner consistent with a formal arrest," the events took place on a public street during "the light of day," (quoting Trueber, 238 F.3d at 94) and no handcuffs were used); Lee, 317 F.3d at 31-32 (reasoning that even when officers drew their guns and blocked the suspect's vehicle from leaving the scene, the investigative stop did not amount to a *de facto* arrest). True, a reasonable person in either Cruz-Rivera or Jimenez's position would not have thought himself free to walk away -- it is reasonable that they would have understood "something more than a routine traffic stop was in progress" -- "[b]ut on the broad spectrum from a speeding ticket to a grilling in the squad room, the events here were . . . short of any *de facto* arrest or custodial interrogation," and, "given this, and that the circumstances were not inherently coercive, no Miranda warning was required." United States v. Teemer, 394 F.3d 59, 66 (1st Cir. 2005). In sum, while the situation certainly had some arrest-like aspects to it, a reasonable person in either defendant's position would not have believed he was under arrest. Therefore, the district court properly denied defendants'

2. Cruz-Rivera's reliance on United States v. Chhien, *supra*, is unpersuasive. While Chhien warned against the danger of a routine traffic stop being used as an excuse to interrogate an individual about unrelated suspected criminal offenses, this case falls squarely within

motion to suppress their statements made during the stop.<sup>2</sup>

### B. Cross-Examination

Next, Cruz-Rivera argues that the district court impermissibly limited questioning of Gutierrez in violation of the Confrontation Clause by not allowing full cross-examination on Gutierrez's discussions with the government regarding his plea deal and sentencing for two other federal drug offenses. During Gutierrez's cross-examination by Cruz-Rivera, the district court sustained objections by the government to limit questioning about Gutierrez's plea deal and cooperation agreements for two other drug offenses, so as to avoid him possibly recounting what his lawyers told him and thereby misleading the jury. Later, when Cruz-Rivera returned to questioning on Gutierrez's understanding of the sentencing guidelines, including attempting to question his understanding of the detailed mechanics of guideline calculations, the government again objected and, at sidebar, the district court probed whether the testimony would confuse the jury. Gutierrez then testified that he understood that his sentence was lower than the high-end of the sentencing guidelines range.

[43-46] "[W]e consider *de novo* whether the strictures of the Confrontation Clause have been met." United States v. Diaz, 670 F.3d 332, 344 (1st Cir. 2012) (quoting United States v. Vega Molina, 407 F.3d 511, 522 (1st Cir. 2005)). Where there has been no violation of the Confrontation Clause, we review limitations placed on cross-examination for an abuse of discretion. United States v. Jiménez-Bencevi,

Chhien's conclusion that an officer may conduct "[r]outine questioning . . . even when not directly related to the violations that induced the stop in the first place," such as about the driver's itinerary. 266 F.3d at 9.

788 F.3d 7, 21 (1st Cir. 2015) (citing United States v. Martínez-Vives, 475 F.3d 48, 53 (1st Cir. 2007)). The Sixth Amendment's Confrontation Clause protects the right of defendants "to cross-examine witnesses who testify against them," United States v. Casey, 825 F.3d 1, 23–24 (1st Cir. 2016), within reasonable limits to avoid "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). A violation of the Confrontation Clause exists where a jury "might have received a significantly different impression" of the witness's testimony or credibility if the defendant had been permitted full cross-examination. Id. at 680, 106 S.Ct. 1431. See also United States v. Acevedo-Hernández, 898 F.3d 150, 168 (1st Cir. 2018) (applying the harmless error rule to admission of testimony).

[47, 48] We conclude that the district court did not err in limiting cross-examination to avoid Gutierrez testifying about the contents of the sentencing guidelines or his out-of-court conversations and to prevent potential juror confusion. See Shannon v. United States, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994) ("providing jurors sentencing information ... creates a strong possibility of confusion" because the jury has "no sentencing function"). The district court's concern regarding the potential for juror confusion did not constitute an abuse of discretion. In fact, the court allowed Cruz-Rivera's questions on Gutierrez's possible bias because of his lower sentence through cooperation with the government. Defense counsel was still able to elicit Gutierrez's testimony about his understanding that his cooperation with investigators could result in a reduced sentence for his drug-trafficking offenses. Furthermore, in closing argument, Cruz-

Rivera argued that the jury should not find Gutierrez's testimony credible, in part, because he knew that his cooperation with the government would result in him getting a lesser sentence. Thus, there was no harm to Cruz-Rivera because Gutierrez's potential bias was exposed through this testimony even though Cruz-Rivera did not get to ask every question desired, therefore, Cruz-Rivera's Confrontation Clause argument fails. See Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (per curiam) ("[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."). This result is not surprising in light of our decisions in similar cases. See United States v. Luciano-Mosquera, 63 F.3d 1142, 1153 (1st Cir. 1995) (finding no Confrontation Clause violation where a district court limited testimony regarding sentencing); Jiménez-Bencevi, 788 F.3d at 21–22 (same).

We discern no abuse of discretion in the district court's limitation on Gutierrez's cross-examination by defendants.

### C. Closing Argument

Third, Cruz-Rivera argues that the prosecutor in closing argument improperly made statements that referred to facts not in evidence. According to Cruz-Rivera, the prosecutor made four erroneous statements to which he objected: (1) in describing Gutierrez's testimony, the prosecutor referred to a location associated with drug-dealing when Gutierrez's testimony indicated that the location named referred to an individual, (2) in using an audiovisual aide, the prosecution added a written caption to video evidence, (3) the prosecutor suggested the jury should interpret translated recorded statements from Gutierrez regarding "the truck from there" as a ref-

erence to drugs coming from Puerto Rico, and (4) the prosecutor argued that, had defendants gone with Gutierrez to find a truck as Cruz-Rivera claimed, the surveillance team would have seen and testified to that fact when in fact one of the investigators testified that he did see Gutierrez leave the garage with two men during the surveillance. He contends that those statements were not harmless despite the district court's instruction that closing arguments are not evidence because of the credibility determinations the jury was required to make.

[49–52] In making closing arguments, a prosecutor “cannot refer to facts not in evidence,” but may “ask jurors to draw reasonable inferences from the evidence.” United States v. Ponzo, 853 F.3d 558, 583 (1st Cir. 2017) (first citing United States v. Auch, 187 F.3d 125, 129 (1st Cir. 1999); then quoting United States v. Meadows, 571 F.3d 131, 145 (1st Cir. 2009)). Where a timely objection is lodged to a statement made by the government in closing argument, “[w]e review *de novo* whether the challenged portion of the government’s closing argument was improper and, if so, whether it was harmful.” United States v. González-Pérez, 778 F.3d 3, 19 (1st Cir. 2015) (alteration in original) (quoting United States v. Appolon, 695 F.3d 44, 66 (1st Cir. 2012)). That is to say, “we may reverse [the] convictions on the basis of the prosecutor’s remarks only if they were ‘both inappropriate and prejudicial.’” United States v. Amaro-Santiago, 824 F.3d 154, 158 (1st Cir. 2016) (quoting United States v. Matías, 707 F.3d 1, 5 (1st Cir. 2013)). We have “fashioned a three prong test for examining whether the [remarks] ‘so poisoned the well’ that the trial’s outcome was likely affected, thus warranting a new trial.” United States v. Joyner, 191 F.3d 47, 54 (1st Cir. 1999) (citing United States v. Capone, 683 F.2d 582, 586–87 (1st Cir.

1982)). “We examine: (1) whether the prosecutor’s conduct was isolated and/or deliberate; (2) whether the trial court gave a strong and explicit cautionary instruction; and (3) whether it is likely that any prejudice surviving the judge’s instruction could have affected the outcome of the case.” Id. (citing United States v. Hodge-Balwing, 952 F.2d 607, 610 (1st Cir. 1991)). We thus review the challenged remarks under the three-pronged test.

[53, 54] First, while Cruz-Rivera identifies four statements by the prosecutor that he claims introduced facts not in evidence, we disagree with those characterizations. As to the first statement, regarding Gutierrez’s reference to “Centro,” which he claimed was a nickname for a person based on where that individual lived, the prosecutor’s statement that Gutierrez “was talking about centro, not the center translation, but centro, a location, a place for drug dealing, a person,” was a summary of Gutierrez’s testimony that was not clearly incorrect in a way that rises to the level of introducing facts not in evidence. Similarly, the caption on the video evidence was a summary of Gutierrez’s testimony and did not constitute facts not in evidence.

[55] As to the prosecutor’s suggestion to the jury that it interpret Gutierrez’s testimony regarding “the truck from there” as a reference to drugs coming from Puerto Rico, this was not a statement of facts not in evidence, or a statement of fact at all. Rather, the prosecutor was asking the jury to make an inference based on the evidence that was presented. This was not an error. See Ponzo, 853 F.3d at 583.

[56, 57] Finally, the prosecutor’s contention that the jury should conclude that Gutierrez and defendants had not left the garage as Cruz-Rivera claimed based on

the surveillance team's observations comes closest to introducing facts not in evidence. While the government's evidence ambiguously identified the presence of two trucks at the Union Street garages during the surveillance, the government addressed this confusion through additional questioning of the testifying officers to clarify that the surveillance team confirmed that the second truck spotted was not Gutierrez's as Cruz-Rivera claimed. Thus, even this statement is not clearly a misstatement of the facts in evidence. In any event, this one arguable misstatement was isolated, the district court instructed the jury that closing arguments were not evidence, and the statement was far from so poisoning the well as to warrant a new trial. See Joyner, 191 F.3d at 54. Because the statement was harmless, we will not disturb the convictions on this basis.

#### D. District Court's Response to the Jury

[58] Next, Jimenez argues that the district court incorrectly instructed the jury in response to a question asked during deliberations. After initially being instructed on the elements of conspiracy of and possession with intent to distribute at least one hundred grams of heroin, the jury asked two questions regarding conspiracy. Relevant here is the second question:

If you are aware that money confiscated during a traffic stop is illegal drug money, and you participate in the attempted retrieval of the confiscated money, are you a willful participant in the conspiracy agreement?

In response, the district court instructed the jurors:

[I]t's going to be very frustrating, and I apologize, but what I'm going to ask you to do -- well, first of all, the answer is it depends, okay. And that is not the answer that I think you wanted to hear,

but it depends upon a bunch of things. It depends upon the facts as you have found them and taking these facts and applying them to the instructions on -- that I gave you on the crime of conspiracy.

Okay. Now, I wish I could be more specific than that, but I can't because the instructions are an accurate recitation of the law, and you have to take those instructions and apply them to the facts as you find them to be.

Both before and after the district court answered the jurors' question, Jimenez objected and noted that his position was that "No" was the appropriate answer. On appeal, Jimenez argues that the answer of "it depends" was legally incorrect because it either was an improper opinion on a hypothetical fact pattern or the district court erroneously instructed the jury that retrieval of the receipt for the cash confiscated during the traffic stop means that Jimenez was a co-conspirator to the narcotics crime.

[59] When evaluating preserved challenges, we consider *de novo* whether the district court misstated the law and review for abuse of discretion whether the district court adequately explained the law. United States v. Monteiro, 871 F.3d 99, 114 (1st Cir. 2017); United States v. Symonevich, 688 F.3d 12, 24 (1st Cir. 2012).

[60] We conclude that the district court did not misstate the law because the jury's question was inherently fact-bound. See United States v. Upton, 559 F.3d 3, 11 (1st Cir. 2009) ("Determining the contours of the conspiracy ordinarily is a factual matter entrusted largely to the jury."). An answer that waded into the facts would have impermissibly intruded on the jury's "constitutional responsibility" "to determine the facts" and "to apply the law to those facts." United States v. Gaudin, 515

U.S. 506, 514, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). The district court sufficiently explained to the jury that a finding of conspiracy depends on its factual findings and did not abuse its discretion in answering the jury's question. Rather, the district court correctly "exercise[d] caution" when answering a question that may have been dispositive to the jury's decision. United States v. Roberson, 459 F.3d 39, 46 (1st Cir. 2006). Accordingly, we find no merit in the claim that the district court's response to the jury warrants disturbing the convictions.

#### E. Jimenez's Sentence

Finally, Jimenez argues that the district court erred in applying the mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B)(i). Section 841(b)(1)(B) mandates a five-year minimum sentence for any violation of section 841(a) involving one hundred grams or more of heroin. At sentencing, the district court adopted the recommendation of the presentence report that Jimenez receive the mandatory minimum based on the jury's finding that Jimenez possessed or distributed one hundred grams or more of heroin. On appeal, Jimenez argues that the district court erred in applying the mandatory minimum sentence because the verdict indicates that Jimenez was convicted on an aiding and abetting theory and, thus, lacked knowledge of the drug quantity. In other words, Jimenez argues that he lacked the requisite mental state for application of the mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B)(i).

[61, 62] Jimenez's argument cannot overcome binding precedent. In United States v. Collazo-Aponte, we held that drug quantity is not "an element of the

3. As Jimenez notes, in a recent unpublished decision, a panel of this court rejected an argument that Collazo-Aponte should be re-

offense to which the mens rea requirements should apply." 281 F.3d 320, 326 (1st Cir. 2002). Instead, Section 841(b)'s "plain language" requires "the government to prove only that the offense 'involved' a particular type and quantity of drug, not that the defendant knew that he was distributing that particular drug type and quantity." Id. (citing United States v. Sheppard, 219 F.3d 766, 768 n.2, 770 (8th Cir. 2000)). As we have noted, the law of precedent is a bedrock to our system of adjudication. See United States v. Barbosa, 896 F.3d 60, 74 (1st Cir. 2018). While that doctrine admits of exceptions in very limited circumstances, defendants' arguments based on subsequent Supreme Court cases, citing principally Rehaif v. United States, — U.S. —, 139 S. Ct. 2191, 2195, 204 L.Ed.2d 594 (2019), Elonis v. United States, 575 U.S. 723, 135 S. Ct. 2001, 2009, 192 L.Ed.2d 1 (2015), and Alleyne v. United States, 570 U.S. 99, 114–15, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), do not "offer[ ] a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." Barbosa, 896 F.3d at 74.<sup>3</sup> Indeed, every other circuit to have considered whether section 841(b) required that a defendant have knowledge of the specific quantity has rejected that claim. See United States v. King, 345 F.3d 149, 152–53 (2d Cir. 2003) (per curiam); United States v. Barbosa, 271 F.3d 438, 457–58 (3d Cir. 2001); United States v. Brower, 336 F.3d 274, 276–77 (4th Cir. 2003); United States v. Gamez-Gonzalez, 319 F.3d 695, 699–700 (5th Cir. 2003) (dictum); United States v. Villarce, 323 F.3d 435, 438–39 (6th Cir. 2003); United States v. Carrera, 259 F.3d 818, 830 (7th Cir. 2001); Sheppard, 219 F.3d at 768 n.2; United States v. Collazo,

visited and overturned. See United States v. Mejia-Romero, 822 Fed. App'x 1, 3 (1st Cir. 2020) (unpublished).

984 F.3d 1308, 1326-29 (9th Cir. 2021) (en banc); United States v. Briseno, 163 F. App'x 658, 665-66 (10th Cir. 2006) (unpublished); United States v. Sanders, 668 F.3d 1298, 1310 (11th Cir. 2012) (per curiam); United States v. Branham, 515 F.3d 1268, 1275-76 (D.C. Cir. 2008). We conclude that the holding of Collazo-Aponte, that “the government [must] prove only that the offense ‘involved’ a particular type and quantity of [a proscribed] drug, not that the defendant knew that he was distributing that particular drug type and quantity,” controls our review of convictions on three drug-trafficking counts. 281 F.3d at 326.<sup>4</sup> We affirm the district court’s application of the mandatory sentencing guidelines on that basis.

### III. CONCLUSION

For the reasons stated above, the judgments of conviction are **affirmed**.



James ROBINSON, on behalf of  
himself and all others similarly  
situated, Plaintiff, Appellee,

v.

NATIONAL STUDENT  
CLEARINGHOUSE, Defendant,  
Appellee,

4. Jimenez suggests that the jury's determination on the conspiracy count that one hundred grams of heroin was not foreseeable to him necessarily meant that he lacked requisite knowledge of the circumstances of the offense, and thus could not be liable as an aider and abettor on the substantive count.

**Paul Camarena, Objector, Appellant.**

**No. 20-1783**

United States Court of Appeals,  
First Circuit.

September 17, 2021

**Background:** Consumer brought putative class action against nonprofit providing educational reporting, verification, and research services alleging that consumers were overcharged for self-verification reports of their university degrees and dates of enrollment, in violation of Fair Credit Reporting Act (FCRA) and Massachusetts law. The United States District Court for the District of Massachusetts, F. Dennis Saylor IV, J., granted final approval of class action settlement, despite objections by class member. Objector appealed.

**Holdings:** The Court of Appeals, Lynch, Circuit Judge, held that settlement was fair, reasonable, and adequate.

Affirmed.

#### 1. Federal Courts $\Leftrightarrow$ 3611(2)

The Court of Appeals reviews a district court's approval of a class action settlement for abuse of discretion.

#### 2. Compromise, Settlement, and Release $\Leftrightarrow$ 714

Where the parties negotiated at arm's length and conducted sufficient discovery, a district court must presume a class action settlement is reasonable. Fed. R. Civ. P. 23(e)(2).

Therefore, he contends, the jury must have found him liable under a constructive possession theory. We are not persuaded by this argument because under any theory of liability, the jury was not required to find that Jimenez had knowledge of the drug quantity.

## Syrie Fried

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**From:** CA01NoticeDocketActivity@ca1.uscourts.gov  
**Sent:** Monday, November 29, 2021 3:03 PM  
**To:** Syrie Fried  
**Subject:** 19-1465 US v. Cruz-Rivera "Court Order"

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### United States Court of Appeals for the First Circuit

#### Notice of Docket Activity

The following transaction was entered on 11/29/2021 at 3:02:07 PM Eastern Standard Time and filed on 11/29/2021

Case Name: US v. Cruz-Rivera

Case Number: 19-1465

Document(s): <https://ecf.ca1.uscourts.gov/docs1/00107815264?uid=a05db3342417a000>

#### Docket Text:

ORDER entered by Jeffrey R. Howard, Chief Appellate Judge; Sandra L. Lynch, Appellate Judge; Rogeriee Thompson, Appellate Judge; William J. Kayatta, Jr., Appellate Judge; David J. Barron, Appellate Judge; Gustavo A. Gelpi, Jr., Appellate Judge and Gary S. Katzmann,\* U.S. District Judge. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be <u>denied</u>. \*Of the United States Court of International Trade, sitting by designation.[19-1465] (GB)

#### Notice will be electronically mailed to:

Michelle L. Dineen Jerrett

Syrie Davis Fried

Donald Campbell Lockhart

Andrew C. Noll

#### Notice will not be electronically mailed to:

Ivan Cruz-Rivera  
FCI Williamsburg  
PO Box 340  
Salters, SC 29590-0000

#### The following document(s) are associated with this transaction:

666 Document Description: Order

Original Filename: /opt/ACECF/live/forms/19-1465\_Denial\_Panel\_\_En\_Banc\_2021\_gelpi.pdf

Electronic Document Stamp:

[STAMP acecfStamp\_ID=1104935054 [Date=11/29/2021] [FileNumber=6462160-0]  
[3120925712aef4719df2ed462984e27e09d444f68bd1c53c37198b1eb17290e88b370f02b7c50622ce50f0c9bcd11781939  
5b087a4c67629c1f37ab7ada1a82c]]

Recipients:

Ivan Cruz-Rivera  
Michelle L. Dineen Jerrett  
Syrie Davis Fried  
Donald Campbell Lockhart  
Andrew C. Noll

#### Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

BEFORE: The Honorable Timothy S. Hillman

Motion to Suppress  
Volume 2

23 Marianne Kusa-Ryll, RDR, CRR  
Official Court Reporter  
United States District Court  
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Mechanical Steno - Transcript by Computer

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19 On behalf of the Defendant, Carlos Jimenez

20 Also Present:

21 Carrie Lilley, as Interpreter, Spanish  
22 Margarita Cardenas, as Interpreter, Spanish

23

24

25

I N D E X

Witnesses:	Direct	Cross	Redirect	Recross
John Maki, Resumed				
By Ms. Dineen Jerrett	7			
By Mr. Bailey		37		
By Ms. Fried		82		
By Ms. Dineen Jerrett			107	
By Mr. Bailey				131
By Ms. Fried				138
Jamie Vitale				
By Ms. Dineen Jerrett	141			
By Ms. Fried		164		
By Mr. Bailey		186		

1                   E X H I B I T S

2	No.	Description	For ID	In Evd.
4	2	DEA-6 prepared by John Maki, dated 10/8/13, Bates Nos. 00010 through 00016.	16	19
6	3	Reports prepared by John Maki.		21
7	4	Photograph.		36
8	5	Report of Sergeant Maki with CW in August of 2014.		35
9	6	Handwritten notes.		75
10	7	Affidavit of John Maki.	92	
11	7A	One-page exhibit attached to the Affidavit of John Maki	92	
13	8	Report dated October 21, 2013, of UCO Eliesett Rodriguez on October 4, 2013.		109

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## PROCEDINGS

2 (The following proceedings were held in open court  
3 before the Honorable Timothy S. Hillman, United States District  
4 Judge, United States District Court, District of Massachusetts,  
5 at the Donohue Federal Building & United States Courthouse,  
6 595 Main Street, Worcester, Massachusetts, on May 23, 2017.)

7 THE CLERK: All rise.

8 Court is now open. You may be seated.

9 Case No. 16-40025, United States versus Ivan  
10 Cruz-Rivera and Carlos Jimenez.

11 | Please note your appearance for the record.

12 MS. DINEEN JERRETT: Good morning, your Honor.

13      Michelle Dineen Jerrett on behalf of the United States.

14 THE COURT: Good morning, Ms. Dineen Jerrett.

15 MS. FRIED: Good morning, your Honor. Syrie Fried on  
16 behalf of Ivan Cruz-Rivera, who is with me at counsel table.

17 THE COURT: Good morning, Ms. Fried.

18 Good morning, Mr. Cruz-Rivera.

19 Good morning, Ms. Lilley.

20 MS. LILLEY: Good morning.

21 MR. BAILEY: Good morning, your Honor. Brad Bailey  
22 for Carlos Jimenez, who's present at counsel table.

23 THE COURT: Good morning, Mr. Bailey. Good morning,  
24 Mr. Jimenez.

25 MR. Jimenez: Good morning, your Honor.

1 Q. Okay. All right. And do you know whether he had been  
2 parked or whether he was -- at that point --

3 A. I don't know.

4 Q. -- when he caught wherever the Lexus was?

5 A. I don't know where it was when it made the U-turn.

6 Q. Okay.

7 MS. FRIED: I don't have any other questions.

8 MR. BAILEY: Your Honor, may I retrieve my detritus?

9 THE COURT: Ms. Dineen Jerrett, anything?

10 MS. DINEEN JERRETT: Your Honor, was it now that you  
11 wanted me to readdress the Exhibit 3 that was marked for  
12 identification while this witness is still on or do we want to  
13 deal with that at the end of the case?

14 THE COURT: Let's do it at the end.

15 MS. DINEEN JERRETT: Then nothing further.

16 THE COURT: Sergeant Maki, if I were you, I would run  
17 for it.

18 THE WITNESS: Thank you.

19 THE COURT: All right. Ms. Dineen Jerrett, please.

20 MS. DINEEN JERRETT: Your Honor, the government calls  
21 Trooper Jake Vitale.

22 THE CLERK: Please raise your right hand.

23 JAMIE VITALE, SWORN

24 THE CLERK: You may be seated. Please state your name  
25 and spell your last name for the record.

1                   THE WITNESS: Jamie Vitale, V-I-T-A-L-E.

2                   Good morning, your Honor.

3                   THE COURT: Good afternoon.

4                   DIRECT EXAMINATION

5                   BY MS. DINEEN JERRETT:

6                   Q. Good afternoon, sir. Can you please tell Court if  
7 you're employed; and if so, where?

8                   A. I am a trooper with the Massachusetts State Police. I'm  
9 currently assigned to the Drug Enforcement Administration as a  
10 deputized task force officer. This specific unit is the  
11 Worcester HIDTA.

12                  Q. And what is the Worcester HIDTA?

13                  A. It's a state, federal, and local drug task force.

14                  Q. And I knew you said your name is Jamie Vitale. Do you go  
15 by a nickname?

16                  A. Jake.

17                  Q. Do the other officers that work with you at the HIDTA task  
18 force, do they call you Jake or Jamie?

19                  A. Jake.

20                  Q. How long have you been a trooper with the Massachusetts  
21 State Police?

22                  A. Twenty-three years.

23                  Q. And how long have you been assigned to the task force with  
24 DEA?

25                  A. Fourteen years.

1 Q. Can you tell the Court about your training when you first  
2 became a State Trooper?

3 A. I attended the Massachusetts State Police Academy in  
4 New Braintree. I received my field training program, which was  
5 about three months. I worked in uniform for about 10 years,  
6 and I've been assigned at the Worcester HIDTA ever since.  
7 While I was in uniform, I was also assigned to the State Police  
8 tactical team, the motorcycle unit, and the community action  
9 team.

10 Q. Have you received any specialized training dealing with  
11 narcotics?

12 A. I attended basic and advanced narcotics with the Drug  
13 Enforcement Administration as well as some proactive criminal  
14 enforcement interdiction classes totaling over a hundred hours  
15 of classroom and field training.

16 Q. And do you receive regular continuing training as part of  
17 your duties?

18 A. Yes.

19 Q. How often?

20 A. Quarterly with the State Police and intermittently with  
21 the Drug Enforcement Administration.

22 Q. Prior to becoming a deputized task force officer with the  
23 DEA, did your duties with the Massachusetts State Police  
24 involve drug interdiction?

25 A. Yes.

1 Q. How much of your duties involved that? Can you estimate?

2 A. While I was on the road I -- I worked on regular patrol,  
3 which encompassed everything from speeding to interdiction,  
4 depending upon what -- what I chose to focus on. I spent the  
5 latter part of my uniformed career on the community action  
6 team. We focused largely on drug interdiction.

7 Q. And with your work as a deputized task force officer, how  
8 much of your work deals with drug enforcement and drug  
9 interdiction?

10 A. A hundred percent.

11 Q. For the last 23 years, how much of that time has been  
12 pertaining to drug enforcement and drug interdiction?

13 A. Between my assignment at the HIDTA -- excuse me. Between  
14 my assignment at the HIDTA and my uniform career, I don't know,  
15 maybe 70 percent.

16 Q. Were you in law enforcement prior to becoming a State  
17 Trooper?

18 A. No, I was not.

19 Q. I would like to direct your attention to October 4th of  
20 2013.

21 Do you recall if you were working that day?

22 A. I was.

23 Q. And in what capacity were you working?

24 A. I was working undercover narcotics with the Worcester  
25 HIDTA.

1 Q. Was there a particular vision that you were involved in on  
2 that day?

3 A. Yes.

4 Q. And who, if you remember, were the targets of that  
5 investigation?

6 A. There were multiple targets. I don't know the names.

7 Q. Had you, prior to October 4th, 2013, been involved in that  
8 particular investigation?

9 A. Yes.

10 Q. And what had your role on October 4th, 2013, been?

11 A. Surveillance.

12 Q. And was there a particular location you were on  
13 surveillance?

14 A. I was positioned on Union Street in Leominster.

15 Q. And what if any significance was Union Street in  
16 Leominster?

17 A. Part of the operation that particular day was the  
18 controlled purchase of an amount of heroin.

19 Q. Did you have an understanding in the morning of  
20 October 4th, 2013, as to whether arrangements had been made in  
21 advance for a purchase of heroin?

22 A. Yes.

23 Q. And what was your understanding?

24 A. That cooperator and undercover would respond to a garage  
25 on Union Street, I believe it was 107, and attempt to conduct a

1 controlled purchase of about 125 grams of heroin.

2 Q. Had you been aware on October 4th, 2013, whether the  
3 cooperating source or the CS -- you said there was also an  
4 undercover?

5 A. Yes.

6 Q. Was there a particular individual that the CS and the  
7 undercover were attempting to purchase heroin from?

8 A. There was.

9 Q. And who was that?

10 A. I do not recall.

11 Q. Are you familiar with the name Segundo Gutierrez?

12 A. Yes.

13 Q. And how are you familiar with that name?

14 A. Through the course of the investigation of the role that I  
15 played as a surveillance officer.

16 Q. On October 4th, 2013, you said your principal surveillance  
17 was on Union Street in Leominster?

18 A. Yes.

19 Q. And was there a particular location on Union Street that  
20 you were focused on?

21 A. The previous -- previously described garage, I believe it  
22 was 107 Union. I was maybe a hundred or so yards down the road  
23 in a parking lot.

24 Q. What were you driving? Was it a marked vehicle? Was it  
25 an undercover vehicle?

1 A. A pickup truck.

2 Q. Were you alone in your vehicle?

3 A. Yes.

4 Q. Do you recall what time you arrived at the Union Street  
5 location?

6 A. Sometime in midmorning. I don't recall exactly.

7 Q. And is it fair to say that you were not the only  
8 surveillance in the area that day?

9 A. That's correct.

10 Q. Do you know how many other agents or task force officers  
11 were on surveillance?

12 A. I do not.

13 Q. Were you in touch with the other agents and officers that  
14 were involved in the transaction that day?

15 A. Yes.

16 Q. How were you in touch with them?

17 A. Via radio.

18 Q. And when you say "radio," was that something that your  
19 truck was equipped with?

20 A. Yes.

21 Q. And is it your understanding that the radio was equipped  
22 in other vehicles that were on surveillance that day?

23 A. Yes.

24 Q. At some point -- well, strike that.

25 During your time on surveillance, what types of things

1       were communicated on the radio?

2       A.    Observations made about the comings and goings of the  
3       garage, the comings and goings of the cooperator and the  
4       undercover, as well as the comings and goings of another  
5       vehicle that had arrived.

6       Q.    And with respect to the other vehicle you just mentioned,  
7       do you recall what type of vehicle that was?

8       A.    A gray Lexus.

9       Q.    When did you first see the gray Lexus?

10      A.    Shortly after two o'clock.

11      Q.    From your advantage point -- strike that.

12           Did you -- were you stationary during your  
13       surveillance or were you moving around?

14      A.    I was predominantly stationary.

15      Q.    Okay. And when you say "predominantly," were there times  
16       that you moved vantage points or moved locations?

17      A.    I may have left to use the bathroom or something, but  
18       generally speaking I was in the same parking lot for a majority  
19       of the surveillance.

20      Q.    From where you were parked on Union Street could you see  
21       the 105-107 garages?

22      A.    No, I could not.

23      Q.    You said shortly after two o'clock you first saw the gray  
24       Lexus?

25      A.    Yes.

1 Q. How did you become aware that the gray Lexus was of  
2 significance?

3 A. That information was provided over the radio.

4 Q. And what do you recall being said about the gray Lexus?

5 A. One of the surveillance officers observed Mr. Gutierrez  
6 come out to the street on his cell phone, stood at the end of  
7 the driveway for a few moments, was waving to a vehicle that  
8 was approaching. It was described initially, I think, as a  
9 Honda and then became more clearly described as a Lexus, color  
10 gray. The vehicle pulled into the lot where the garage sits.  
11 Maybe an hour or so later, the vehicle was reported as leaving  
12 the garage and traveling down Union Street towards the center  
13 of town. I observed a vehicle similar in description. The  
14 plate had been given out past my location. It made a U-turn in  
15 the street. I followed in behind it, confirmed the plate, and  
16 maintained surveillance throughout -- throughout its travels.

17 Q. When you say that you heard that the vehicle had left the  
18 garages and was traveling towards -- I believe you said the  
19 center of town?

20 A. Yes.

21 Q. Was that traveling towards where you were or away from  
22 where you were?

23 A. Towards.

24 Q. And at some point you were able to see that on Union  
25 Street traveling towards you?

1 A. Yes.

2 Q. And you said that it made a U-turn?

3 A. It did.

4 Q. Okay. Could you see the Lexus make the U-turn?

5 A. Yes.

6 Q. And why is it that you then began following the Lexus?

7 A. It would be common practice under the circumstances to  
8 maintain surveillance of the vehicles in question until asked  
9 by the case officer to break surveillance.

10 Q. Did anyone direct you to follow the Lexus?

11 A. Not initially. As it passed my location, I did not  
12 observe any other surveillance officers directly behind it, so  
13 I made the decision to follow in and confirm that it was the  
14 correct vehicle, which I did. As it traveled onto Route 12 in  
15 Leominster, I radioed and asked if I should maintain  
16 surveillance of the vehicle, and I was instructed to do so.

17 Q. Was there anything -- do you recall where -- do you recall  
18 the license plate as you sit here today?

19 A. I do not.

20 Q. Do you recall where the vehicle was registered, which  
21 state, which license plate?

22 A. New Jersey.

23 Q. And when you say you confirmed the license plate, were you  
24 confirming both New Jersey and a specific tag number?

25 MS. FRIED: Objection. Leading.

1                   THE COURT: Okay. Don't lead.

2 BY MS. DINEEN JERRETT:

3 Q. How did you confirm that it was the vehicle in question?

4 A. I broadcast the vehicle description, the plate, including  
5 the state and the tag number over the radio, and one of the  
6 surveillance officers, I do not recall who, confirmed yes,  
7 that's the vehicle.

8 Q. When the vehicle -- when you first saw the vehicle, could  
9 you see how many occupants were in it?

10 A. Two.

11 Q. Okay. And what did you notice about them, if anything?

12 A. They were --

13 Q. Were they males, females, what -- what did you notice?

14 A. They were male, appeared to be darker skin, and in my  
15 mind, I would have described them as Hispanic males.

16 Q. How -- how long did you see them heading towards you  
17 before you observed the U-turn?

18 A. Oh, maybe a few moments.

19 Q. And after the car made the U-turn, and you started  
20 following it, where did the car go?

21 A. It went from Union Street down a side street. I don't  
22 recall the name of the side street, which leads directly down  
23 to Route 12. They made a right on Route 12, which would be  
24 12 southbound, and continued out towards Route 190.

25 Q. Were you aware why the Lexus made a U-turn?

1 A. No.

2 Q. Did you hear anything from other surveillance officers  
3 regarding the Lexus at the time it made the U-turn?

4 A. Not that I recall.

5 Q. When you traveled down Union Street, you said it made --  
6 the Lexus made a left onto Graham Street?

7 A. I didn't say the street because I don't know what it is.

8 Q. Okay. My apologies. But it made a left turn off of Union  
9 Street?

10 A. Yeah, it made a U-turn. It went -- it went -- I guess, it  
11 would be considered north on Union, made a U-turn, traveled  
12 back down Union towards the garage, stopped briefly in the  
13 street, and then continued. The left -- again, I don't recall  
14 the name of the street. It's a left-hand turn, which brings  
15 you to Route 12 and a right on 12, which is 12 south.

16 Q. When the car made a stop in the street before it made its  
17 left turn, did you make any observations at that point?

18 A. No, I did not.

19 Q. Did you -- could you see the garage from your vantage  
20 point at the time that the Lexus stopped in the street?

21 A. It may have been within viewing distance, but I don't  
22 recall looking at it, no.

23 Q. How would you describe the color of the Lexus? You've  
24 said gray, but can you describe what that color looked like to  
25 you?

1 A. Not -- nothing beyond gray. Gray. I don't recall if it  
2 was light gray or dark gray.

3 Q. When you followed the Lexus, did you maintain constant  
4 visual --

5 MS. FRIED: Objection. Leading.

6 THE COURT: Sustained.

7 BY MS. DINEEN JERRETT:

8 Q. How long did you follow the Lexus?

9 A. Time wise it was about an hour. The distance was between  
10 Leominster and Sturbridge.

11 Q. Okay. Where did the car go from Route 12 in Leominster?

12 A. 12 south in Leominster to Route 190 south to Route 290  
13 west to Route 90, which is the Mass. Pike west, to Route 84  
14 west.

15 Q. And you said that you radioed to find out whether you  
16 should stay with that vehicle?

17 A. Yes.

18 Q. Do you recall where you were when you made that radio  
19 transmission?

20 A. On 12 in Leominster.

21 Q. And was that calling out to the entire surveillance team  
22 or were you reaching out to anyone in particular?

23 A. Just a broadcast of I'm still behind it, do you want me to  
24 stay with it.

25 Q. And do you recall who responded?

1 A. I don't.

2 Q. What did they say?

3 A. Continue the surveillance.

4 Q. Okay. At any point were you asked to do something with  
5 respect to the vehicle?

6 A. Yes.

7 Q. What was that?

8 A. The request was to attempt to stop and identify the  
9 occupants.

10 Q. Do you recall who made that request?

11 A. I believe that came from Task Force Officer Maki.

12 Q. And how soon after you started following the New Jersey  
13 Lexus was that request made?

14 A. Time wise maybe 15, 20 minutes. I don't recall  
15 specifically.

16 Q. What did you do after Sergeant Maki asked you to attempt  
17 the stop and ID the occupants of the car?

18 A. I tried to make a determination how long it would take to  
19 get someone set up to do it, and that led me to believe that it  
20 would have to occur at a minimum in the Sturbridge area, which  
21 would be covered by the Sturbridge barracks. So I called the  
22 Sturbridge barracks and asked the desk officer who was working  
23 and if the patrol that is assigned to Route 84 was available to  
24 assist me. I was then passed on to Trooper DiCrescenzo, and I  
25 spoke with Trooper DiCrescenzo over the phone and continued to

1 surveil the vehicle as it traveled down the Mass. Pike  
2 westbound.

3 Q. How did you know that the vehicle would be ultimately on  
4 Route 84?

5 A. Well, I based it upon the fact that it was registered in  
6 New Jersey, and that that would be the common route of travel,  
7 so I hedged my bet and figured it would be C5. If it didn't  
8 take the Mass. Pike westbound it would have been 395 southbound  
9 at that point because those calls were being made while I was  
10 on 290 in Worcester. I would have asked for an available  
11 cruiser that patrols 395.

12 Q. And was -- would that have been a separate trooper than  
13 Trooper DiCrescenzo that you mentioned?

14 A. Yes.

15 Q. When you spoke with Trooper DiCrescenzo, what did you tell  
16 him?

17 A. Well, Trooper DiCrescenzo was aware of where I work, which  
18 is an undercover federal narcotics --

19 MR. BAILEY: Objection.

20 THE WITNESS: -- task force.

21 THE COURT: Hold up. Hold up.

22 THE WITNESS: Yes, sir.

23 THE COURT: Just wait.

24 MS. DINEEN JERRETT: I can lay a foundation.

25 THE COURT: Please, yeah.

1 Q. Have you -- prior to --

2 THE COURT: Before you do that, how do you spell  
3 DiCrescenzo's name?

4 THE WITNESS: That, your Honor, I do not know.

5 MS. DINEEN JERRETT: I have it. It's D-I, capital  
6 C-R-E-S-C-E-N-Z-O.

7 THE COURT: Thank you. Go ahead.

8 BY MS. DINEEN JERRETT:

9 Q. Trooper Vitale, prior to October 4th, 2013, had you had  
10 occasion to work with Trooper DiCrescenzo?

11 A. Yes.

12 Q. Approximately over what time period?

13 A. I do not recall.

14 Q. Do you know how long Trooper DiCrescenzo has been with the  
15 Massachusetts State Police?

16 A. I have no idea.

17 Q. Did your relationship with Trooper DiCrescenzo go back  
18 into 2013, if you know, or 2012, if you know?

19 A. It may have, yes.

20 Q. Okay. 2011?

21 A. I don't know.

22 MS. FRIED: Objection.

23 BY MS. DINEEN JERRETT:

24 Q. When you have worked with Trooper DiCrescenzo in the past,  
25 what -- has that been in a professional capacity?

1 A. Yes.

2 Q. Okay. Had you prior to October 4th, 2013, spoken with  
3 Trooper DiCrescenzo about stopping motor vehicles at your  
4 request? Had that happened prior to October 4, 2013?

5 A. It -- it may have. I don't know.

6 Q. Okay. You don't have a specific recollection?

7 A. No, I don't.

8 Q. On October 4th, 2013, when you first spoke with Trooper  
9 DiCrescenzo, you were aware or were you aware of whether he was  
10 on duty that day?

11 A. When I spoke with him?

12 Q. Yes.

13 A. Yes.

14 Q. Okay. And how did you become aware of that?

15 A. I called the barracks desk officer. I asked who was  
16 assigned to the middle patrol, which would be Route 84. They  
17 responded it was Trooper DiCrescenzo. I was familiar with him  
18 and his phone number and reached out for him.

19 Q. Okay. And are you aware whether Trooper DiCrescenzo knew  
20 where you worked in October of 2013?

21 A. Yes.

22 Q. Okay. Describe the conversation between you and Trooper  
23 DiCrescenzo when you first reached him.

24 What did you say to him?

25 A. I related that I was following a vehicle. The current

1 location was on the Mass. Pike in -- it would have been west of  
2 Auburn. I provided him with the license plate and a vehicle  
3 description; that it was occupied by two what I believed to be  
4 Spanish males. I was looking to identify the occupants of the  
5 vehicle. I further described that we were interested in the  
6 vehicle with regards to a drug investigation, and that my  
7 information would not be the basis for the stop. Essentially,  
8 if there was some motor vehicle violation observed that would  
9 be a lawful reason to stop the car to go ahead and do so.

10 I further stated that access to the inside of the  
11 vehicle wouldn't be based upon my information either, that he  
12 would have to develop his own probable cause if it went in that  
13 direction.

14 Q. And why did you tell him that?

15 MR. BAILEY: Objection.

16 THE COURT: Overruled.

17 THE WITNESS: I provided him with as much information  
18 as I thought was reasonable under the circumstances and that  
19 using the information, specific information with regards to the  
20 undercover officer and the cooperator, as it relates to the  
21 purchase of 125 grams of heroin, it was an effort to protect  
22 the integrity of that investigation.

23 BY MS. DINEEN JERRETT:

24 Q. Have you ever heard of the term walled off car stop?

25 A. I have.

1 Q. And what does that mean?

2 A. It would be conducting a motor vehicle stop that is in  
3 some ways related to an investigation, but has its own basis  
4 of -- of acquiring information, whether it be identifying the  
5 occupants or an eventual search of the vehicle by different  
6 means, whether it be a probable cause search or a -- or a  
7 consent search. It's a way to separate the two while  
8 protecting the integrity of the larger investigation.

9 Q. And prior to October 4th of 2013, had you been involved in  
10 walled off car stops previously?

11 A. Yes.

12 Q. Specifically with respect to your work as a task force  
13 officer with DEA, how often, if you can estimate, are walled  
14 off car stops requested?

15 MS. FRIED: Objection. Relevance.

16 THE COURT: Well, I tend to agree, but I'm curious.  
17 So I'll let you answer that one, Trooper.

18 THE WITNESS: Could you repeat the question, please.

19 BY MS. DINEEN JERRETT:

20 Q. Prior to October 4th of 2013, specifically with request --  
21 with respect to your work with the DEA, how often were walled  
22 off car stops utilized?

23 MR. BAILEY: Objection. Regarding him?

24 THE COURT: Huh?

25 MR. BAILEY: It's a pretty broad question. I

1 think --

2 THE COURT: How many times have you done walled off  
3 car stops?

4 THE WITNESS: Dozens and dozens of times, I guess.

5 THE COURT: Thank you. Next question, please.

6 BY MS. DINEEN JERRETT:

7 Q. When you spoke with Trooper DiCrescenzo, you said it was  
8 by phone?

9 A. Yes.

10 Q. Okay. Do you know if called him or he called you; do you  
11 recall?

12 A. I believe the desk officer said that he was working, and I  
13 called him, but I don't recall. And I spoke with him via radio  
14 at some point as well.

15 Q. Did you have -- on October 4th, 2013, did you have Trooper  
16 DiCrescenzo's telephone number, or did you have to obtain that  
17 from somewhere?

18 A. I -- I believe I had his phone number and reached out for  
19 him, but I don't recall specifically.

20 Q. You said that you told the trooper about the car's current  
21 location; correct?

22 A. Yes.

23 Q. Did you indicate where you were with respect to that car?

24 A. Yes.

25 Q. What did you say?

1 A. I was on the Pike westbound.

2 Q. Did you tell Trooper DiCrescenzo about where the Lexus had  
3 come from?

4 A. Yes.

5 Q. What did you tell him?

6 A. Leominster.

7 Q. Between the time that you started following the Lexus in  
8 Leominster, you described a route that it took. You said  
9 Route 12 to 190 to 290; do you recall that?

10 A. Yes.

11 Q. Did the New Jersey Lexus stop at any point during that  
12 route?

13 A. Not that I recall.

14 Q. Okay. Did you go -- did the New Jersey Lexus go anywhere  
15 other than the route that you described a few minutes ago?

16 A. No.

17 Q. When you spoke with Trooper DiCrescenzo on the phone, did  
18 he have any questions for you?

19 A. Not that I recall specifically, no.

20 Q. Do you recall anything else about the conversation you had  
21 had with him initially?

22 A. No.

23 Q. At some point did you stop following the New Jersey Lexus?

24 A. Yes.

25 Q. And when was that?

1 A. While it was traveling westbound on 84 in the Sturbridge  
2 area, I passed the vehicle off to Trooper DiCrescenzo, who  
3 continued to follow it on his own. I believe I got off at the  
4 rest area westbound.

5 THE COURT: On 90?

6 THE WITNESS: On 84 westbound, your Honor.

7 BY MS. DINEEN JERRETT:

8 Q. How did you know that Trooper DiCrescenzo was at that  
9 point taking over the surveillance?

10 A. I was communicating with him via radio.

11 Q. And when you say "via radio," do you recall what radio you  
12 used? Was it the same radio that you were in communication  
13 with DEA about?

14 A. No.

15 Q. What radio were you using?

16 A. The radio used to communicate with the surveillance  
17 officers in Leominster is a federal radio. It has a whole  
18 different sets of channels than the radio I spoke to Trooper  
19 DiCrescenzo on, which is the Mass. State Police radio.

20 Q. Do you know whether the communications on the Mass. State  
21 Police radio are recorded?

22 A. I have no idea.

23 Q. After -- well, strike that.

24 Prior to you suspending your surveillance of the New  
25 Jersey Lexus, had you obtained any additional information from

1 the -- the remainder of the surveillance team up at the  
2 105-107 garages?

3 A. Yes.

4 Q. What was that?

5 A. After the gray Lexus departed and headed towards  
6 Sturbridge, the cooperator and the undercover returned to  
7 107 Union Street garage and exchanged money for approximately  
8 120, 125 grams of heroin. I don't know the exact weight.

9 Q. And you learned that information prior to suspending your  
10 own surveillance of the Lexus?

11 A. Yes.

12 Q. Do you recall who you learned that information from?

13 A. Sergeant Maki.

14 Q. And how did he communicate that to you?

15 A. Over the phone.

16 MS. DINEEN JERRETT: If I may have a moment, your  
17 Honor.

18 THE COURT: You may.

19 BY MS. DINEEN JERRETT:

20 Q. At some point did you become aware that Trooper  
21 DiCrescenzo effectuated a car stop of the vehicle?

22 A. Yes.

23 Q. And how did you become aware of that?

24 A. I believe I watched it happen, that he activated his  
25 lights at some point. I don't recall whether I was behind him

1 or ahead of him, and he may have confirmed the vehicle was  
2 stopped at -- in the location, but I don't recall.

3 Q. Did you at some point learn the details of the car stop?

4 A. Some of them, yes.

5 Q. And when did you learn those?

6 A. The same afternoon, but I don't recall what time.

7 Q. Okay. And who did you learn them from?

8 A. Trooper DiCrescenzo.

9 Q. Okay. Did you speak by phone or radio, in person? How  
10 did you communicate with him?

11 A. I met with him at the rest stop.

12 Q. And that occurred after the car stop?

13 A. Yes.

14 Q. What did Trooper DiCrescenzo tell you about the car stop?

15 A. He provided identification for the two parties and related  
16 that he had located a bag of money, unknown amount of U.S.  
17 currency, and I instructed him to process it at the State  
18 Police barracks, and that was about it.

19 MS. DINEEN JERRETT: No further questions.

20 THE COURT: All right. Why don't we take ten, and  
21 I'll see you back here then.

22 (Recess from 3:06 p.m. until 3:15 p.m.)

23 THE CLERK: All rise.

24 Court is now open. You may be seated.

25 MS. FRIED: I think it's my turn.

1 | CROSS-EXAMINATION

2 BY MS. FRIED:

3 Q. Good afternoon, Trooper Vitale. My name is Syrie Fried.  
4 I'm an attorney, and I'm representing Ivan Cruz-Rivera.

5 A. Good afternoon.

6 Q. Just to recap a couple of things. You're currently a  
7 State Trooper; is that correct? Have I got that right?

8 A. Yes.

9 Q. You're Mass. State Police?

10 A. Yes.

11 Q. But you're detailed to the Drug Enforcement  
12 Administration, and you're a task force officer with the DEA?

13 A. Yes.

14 Q. Okay. And you have been doing that for how long,  
15 10 years, did you say?

16 A. Maybe 14.

17 O. Fourteen.

18 A. Thirteen, fourteen.

19 Q. Okay. All right. Now, with regard -- just bringing you  
20 around to this investigation, this whole business that we're  
21 here for today and what happened on October 4th, 2013, a couple  
22 of background questions.

23                   Had you been a member of the team that was working on  
24 the investigation of drug selling that was involving this  
25 particular confidential source before October 4th?

1 A. Yes.

2 Q. How long had you been personally yourself involved in that  
3 in this team's work on this particular investigation?

4 A. Well, I was assigned to the Worcester HIDTA in '03, so  
5 when the investigation started I assume I was working as a  
6 surveillance officer. I wasn't the primary or secondary case  
7 officer. So I don't recall the time frame.

8 Q. Okay. Had you ever done any surveillance in relation to  
9 this investigation at 105-107 Union Street in Leominster before  
10 October 4th?

11 A. I may have. I don't recall specifically.

12 Q. You don't recall having done so?

13 A. I may have. I don't recall specifically.

14 Q. Okay. Now -- and I just want to be sure I got a couple of  
15 things right. You -- you said you were driving a pickup truck?

16 A. I believe so, yes.

17 Q. What kind? What make and model, color?

18 A. Well, it's -- I know it's a black pickup truck because  
19 that's all I've had for the last two vehicles. So it was  
20 either a Dodge or a Ford, but I don't recall specifically.

21 Q. Okay. So this isn't your own vehicle. It's something  
22 issued by the State Police for State Police work; right?

23 A. Yes.

24 Q. It's a State Police vehicle that they give you?

25 A. Yes.

1 Q. And -- can I take it that this is the vehicle you're  
2 normally using when you do all your surveillance on everything?

3 A. Normally, yes.

4 Q. Okay. All right. And it's a black Dodge or a Ford;  
5 right?

6 A. Yes.

7 Q. Okay. And on October 4th, 2013, you told us that you were  
8 essentially stationary about a hundred yards away from the  
9 garages at 105-107 Union Street in a parking lot?

10 A. Yes.

11 Q. Is it accurate that you were not watching and were not  
12 asked to watch what was going on at the actual parking lot,  
13 that is, you didn't have a visual on any of that?

14 A. Yes.

15 Q. Okay. That's accurate. So what you know about what was  
16 going on in terms of what was happening at the garages was  
17 whatever was coming to you through police radio communications?

18 A. Yes.

19 MS. FRIED: All right. Your Honor, I just need to  
20 stop and make a few notes, if I might.

21 THE COURT: Uh-huh.

22 MS. FRIED: Thank you.

23 (Pause.)

24 Q. All right. Now, I want to ask you something about -- you  
25 were asked some questions by Ms. Dineen Jerrett about the

1       Lexus, the first thing, the first time you heard anything about  
2       the Lexus. Okay. And you said something that I wanted to ask  
3       you some questions about.

4               You were -- do you remember testifying about a car  
5       being waved into the garage or being waved into the parking lot  
6       by somebody who got out on the -- came onto the street, had a  
7       telephone to their ear, and then started waving the car in?

8       A.    Yes.

9       Q.    You remember that?

10      A.    Yes.

11      Q.    Okay. And do you remember that you also said on your  
12     direct-examination testimony that there was something about a  
13     blue Ford, and then there was some confusion, maybe it was a  
14     Lexus.

15               Do you recall giving that testimony?

16      A.    Yes.

17      Q.    Okay. I want to unpack that a little bit. When you say  
18     that there was some confusion can you recount specifically what  
19     communications you heard at that time on that date that led you  
20     to say here in court today that there was some degree of  
21     confusion about what car was being -- what kind of car was  
22     being waved into the parking lot.

23               What is it that you remember hearing?

24      A.    There were a few different people reporting a vehicle  
25     pulling in. One described it in one way, and one described it

1       in another. It's normal -- normal chatter that is on the radio  
2 when there's observations being made from several different  
3 vantage points. Some are close and some are far away. I  
4 wasn't there so I couldn't see either.

5       Q. Well, let me ask you this. What, if anything, do you  
6 remember about the time proximity of these different  
7 transmissions?

8       A. I'm dating myself, but I -- I recall that they were one  
9 right after the other.

10      Q. Okay. All right. Now, let me ask you another few  
11 questions. You told us that at some point you ended up  
12 following this car, this Lexus, that it came down to where you  
13 were, did a U-turn, and then went back, and then you followed  
14 it.

15           Do you remember that?

16      A. Yes.

17      Q. Okay. How close did you ever get to this vehicle during  
18 the course of following it? During the course of your tailing  
19 this car, what's the closest distance you ever got to it?

20      A. You know, maybe a car length or two, but that wouldn't  
21 have been for a long period of time.

22      Q. Okay. Let me ask you this. Were you ever -- were you  
23 always behind it?

24      A. Yes.

25      Q. You were never alongside it; is that correct?

1 A. Maybe on the highway, I pulled up next to it, but again it  
2 was an hour trip. I don't recall specifically.

3 Q. All right. Well, at least with regard to the time that  
4 you were in Leominster before you got onto the interstate, is  
5 it accurate that you were never abreast of that car at that  
6 point? If you ever got abreast of that car, you were on the  
7 highway by then, you had left Leominster and were already on  
8 the road?

9 A. If you're referring to my ability to see like through the  
10 side of the car is that what you're asking?

11 Q. I am asking whether you had -- yeah, I'm trying to figure  
12 that out, correct.

13 A. So the vehicle passed by me twice at a perpendicular  
14 angle. So that would be a side view of -- of the vehicle.

15 Q. Where did that happen?

16 A. It passed by me on Union Street. I was sitting in a  
17 parking lot facing Union Street.

18 Q. Okay.

19 A. The vehicle drove by, it made a U-turn, and it drove by  
20 again, so I would see essentially both sides of the -- of the  
21 vehicle.

22 Q. Okay. So at the time when you saw the car make the  
23 U-turn, you were still sitting in your -- you were still at  
24 your stationary post?

25 A. Yes.

1 Q. Looking out onto Union Street?

2 A. Yes.

3 Q. And the car drove by you in one direction and drove by you  
4 in the other direction?

5 A. Yes.

6 Q. Okay. And how close to the mouth of your parking lot were  
7 you when this activity took place?

8 A. Oh, maybe one -- one or two rows back maybe.

9 Q. Okay. Now -- and do you recall what the weather was like  
10 that day?

11 A. I don't. I -- I don't recall if it was raining. So I  
12 assume either sunny or cloudy, but I don't recall it being  
13 rainy.

14 Q. You don't recall that?

15 A. I -- I don't remember.

16 Q. Okay. And let me ask you this: When you were following  
17 this car, were you obeying, as far as you know, all traffic  
18 laws in terms of maintaining the correct distance behind the  
19 car, not speeding, et cetera, et cetera?

20 MS. DINEEN JERRETT: Objection.

21 THE COURT: Well --

22 MS. FRIED: It goes to his --

23 THE COURT: -- overruled. You may answer.

24 THE WITNESS: I have no idea. I drove behind the  
25 vehicle as it traveled from Leominster to Sturbridge. I do not

1 recall observing how fast I was going. I can say I recall I  
2 wasn't driving 120 miles an hour, but I don't recall  
3 specifically. I tried to maintain a safe distance and a visual  
4 on the vehicle as it traveled from Leominster to Sturbridge.

5 BY MS. FRIED:

6 Q. Now, a lot of this travel was on the highway; correct?

7 A. The majority of it, yes.

8 Q. Yeah. And at highway speed?

9 A. Again, I do not recall. I don't know.

10 Q. Well, what's -- okay. But what's your impression --

11 A. We were not going 20.

12 Q. Huh?

13 A. We were not going 20, and we weren't going 100. It was  
14 someplace at a, you know, in that range. I just don't recall  
15 specifically. There was a lot going on between phone calls and  
16 radio calls and whatnot.

17 Q. Okay. Okay. And do you have a recollection about how  
18 many car lengths behind the car you were traveling when you  
19 were on Interstate 90 or 290 or 90?

20 A. Not specifically. I tried to maintain a visual of the  
21 vehicle. At some points it may have been, you know, several  
22 hundred yards ahead of me. Sometimes it may have been a little  
23 bit closer. I don't recall how many other people were in the  
24 surveillance. So I tried to use good judgment and -- and try  
25 to at least maintain a visual the entire time.

1 Q. It's accurate, isn't it though, that almost the entire  
2 time that you were following this vehicle you would not be able  
3 to distinguish the people inside other than the number of them;  
4 is that accurate, because you weren't close enough to see their  
5 hair, their face, or any sort of particular features?

6 A. While we were traveling on the highway?

7 Q. Well, most of the time while you were surveilling them at  
8 all, whether you were on the highway or on the city streets in  
9 Leominster?

10 A. Well, as previously stated, the vehicle drove by me on one  
11 direction, turned around and drove by me in the other  
12 direction, and I determined that they were, in my belief,  
13 Spanish males. Beyond that --

14 Q. That wasn't my question.

15 A. -- I have no specific recollection along the way of  
16 re-determining that, no.

17 Q. Okay. Okay. All right. Now, just a couple of other  
18 things I want to get straight here.

19 You followed the Lexus from Leominster and to  
20 Stur -- all the way to Sturbridge; right?

21 A. Yes.

22 Q. And that took you about an hour probably to drive, that's  
23 your estimate?

24 A. Approximately, yes.

25 Q. Yeah. I mean, it's not a -- it's not a close distance, is

1 it?

2 A. I don't know how many miles it is. I really don't.

3 Q. How often have you driven that or have you not driven that  
4 between those two points very often?

5 MS. DINEEN JERRETT: Objection.

6 THE COURT: Overruled. You may answer.

7 THE WITNESS: I may have. I don't -- I don't recall.

8 BY MS. FRIED:

9 Q. Okay. And I want to ask you some questions -- well, about  
10 your surveillance. I just want to confirm really a couple of  
11 things that you said.

12 It's accurate that you took the initiative in deciding  
13 to surveil this vehicle; correct?

14 It was your decision to start the surveillance?

15 A. That was my assignment, surveillance.

16 Q. Right. No, I understand. But of this -- of this specific  
17 car, it was -- you are the one who decided to follow the car  
18 and started following the car before you asked for any  
19 direction vis-à-vis that specific vehicle; accurate?

20 A. Yes.

21 Q. Okay. And also accurate that you had been following that  
22 car for some period of time maybe 15, 20 minutes, maybe longer  
23 before you spoke with anybody who affirmed, confirmed, gave you  
24 any direction about maintaining your surveillance on that car;  
25 is that correct?

1 A. No, it is not.

2 Q. Okay. Correct me where I'm wrong.

3 A. The vehicle made a U-turn after coming out of Union  
4 Street. So maybe that's 30 or 40 seconds.

5 Q. Sure.

6 A. It traveled back to Union -- to the garage on 107 Union  
7 Street, so maybe that's another 30, 45 seconds.

8 Q. Sure.

9 A. It stopped briefly, it continued down the road, took a  
10 left-hand turn on a side street, the name of which I can't  
11 recall. It took a right-hand turn on Route 12 southbound. As  
12 we approached, and I can't remember the name of the street, but  
13 I guess it would be like the business district of that section  
14 of roadway, I had reported that I was behind it.

15 Q. Right.

16 A. I reported I was behind it when it initially went by me.  
17 I said it went by --

18 Q. Yeah.

19 A. -- confirming and whatnot. So that's maybe two miles.  
20 And I'm aware that the radio in that area gets a little  
21 scratchy once you hit a certain point so I reached out and  
22 said, hey, I'm still behind it. Do you want me to stay with  
23 it? The response was, Yeah, stay with it. I'll get back to  
24 you. And then I continued along with re-requesting I'm going  
25 to stay with it, yes, and that went on. So it was maybe a

1       couple of minutes initially, and then it was reconfirmed by the  
2       case officer and the assistant case officer as I traveled.

3       Q.     Okay. Well, that's what I was trying to get at because it  
4       seemed to me I thought I heard you say that you had been  
5       following it for about 15, 20 -- or 20 minutes before the case  
6       officer said to you, Keep on it?

7       A.     I think that my testimony was that after about 15 minutes,  
8       the information from the case officers were if I had an  
9       opportunity to stop and ID the occupants to go ahead and do  
10      that.

11      Q.     Okay. All right. So that was where my -- that was my  
12      mistake. You got the instruction to try to make a stop after  
13      you had been following it for 15 or 20 minutes?

14      A.     Yes.

15      Q.     Okay. Now, was anything said to you in terms of that  
16      instruction about where you should try to affect that stop?

17      A.     There may have been conversation about if it was even  
18      plausible to do it in Massachusetts. We may have to wait until  
19      we get into Connecticut, but I don't recall.

20      Q.     You don't recall anything specific?

21      A.     I don't. I'm sorry.

22      Q.     Okay.

23      A.     That would be the normal conversation so I wouldn't want  
24      to testify to, you know, what's normal practice. I want to  
25      testify to what I know, which is I don't know.

1 Q. Okay. That's fine. I'm not asking you to give me what's  
2 normal. I'm asking you what you remember. Okay. So that's  
3 just fine.

4               Okay. And it was somewhere after you had gotten to  
5 Interstate 90 or 290, excuse me, that you got the request to  
6 try to affect a stop; is that accurate?

7 A. Yes.

8 Q. Okay. So you had already gotten from Leominster down  
9 Route 12 to 190, and then where 190 merges into 290 here in  
10 Worcester; right?

11 A. Yes.

12 Q. Okay. And then 290 continues here through town for  
13 another five or seven or eight miles before it hits the  
14 interstate; right?

15 A. Yes.

16 Q. So it was some point after you had actually managed to get  
17 into the City of Worcester, and perhaps you were on the way out  
18 of town at Worcester before you started trying to figure out  
19 what help you could get in order to actually affect the stop;  
20 correct?

21 A. It may have been -- I don't recall where it happened.

22 Q. Okay. But somewhere on 290 it happened, that's your  
23 memory; correct?

24 A. 290 or 90, I don't recall.

25 Q. Okay. It could have been as late as 90?

1 A. It could have been.

2 Q. Okay. Now -- so that's when you reached out to the State  
3 Police -- you're a member of the State Police; correct?

4 A. Yes.

5 Q. Okay. And you reached out to the State Police and found  
6 out that -- or playing a hunch about which way it was going to  
7 go, you ended up getting in contact with Trooper DiCrescenzo;  
8 right?

9 A. Yes.

10 Q. Okay.

11 MS. FRIED: Could I have just a minute, your Honor.

12 THE COURT: Uh-huh.

13 (Pause.)

14 Q. Actually, I want to ask you something else. You were  
15 asked a question by Ms. Dineen Jerrett about Mass. State Police  
16 radio communications and whether or not they're recorded.

17 Do you recall being asked that question?

18 A. Yes.

19 Q. Okay. And you told her that you had no idea whether they  
20 were recorded or not.

21 Do you remember giving that answer?

22 A. Yes.

23 Q. I guess I just want to explore that a little bit. You  
24 have been a Mass. State Police officer for a long time.

25 Why is it that you do not know the answer to that

1 question?

2 MS. DINEEN JERRETT: Objection.

3 THE COURT: No, I'm actually kind of curious about  
4 that myself so overruled.

5 THE WITNESS: I haven't had occasion to -- to  
6 determine if they do or don't or where they do or don't.

7 There's several different troop radios. It may be recorded at  
8 headquarters. I've just never had occasion to explore that  
9 information.

10 BY MS. FRIED:

11 Q. So is it the case that in all of your many years, and it's  
12 what did you tell us, 23 years at the Mass. State Police?

13 A. Yes.

14 Q. That you have never worked on a case where it came up that  
15 there was a request made in any case that you've ever worked on  
16 for -- for a tape or a recording of any police radio  
17 communications; is that --

18 A. That I've been involved?

19 Q. That you've been involved in?

20 A. Not that I'm aware of.

21 Q. That has never happened in your 23 years on the force?

22 A. No.

23 Q. And because you're saying that has never happened in your  
24 23 years on the force, you don't know what the Mass. State  
25 Police rules, policies, et cetera, are on whether these things

1 are recorded, is that -- I'm just trying to find out. I don't  
2 want to put words in your mouth.

3 A. Okay. I just don't know. I've overheard what they  
4 referred to as -- I'm dating myself at this point -- turret  
5 tapes when it used to be the reel to reel.

6 Q. Yeah.

7 A. And that equipment was -- but that was 20 years ago. I  
8 don't know what the new equipment is or if they do. They may.  
9 I know that there's cameras in the barracks, but I don't  
10 believe it's recorded. I think it's like livestream, and you  
11 can watch it, but I just don't -- I don't know. I haven't  
12 had -- my assignment has been to the DEA for now 14 years. My  
13 involvement with the day-to-day operations of the State Police  
14 is limited. What the new policy is I just -- I don't know. I  
15 don't know. It may be, but I don't know.

16 Q. Okay. Now, when you were speaking -- after you had gotten  
17 hooked up with Trooper DiCrescenzo and you were making your  
18 request for his assistance -- well, first of all, did you know  
19 whether or not he was alone or accompanied in his vehicle at  
20 the time you were talking to him?

21 A. I would have assumed that he was alone, but I don't know.

22 Q. It wasn't something that came up during the course of your  
23 talk with him?

24 A. No.

25 Q. You weren't ever given to understand one way or the other

1       whether he was alone?

2       A.     No.

3       Q.     Okay. And the information that you gave him, I guess I  
4       just want to recount it. You said that you were requesting  
5       this stop in connection with a drug investigation?

6       A.     Yes.

7       Q.     Okay. And you identified the make and model of the car;  
8       correct?

9       A.     I did, yes.

10      Q.     And told him that it had two Spanish men in it; correct?

11      A.     Yes.

12      Q.     All right. And that -- and is it accurate that you said  
13       nothing to him about whether or what might be found in a search  
14       of the car?

15      A.     I believe that I related that we were conducting an  
16       investigation. We had been making -- purchasing drugs. The  
17       goal was to stop and identify the two occupants. If there was  
18       a reason to go forward, based upon his own personal  
19       information, that was up to him. There may be drugs or money  
20       in the car, but I don't know whether there are or aren't.

21      Q.     Well, that's what I'm asking you whether you had that --  
22       I'm asking you whether you said -- not your own subjective  
23       thought process, but what you communicated to him.

24               Did you say something to him like there may be drugs  
25       or money in the car, but I don't know, or did you -- were you

1 silent on the subject of what they might -- what he might find  
2 if he managed to successfully search the car?

3 A. I related what I just said, which is we're doing an  
4 investigation. We're buying drugs. I'd like to stop and  
5 identify these two people. If you have an opportunity to get  
6 into the car on your own basis, that's up to you. There may be  
7 drugs or money.

8 Q. You said that, "There may be drugs or money"?

9 A. Yes.

10 Q. Okay. And you did not say anything about there may be  
11 weapons or anything like that?

12 A. I -- I don't believe so, no.

13 Q. Okay. Now, when you said, "There may be drugs or money,"  
14 where did you get that conclusion or where did you get that  
15 notion from in -- with regard specifically to that car?

16 A. It was based upon the totality of the information over the  
17 course of the investigation that we were exchanging drugs and  
18 monies with different individuals; that there was an apparent  
19 drug transaction that may have occurred in Leominster earlier  
20 in the day, and the confirmation from the case investigator  
21 that they had actually consummated said drug deal of 125 grams  
22 of heroin. So as a result there may or may not be  
23 drugs -- additional drugs or the money for the drugs in the  
24 car.

25 Q. Well, I want to get to that. You said ultimately you got

1 some information about a drug deal that had actually been  
2 consummated?

3 A. Yes.

4 Q. Okay. Now, it's true, isn't it, that you did not get that  
5 information until about three o'clock?

6 A. I don't recall the time. It was shortly before the  
7 vehicle stop. So maybe -- if the vehicle stop happened at 3:15,  
8 it would have been around three o'clock, sure.

9 Q. Okay. But you had -- it's also true though, isn't it,  
10 that you had already directed and requested Trooper  
11 DiCrescenzo's assistance before you had that information;  
12 correct?

13 A. Maybe shortly before that, yes.

14 Q. Okay. So at the time that you requested information or  
15 assistance from DiCrescenzo, you did not know that a drug deal  
16 had actually been consummated; isn't that right?

17 A. Correct.

18 Q. Okay. Now, you also told us that after you broke off the  
19 surveillance and allowed DiCrescenzo to take over and make the  
20 stop, that you stopped at a rest area on 84 west?

21 A. Yes.

22 Q. Okay. And how long did you stay at that stop that day?

23 A. I have no idea.

24 Q. Well, is it accurate -- is it the case that you would have  
25 gotten to that stop sometime before quarter after 3:00?

1 A. It would have -- the rest area was in the same general  
2 location as the motor vehicle stop.

3 Q. Yeah.

4 A. So if the motor vehicle stop was at 3:15 then I was in the  
5 rest area around the same time and remained there until I made  
6 contact with Trooper DiCrescenzo, and I don't recall how long  
7 that was, if, you know, maybe 10 or 15 minutes. I don't  
8 recall.

9 Q. Well, let me ask you this. You told us on your direct  
10 that you actually thought you might have actually seen the stop  
11 happen on the highway.

12 Do you remember that?

13 A. Yes.

14 Q. Were you seeing the stop take place in front of you? Was  
15 all this action happening in front of you, or was it happening  
16 in your rear view mirror that you saw it?

17 A. I don't recall.

18 Q. You don't remember whether it was in front of you or  
19 behind you?

20 A. I do not.

21 Q. Okay. You also -- well, let me ask you this. You said  
22 that while you were at the rest area, you got -- you had some  
23 information from DiCrescenzo that he had actually found money  
24 in the car.

25 Did I -- am I remembering your direct examination

1       testimony correctly?

2       A.     I believe so, yes.

3       Q.     Okay. That you did say that he had told you that he  
4       contacted you while you were at the rest area to say that he  
5       had actually searched the car or searched items in the car and  
6       discovered a large amount of money. I got that right; correct?

7       A.     Yeah, I do not -- excuse me -- yes, I do not recall if it  
8       was he called over the radio or the phone and told me or he  
9       just told me when he got to the rest area. I just -- I don't  
10      recall.

11      Q.     Well, that's what I'm trying -- that's what I'm trying to  
12      figure out. I'm trying to figure out how long you had been  
13      sitting at the rest area before you got that information from  
14      him?

15      A.     No idea.

16      Q.     Well, was it 20 minutes, an hour and 20 minutes, two hours  
17      and 20 minutes; how long?

18                    MS. DINEEN JERRETT: Objection.

19                    THE COURT: Sustained.

20                    BY MS. FRIED:

21      Q.     Was it an hour?

22                    MS. DINEEN JERRETT: Objection.

23                    THE COURT: Overruled.

24                    THE WITNESS: I do not recall. It may have been  
25      15 minutes. It may have been a half an hour. I do not recall.

1 I was at the rest area awaiting contact with Trooper  
2 DiCrescenzo. At some point shortly after the stop -- it wasn't  
3 an hour or two -- I made contact with Trooper DiCrescenzo, had  
4 a short conversation with him, and then continued to march down  
5 the road.

6 BY MS. FRIED:

7 Q. Okay. So -- well, that's helpful. I mean, so it's your  
8 best memory now that the conversation you had with DiCrescenzo  
9 about actually money being recovered in the car happened not  
10 long after you got to the rest area, probably within a half an  
11 hour after you got there?

12 MS. DINEEN JERRETT: Objection.

13 THE COURT: Sustained.

14 BY MS. FRIED:

15 Q. Well, is it your memory that the conversation that you had  
16 with DiCrescenzo happened not long after you got to the rest  
17 area?

18 MS. DINEEN JERRETT: Objection.

19 THE COURT: If you can answer that.

20 THE WITNESS: I do not recall how long it took before  
21 I had contact with Trooper DiCrescenzo. It may have been 15 or  
22 20 minutes. I would hazard to guess that it was less than an  
23 hour, but I do not recall specifically.

24 MS. FRIED: Okay. I think I'm about done, your Honor.  
25 I just need to check my notes. One more moment, okay.

1                   I don't have anything further.

2                   THE COURT: Mr. Bailey, please.

3                   MR. BAILEY: Thank you, your Honor.

4                   CROSS-EXAMINATION

5                   BY MR. BAILEY:

6                   Q. Good afternoon, Trooper. My name is Brad Bailey. I  
7 represent Mr. Jimenez in this case.

8                   A. Good afternoon.

9                   Q. Now, you indicated early on in direct testimony that you  
10 had been involved in various aspects of surveillance in the  
11 investigations that were -- resulted in you being at -- on  
12 Union Street on October the 4th; correct?

13                  A. Yes.

14                  Q. However, you stated you didn't have any present memory of  
15 the various people who were under investigation and/or from  
16 whom narcotics transactions had occurred; correct?

17                  A. Not by name, no.

18                  Q. And you also indicated on -- in response to direct  
19 examination that you weren't really clear of the weather that  
20 day; correct?

21                  A. Correct.

22                  Q. And you also indicated that you were parked in a black  
23 pickup truck out on Union Street in a parking lot and didn't  
24 have visuals on 105-107 Union Street; correct?

25                  A. Correct.

1 Q. However, one of the first things that you said in response  
2 to the government's questions was that you heard a broadcast  
3 regarding a -- the waving of a vehicle that was first described  
4 as a Honda, and then you said it was actually a Lexus; correct?

5 Do you remember saying that on direct examination?

6 A. Yes.

7 Q. So you had a -- you had a clear memory about that; is that  
8 your testimony?

9 A. It was a description of a vehicle -- of two different  
10 types of vehicles. My recollection was that it was -- that it  
11 was a Honda, but it may have been something different. I just  
12 don't know.

13 Q. Okay. So your recollection was there was a description of  
14 a Honda at one point; correct?

15 A. Yes.

16 Q. Okay. Now, your first observation of this gray Lexus that  
17 you described your recollection of the color being gray. You  
18 weren't sure whether it was a light gray, but you were sure it  
19 was gray, was a little bit after two o'clock on October the  
20 4th; correct?

21 A. I apologize. My first observation of the vehicle?

22 Q. Yes. Yes, sir.

23 A. To the best of my knowledge for the time, yes.

24 Q. Yeah, that was the first time you saw it that day; right?

25 A. Yes.

1 Q. And at the time it was heading away from the garage  
2 towards Leominster center on Union Street; correct?

3 A. Yes.

4 Q. And from your familiarity with the area, you knew that  
5 that -- you knew that to be the wrong direction for access to  
6 the Mass. Pike; correct?

7 A. I did.

8 Q. Heading towards the center of Leominster?

9 A. Well, I -- if you're asking -- no, you -- that goes to  
10 Route 12, which goes to the same place he ended up on anyways.  
11 It is in a northerly direction, but it -- that's the direct  
12 route to Route 12, which then if you take a right goes to 190.

13 Q. And then that car made a U-turn; correct?

14 A. It did.

15 Q. And it proceeded back past 105-107; correct?

16 A. Yes.

17 Q. And went down a street that you followed it down on your  
18 own initiative; correct?

19 A. Yes.

20 Q. And through that street connected up to Route 12; right?

21 A. Yes.

22 Q. And isn't it true that that's the quicker access to  
23 Route 12 from that location?

24 A. Yeah, both roads go to the same place, so I don't -- I  
25 honestly doesn't know which would be quicker. I guess if you

1       went Union Street to Route 12 and then took 117 out, you know,  
2       it may be quicker that way. I guess it's six and one half a  
3       dozen of the other. They're in very close proximity.

4       Q.     So you're not in a position to say whether one way is the  
5       right or the wrong direction?

6       A.     Both can lead to the same ultimate destination, which was  
7       Sturbridge.

8       Q.     And so you followed this vehicle for up to an hour; right?

9       A.     Yes.

10      Q.     And you don't think that you were going as slow as five,  
11     and you don't think you were going as fast as 100 when you were  
12     following; right?

13      A.     Correct.

14      Q.     And you don't have any specific recollections of excessive  
15     speeds being involved either in that car or you having to use  
16     it to keep up with it; right?

17      A.     I don't recall specifically.

18      Q.     Well, I mean you're going on through some neighborhoods,  
19     and you're going down Route 12 in Leominster. You would have  
20     recalled that if there were excessive speeds, wouldn't you  
21     have?

22            MS. DINEEN JERRETT: Objection.

23            THE COURT: Well, overruled. I'll let you answer  
24     that.

25            THE WITNESS: With regards to the travel on Route 12,

1 I do not recall the gray Lexus speeding down -- speeding down  
2 Route 12 with reckless abandon. I don't. I assume I would  
3 have had some memory of that. My -- my -- my belief is that it  
4 was traveling in a somewhat reasonable manner, but I do not  
5 know if it was a mile over the speed limit or a mile under the  
6 speed limit. I just don't know.

7 Q. Well, you would have had a responsibility to stop it if it  
8 was traveling in a reckless manner and endangering other  
9 vehicles or persons; correct?

10 MS. DINEEN JERRETT: Objection.

11 THE WITNESS: Sure.

12 BY MR. BAILEY:

13 Q. Okay. And you didn't notice anything from your training  
14 and experience would be consistent with counter surveillance  
15 moves by this vehicle; correct?

16 A. Not that I was aware of, no.

17 Q. You were able to follow it easily one to two car lengths  
18 behind; right?

19 A. I don't recall what my position was. Generally speaking,  
20 I feel more comfortable more than a car length or two to have a  
21 vehicle separating myself and the suspect vehicle, but I don't  
22 recall specifically.

23 Q. And so eventually you make this call to Trooper Dave  
24 DiCrescenzo; correct?

25 A. Yes.

1 Q. Now, in your truck, you had handheld radio on the DEA  
2 frequency; correct?

3 A. Yes.

4 Q. And that was a radio that you had been using while you  
5 were sitting in the parking lot on Union Street; correct?

6 A. Yes.

7 Q. And that's the frequency via which you had heard certain  
8 observations from other members of your surveillance team;  
9 correct?

10 A. Yes.

11 Q. And you know for a fact, don't you, that Trooper  
12 DiCrescenzo did not have access to that frequency?

13 A. He doesn't have his DEA radio in his cruiser so I would  
14 assume no.

15 Q. You know -- you know no, don't you --

16 MS. DINEEN JERRETT: Objection.

17 BY MR. BAILEY:

18 Q. -- Trooper?

19 A. Well, with regards to that --

20 THE COURT: Hold up. Hold up. Hold up. Sustained.

21 BY MR. BAILEY:

22 Q. How long have you been doing this, Trooper?

23 A. The DEA or the State Police?

24 Q. Your DEA Task Force work?

25 A. Fourteen years on or about.

1 Q. You know that that's a closed radio network that's used in  
2 order to maintain the secrecy of what's going on by the  
3 surveillance teams; correct, sir?

4 MS. DINEEN JERRETT: Objection.

5 THE COURT: Overruled.

6 THE WITNESS: The radio frequency that we were using  
7 that day is -- has a specific number. There's two sides of  
8 that channel. There's a secure side and an unsecure side. To  
9 the best of my knowledge, at that time, we were operating on an  
10 unsecure side. There were issues with the secure side. So in  
11 theory, Trooper DiCrescenzo could have listened to what we were  
12 saying on a scanner. I don't believe he could have listened to  
13 it from Sturbridge, but just generally speaking, the answer  
14 could be yes or no.

15 So can he talk to me? No. Could he have heard what I  
16 was saying? There's a slim possibility that he could have.

17 BY MR. BAILEY:

18 Q. Slim possibility. But you knew that he was working out of  
19 Sturbridge, and that's where you found him was in Sturbridge;  
20 correct?

21 A. I did not know that until I called, and that's when we  
22 were on 290 and/or the Pike traveling towards Sturbridge.  
23 Prior to that, I didn't know whether he was working or not.

24 Q. And he certainly didn't indicate to you, yeah, I've been  
25 listening to your broadcast when you called him, did he?

1 A. No, he did not.

2 THE COURT: Mr. Bailey, we're going to break it here.

3 Trooper, thank you. You can step down.

4 THE WITNESS: Thank you, your Honor.

5 THE COURT: See you back, everybody, on the 30th. I  
6 am going to set the trial date. I presume regardless of what  
7 happens with the motion that the government is going to move  
8 forward whether I grant it or deny it.

9 MS. DINEEN JERRETT: I -- I believe so, your Honor.  
10 If I may, I don't mean to interrupt, but the Trooper is  
11 signaling to me there may be an issue with the 30th.

12 THE WITNESS: I may be out-of-state on the 30th for an  
13 operation.

14 THE COURT: Well, we have witnesses; right?

15 MS. DINEEN JERRETT: I do, but it would involve  
16 suspending his testimony and -- and taking that up at a  
17 different time.

18 THE COURT: That's the way it goes.

19 MS. DINEEN JERRETT: Okay.

20 THE WITNESS: I may be able to come here in the  
21 afternoon to finish up, but in the --

22 THE COURT: Well, I'm not sure we're going to be  
23 sitting in the afternoon, but check with Ms. Dineen Jerrett,  
24 but I appreciate your willingness.

25 THE WITNESS: Thank you, your Honor.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

United States of America,)  
Plaintiff, )  
 )  
 )  
vs. ) Case No. 16CR40025-TSH  
 )  
 )  
 )  
Ivan Cruz-Rivera and )  
Carlos Jimenez, )  
Defendants.)

BEFORE: The Honorable Timothy S. Hillman

Motion to Suppress  
Volume 4

United States District Court  
Courtroom No. 2  
595 Main Street  
Worcester, Massachusetts  
July 25, 2017

Marianne Kusa-Ryll, RDR, CRR  
Official Court Reporter  
United States District Court  
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19 On behalf of the Defendant, Carlos Jimenez

20 Also Present:

21 Carrie Lilley, as Interpreter, Spanish  
22 Margarita Cárdenas

23

24

25

I N D E X

	Witnesses:	Direct	Cross	Redirect	Recross
3	Jamie Vitale, Resumed				
4	By Mr. Bailey		7		
5	By Ms. Dineen Jerrett			20	
	By Ms. Fried				28
6	David DiCrescenzo, Resumed				
7	By Mr. Bailey		36		
	By Ms. Dineen Jerrett			55	
	By Ms. Fried				68
8	Patrick Robinson				
9	By Ms. Dineen Jerrett	78			
	By Ms. Fried		100		
10	By Mr. Bailey		112		
	By Ms. Dineen Jerrett			121	
11	By Ms. Fried				123
12	Luis DeJesus				
13	By Ms. Dineen Jerrett	126			
	By Ms. Fried		137		
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1                   THE COURT: Good morning.

2                   CONTINUED CROSS-EXAMINATION

3                   BY MR. BAILEY:

4                   Q.     Good morning, Trooper.

09:08:23AM 5                   A.     Good morning.

6                   Q.     It's good to see you again.

7                   A.     You as well.

8                   THE COURT: I wish you meant that.

9                   MR. BAILEY: It's like those ads on television, right,  
09:08:37AM 10                   your Honor.

11                   MS. DINEEN JERRETT: Both of them, your Honor.

12                   BY MR. BAILEY:

13                   Q.     So, Trooper, when we left off on, I believe, May 23rd, you  
14                   had told us a number of things. And to recap, you were in an  
09:08:51AM 15                   unmarked black pickup truck on October the 4th, 2013; correct?

16                   A.     Yes.

17                   Q.     And you had been parked on Union Street in a parking lot  
18                   two to three rows back from the street; right?

19                   A.     Yes.

09:09:03AM 20                   Q.     And you were part of a surveillance team that was  
21                   conducting surveillance on 105-107 Union Street that day;  
22                   correct?

23                   A.     Yes.

24                   Q.     You indicated you had no visuals on 105-107 from where you  
09:09:17AM 25                   were parked in that parking lot; correct?

1 A. Yes.

2 Q. So you couldn't see what was going on or transpiring  
3 inside at that location; right?

4 A. Correct.

09:09:25AM 5 Q. You told us the first time you saw the Lexus about which  
6 you've testified was a little bit after two o'clock in the  
7 afternoon that day; right?

8 A. Yes.

9 Q. And you had not seen it before that time; correct?

09:09:38AM 10 A. Correct.

11 Q. And you didn't see it when it purportedly arrived or  
12 pulled into 105-107 Union Street; right?

13 A. Yes.

14 Q. And so your first sighting, which is where we left off,  
09:09:54AM 15 was when you saw that car heading towards Leominster center at  
16 a little bit after 2:00 p.m. and then make a U-turn; correct?

17 A. Yes.

18 Q. You then decided to follow it on your own down Route 12 to  
19 Route 190 to Route 290 and to the Mass. Pike; right?

09:10:16AM 20 A. Yes.

21 Q. I believe my last questions were you said you didn't  
22 recall seeing that car driving at either high or excessive  
23 speeds; correct?

24 A. Not to my knowledge.

09:10:31AM 25 Q. And you didn't need to drive at high or excessive speeds

1 to follow it; right?

2 A. Not that I recall.

3 Q. You didn't observe any countersurveillance moves by the  
4 vehicle while you followed it; right?

09:10:42AM 5 A. No, sir.

6 Q. You didn't observe any furtive gestures occurring inside  
7 that vehicle?

8 A. No.

9 Q. You didn't see anyone reaching down below their seats;  
09:10:53AM 10 right?

11 A. Correct.

12 Q. Or reaching back behind them to tuck things away; correct?

13 A. Correct.

14 Q. And you were eventually told at some point during you  
09:11:06AM 15 following this car by Sergeant Maki to attempt to stop the car  
16 and ID its occupants; right?

17 A. Correct.

18 Q. And that was about 15 to 20 minutes into your following  
19 it, give or take?

09:11:23AM 20 A. Give or take.

21 Q. So to protect the ongoing nature of the investigation, you  
22 reached out to the state trooper that you knew, Trooper Dave  
23 DiCrescenzo; correct?

24 A. Yes.

09:11:37AM 25 Q. And you indicated that you had worked with him before;

1 right?

2 A. Correct.

3 Q. And you knew that he would be working out of Sturbridge,  
4 and you had guessed that the Lexus would either be heading to  
09:11:52AM 5 New Jersey via Route 84 or 394; correct?

6 A. To be absolutely correct, I wasn't aware that he was  
7 working that day. I learned that he was working that day after  
8 reaching out to the barracks, but generally speaking, yes.

9 Q. And you guessed at the route that that vehicle would  
09:12:14AM 10 likely be taking?

11 A. I believe the point at which I made contact with the  
12 barracks and had received directions from Sergeant Maki, it was  
13 westbound on the Pike, so the plausible route back to New  
14 Jersey would 84, yes.

09:12:33AM 15 Q. But you didn't have any information at all that that car  
16 was headed to New Jersey, did you?

17 A. No, I did not.

18 Q. So that was simply a guess by you; right?

19 A. Sure.

09:12:41AM 20 Q. And according to your testimony on May 23rd, you said you  
21 radioed DiCrescenzo, made contact with him eventually, and said  
22 you were following the vehicle on the Mass. Pike west of  
23 Auburn; right?

24 A. Yes.

09:13:01AM 25 Q. And according to you, you gave him the plate number and

1 said there were two Hispanic males in the car; correct?

2 A. Yes.

3 Q. And you testified that you told him you also wanted to ID  
4 the occupants; correct?

09:13:15AM 5 A. Correct.

6 Q. And you said you were interested in the vehicle according  
7 to you regarding a drug investigation; correct?

8 A. Yes.

9 Q. However, as you testified the last time, you didn't  
09:13:28AM 10 provide any specifics about the drug transactions or the  
11 confidential investigation itself; right?

12 A. Not that I recall.

13 Q. And you specifically told Trooper DiCrescenzo that  
14 the -- that that information that you've just testified about,  
09:13:47AM 15 which you say you gave him, was not the basis for him to make a  
16 stop?

17 A. Correct.

18 Q. But you said if a motor vehicle infraction occurred that  
19 could be a reason to stop the car; correct?

09:14:01AM 20 A. Yes.

21 Q. And you also said that you told him in order to access the  
22 inside of the car he would have to develop his own probable  
23 cause; right?

24 A. Correct.

09:14:15AM 25 Q. Now, you had testified on cross-examination earlier under

1 questioning from Ms. Fried that you recalled saying there might  
2 be drugs or money in that car to him; correct?

3 A. Yes.

4 Q. But isn't it true that you also told him you didn't know  
09:14:36AM 5 if there was or wasn't drugs or money in that car?

6 A. I would have no knowledge either way.

7 Q. Well, isn't -- wasn't it your testimony that you told him  
8 you didn't know if there was or wasn't drugs in that -- or  
9 money in that car?

09:14:56AM 10 A. If that's what is stated on the record, I will agree. I  
11 don't recall.

12 Q. Well, if I could approach, please.

13 MR. BAILEY: You have a transcript, right?

14 MS. DINEEN JERRETT: Uh-huh.

09:15:13AM 15 MR. BAILEY: Volume 2, page 180.

16 BY MR. BAILEY:

17 Q. Trooper, if you could just read lines 19 and 20 to  
18 yourself, please.

19 A. (Witness complied.)

09:15:48AM 20 Q. Does that refresh your recollection on that point,  
21 Trooper?

22 A. Yes.

23 Q. And so you told --

24 (Counsel conferred.)

09:16:02AM 25 MR. BAILEY: 19 and 20.

1 Q. -- Trooper DiCrescenzo that you didn't know if there was  
2 or wasn't drugs or money in that car; correct?

3 A. Yes.

4 Q. And you had mentioned drugs or money even though you had  
09:16:18AM 5 never seen either that day; correct?

6 A. Correct.

7 Q. And you mentioned that even though you hadn't even seen  
8 that car at the target location yourself; correct?

9 A. Correct.

09:16:32AM 10 Q. And you mentioned that even though no one else at that  
11 particular point -- withdrawn.

12 You mentioned that even that -- even though no one  
13 else had told you that he or she had seen drugs in that car;  
14 correct?

09:16:53AM 15 No one else had told you that they had seen drugs in  
16 that car from the DEA?

17 A. Specifically in that vehicle?

18 Q. That's correct.

19 A. Correct.

09:17:03AM 20 Q. And nobody else had said they had specifically seen money  
21 in that vehicle; correct?

22 A. Correct.

23 Q. And you also didn't say anything to Trooper DiCrescenzo  
24 about whether there might be weapons in that car; right?

09:17:18AM 25 A. Correct.

1 Q. The request that you say you made to Trooper DiCres --  
2 DiCrescenzo -- excuse me -- wasn't recorded; right?

3 A. I don't believe so.

4 Q. And you didn't write up a report about your communications  
09:17:40AM 5 with him; correct?

6 A. There -- there may be a -- a DEA record of investigation,  
7 which is referred to as a 6 that contains information with  
8 regards to the surveillance and the stop, but I -- I don't  
9 recall specifically, no.

09:18:00AM 10 Q. Well, when you say that, do you recall authoring a DEA-6  
11 yourself?

12 A. Not that I'm aware of. It may contain some information.

13 Q. From you?

14 A. From me, but I don't believe I authored one, no.

09:18:13AM 15 Q. Or you didn't write up a Massachusetts State Police  
16 narrative about any of this either; correct?

17 A. I did not.

18 Q. And you also didn't write up a report, whether a 6 or a  
19 Massachusetts State Police narrative, about purportedly being  
09:18:36AM 20 told by Sergeant Maki to stop the Lexus after you had been  
21 following; correct?

22 A. Correct.

23 Q. And this request that you indicate Sergeant Maki made to  
24 you in that regard, that wasn't tape recorded to your knowledge  
09:18:52AM 25 either; right?

1 A. Not that I'm aware of.

2 Q. Now, back to the statement that there could be drugs or  
3 money in that car, but there might not be, while you were  
4 following that Lexus you personally never saw drugs or money in  
09:19:18AM 5 that car; correct?

6 A. Correct.

7 Q. And that included the few instances that you testified  
8 about on May 23rd, when you were abreast of it; correct?

9 A. Correct.

09:19:29AM 10 Q. And so you certainly -- if you never saw drugs or money in  
11 that car, you never saw the occupants of that car holding  
12 anything that could either have been drugs or money; correct?

13 A. Correct.

14 Q. And you had no reports from the moment that you observed  
09:20:05AM 15 that car leaving or driving past you on Union Street at after  
16 two o'clock on October 4th, you had no reports of anyone else  
17 having seen anyone in that car doing anything with drugs or  
18 money; correct?

19 A. Correct.

09:20:30AM 20 Q. You also weren't aware of any anonymous information or  
21 informant tips about that car before it arrived; correct?

22 A. Correct.

23 Q. And on May 23rd, you indicated that the information that  
24 you relayed to Trooper DiCrescen -- DiCrescenzo was relayed  
09:21:04AM 25 prior to you being informed about a purported drug transaction

1 at 105-107 Union Street, which you did not witness; correct?

2 A. I apologize. Could you repeat the question.

3 Q. I think that was awkwardly worded.

4 The information that you relayed to Trooper  
09:21:34AM 5 DiCrescenzo was relayed prior to you being told anything about  
6 a purported drug transaction at 105-107 Union Street that day,  
7 which you did not witness yourself; correct?

8 A. That is not correct.

9 Q. Well, do you recall testifying on May 23rd, page 182,  
09:22:03AM 10 Volume 2?

11 (Trooper Vitale's radio.)

12 A. I apologize. I'm just going to shut it off.

13 MR. BAILEY: I just thought I was hearing things.

14 Q. So, Trooper, do you recall being asked the following  
09:22:24AM 15 questions by Ms. Fried and giving the following answers on  
16 May 23rd.

17 "Question: Line 9. Okay. But you had -- it's also  
18 true though, isn't it, that you had already directed and  
19 requested Trooper DiCrescenzo's assistance before you had that  
09:22:47AM 20 information; correct?

21 "Answer: Maybe shortly before that, yes.

22 "Question: Okay. So at the time that you requested  
23 information or assistance from DiCrescenzo, you did not know  
24 that a drug deal had actually been consummated; isn't that  
09:23:07AM 25 right?

1                   "Answer: Correct."

2                   Were those the questions you were asked and was  
3                   that -- were those the answers that you gave on May 23rd, when  
4                   you were testifying on this same issue?

09:23:16AM 5                   A.    They were; however, to be clear, the question you asked  
6                   was did I give information regarding the stop to DiCrescenzo  
7                   before I got information from Sergeant Maki, and that is not  
8                   true.

9                   Q.    No, my question --

09:23:34AM 10                  A.    I reached out --

11                  Q.    Go ahead.

12                  A.    I reached out for the barracks, as I was travelling on  
13                  Route 90. It's a short window of opportunity to have this stop  
14                  conducted before we hit the border, assuming that it was going  
09:23:48AM 15                  down 84. I reached out for the barracks to determine who was  
16                  working and if someone would be available to conduct a stop if  
17                  that was the plan. While waiting for a response or shortly  
18                  after receiving word that someone was working and available,  
19                  Sergeant Maki made contact with me, advised that the

09:24:12AM 20                  transaction was consummated. I then provided additional  
21                  information to Trooper DiCrescenzo, all happening within  
22                  minutes of each other, but just to be clear on the time line,  
23                  that is my testimony and recollection.

24                  Q.    Wasn't it your testimony repeatedly on May 23rd that what  
09:24:32AM 25                  you told Trooper DiCrescenzo is the vehicle was involved in a

1 drug investigation?

2 A. Yes.

3 Q. And to be certain, again, what you told Trooper  
4 DiCrescenzo -- DiCrescenzo is he first had to develop his own  
09:25:20AM 5 basis to stop the Lexus; correct?

6 A. Yes.

7 Q. Couldn't use your information; correct?

8 A. Yes.

9 Q. And that the basis could be a vehicular violation; right?

09:25:35AM 10 A. Yes.

11 Q. And that once it was stopped he had to develop his own  
12 probable cause to get inside and search it after it was  
13 stopped; correct?

14 A. Correct.

09:25:49AM 15 Q. Now, you were not physically present when the Lexus was  
16 stopped in Sturbridge; correct?

17 A. Yes.

18 Q. In fact, you had stopped your car and waited at a rest  
19 stop short of where this car stop occurred; correct?

09:26:05AM 20 A. Correct.

21 Q. And you couldn't see the car stop from where you were;  
22 right?

23 A. Correct.

24 Q. You testified that you never went to the scene of the  
09:26:13AM 25 stop; right?

1 A. Yes.

2 Q. So you didn't witness any of the interactions between  
3 Trooper DiCrescenzo and the occupants of that vehicle after the  
4 stop; correct?

09:26:24AM 5 A. Correct.

6 Q. You also indicated that you weren't physically on scene at  
7 105-107 Union Street when this purported controlled buy of  
8 heroin went down in a separate undercover vehicle; correct?

9 A. Correct.

09:26:43AM 10 Q. In fact, you had left the area before that; right?

11 A. Yes.

12 Q. And before that you had already begun to follow the Lexus;  
13 correct?

14 A. Correct.

09:26:55AM 15 Q. And the time that you had left the area was nearly  
16 40 minutes before the time you learned that that transaction  
17 occurred; correct?

18 A. Correct.

19 Q. So you also weren't present when the person  
09:27:10AM 20 indicated -- the person referred to as the CS was debriefed  
21 after the transaction about what had happened; right?

22 A. Correct.

23 Q. You don't speak Spanish, do you?

24 A. I do not.

09:27:23AM 25 MR. BAILEY: Thank you, sir. I have no further

1       questions.

2           THE COURT: I'm sorry. Trooper, did you say you do or  
3       don't?

4           THE WITNESS: I do not, your Honor.

09:27:32AM 5           THE COURT: Ms. Dineen Jerrett, do you have any  
6       redirect?

7           MS. DINEEN JERRETT: Yes, your Honor.

8           MR. BAILEY: Judge, could I just approach other  
9       counsel table --

09:27:46AM 10          THE COURT: Of course.

11          MR. BAILEY: -- for one second.

12          THE COURT: Of course you can.

13          (Counsel conferred.)

14          MR. BAILEY: Thank you, your Honor.

09:28:15AM 15           REDIRECT EXAMINATION

16          BY MS. DINEEN JERRETT:

17          Q.     Trooper Vitale, from the time that you began following the  
18       Lexus from Union Street in Leominster until the time that you  
19       stopped your vehicle after you contacted Trooper DiCrescenzo,  
09:28:33AM 20       and you stopped following the Lexus, was there a time that you  
21       could not -- that you did not or could not maintain visual  
22       sight of that Lexus?

23          A.     There was not. It was in varying distances. You know, it  
24       was a little bit further ahead of me, or I was a little closer,  
09:28:56AM 25       but I was able to maintain a visual surveillance for most of

1 the travel.

2 Q. Okay. And when you say "for most of the travel," what do  
3 you mean by that?

4 A. Again, to be specific, if we were going around, say, the  
09:29:10AM 5 corner to the ramp for the Pike and it was further around the  
6 corner than I was, you know, maybe I couldn't physically see  
7 it, but I followed the line that it was in, and again trying to  
8 be as specific as possible, it was as much as a half mile ahead  
9 of me or within, you know, maybe 15 or 20 yards.

09:29:31AM 10 Q. Why did you not stop the vehicle yourself?

11 MS. FRIED: Asked and answered, I believe.

12 THE COURT: Well, it was a while ago. Go ahead.

13 THE WITNESS: Investigatively, it would not have been  
14 a good idea for an unmarked vehicle to stop another vehicle  
09:29:59AM 15 that may or may not have been involved in a drug transaction.  
16 Beyond that, that decision would be made above my head by  
17 either the case agent or the group supervisor.

18 BY MS. DINEEN JERRETT:

19 Q. And -- and in this case, the case agent was Sergeant Maki;  
09:30:15AM 20 correct?

21 A. Yes.

22 Q. Do you recall having any conversation with Sergeant Maki  
23 about whether you should effectuate a stop of the vehicle?

24 A. Not that I recall.

09:30:30AM 25 Q. You were asked just a few minutes ago about whether you

1       were guessing at the route that the New Jersey Lexus was going  
2       to be taking.

3                   Do you recall those questions by Mr. Bailey?

4       A.    Yes.

09:30:54AM 5       Q.    Okay. Can you just explain to the Court why you believed  
6       that the car may be going on Route 84?

7       A.    It was the most plausible route to New Jersey, which is  
8       where the car was registered.

9       Q.    And you were aware that the car was registered to New  
09:31:12AM 10       Jersey; correct?

11      A.    Yes.

12      Q.    Trooper Vitale, in your work with the DEA on the task  
13       force, is it common for agents and task force officers to work  
14       in groups?

09:31:29AM 15      A.    Yes.

16      Q.    And is it common in your experience with the DEA as a task  
17       force officer for these groups of people to each have their own  
18       specific assignment?

19                   MS. FRIED: Objection. Leading.

09:31:45AM 20                   THE COURT: Overruled.

21                   THE WITNESS: Yes.

22                   BY MS. DINEEN JERRETT:

23      Q.    And on October 4th, 2013, what was your assignment?

24      A.    Surveillance outside of the immediate area of the place  
09:32:03AM 25       where the transaction was purported to take place.

1 Q. And to your knowledge, were other individuals' assignments  
2 that day to conduct surveillance in the area in which the  
3 transaction purportedly was to occur?

4 MS. FRIED: Objection. Leading.

09:32:22AM 5 THE COURT: Overruled. You may answer.

6 THE WITNESS: Yes.

7 BY MS. DINEEN JERRETT:

8 Q. You were asked some questions by Mr. Bailey a few moments  
9 ago about whether you relayed information to Trooper  
09:32:44AM 10 DiCrescenzo that you learned from Sergeant Maki about a heroin  
11 deal having been consummated.

12 Do you recall those questions?

13 A. Yes.

14 Q. Do you recall relaying information to Trooper DiCrescenzo  
09:33:00AM 15 that a drug deal had occurred?

16 A. I do not.

17 MS. FRIED: Objection. Leading.

18 THE COURT: Yeah, don't lead. I'll let you do it to  
19 set the table, but now we're there.

09:33:13AM 20 BY MS. DINEEN JERRETT:

21 Q. At some point you had a conversation with Sergeant Maki on  
22 October 4th, 2013, after you had started following the New  
23 Jersey Lexus; correct?

24 A. Yes.

09:33:24AM 25 Q. And what information did Sergeant Maki relate to you

1       regarding activity that occurred at 105-107 Union Street after  
2       you left the area?

3       A.     That a drug transaction had taken place.

4       Q.     And did you do anything with that information?

09:33:44AM 5       A.     I -- I don't -- I do not recall.

6       Q.     When you spoke with Trooper DiCrescenzo and you provided  
7       the preliminary information to him about the vehicle and about  
8       your request that the vehicle be stopped, why did you tell  
9       Trooper DiCrescenzo not to use the information you had provided  
09:34:35AM 10      as a basis for the stop?

11      A.     The information that I got from Sergeant Maki was that a  
12       drug transaction had taken place. Beyond that the instructions  
13       were to have the vehicle stopped to identify the occupants.

14      I'm not aware that it rose to the level of probable cause. I  
09:35:07AM 15      was not privy to that information other than a drug transaction  
16       had taken place. I gave instructions to Trooper DiCrescenzo  
17       that we were involved in a narcotics investigation. The  
18       vehicle that I was following was potentially involved in that  
19       and asked for him to stop and ID the occupants.

09:35:29AM 20      Q.     Why did you tell him not to use the information you  
21       provided as a basis for the stop?

22                    MS. FRIED: Objection. Asked and answered.

23                    THE COURT: Overruled.

24                    THE WITNESS: I'm not sure that I have an answer for  
09:35:45AM 25        your question.

1 BY MS. DINEEN JERRETT:

2 Q. On October 4th, 2013, were you aware as to whether that  
3 particular investigation had been going on prior to October 4th  
4 of 2013?

09:35:58AM 5 A. Yes.

6 Q. Okay. And what were you aware of?

7 A. The -- we were conducting an investigation in Leominster  
8 involving heroin traffickers and a cooperator and -- and  
9 eventually an undercover were conducting controlled purchases  
09:36:21AM 10 for various members of the organization and some locations that  
11 they were tied to, one specifically being the Union Street  
12 address.

13 Q. And how long had that investigation been going on prior to  
14 October 4th, 2013?

09:36:39AM 15 A. I have no idea.

16 Q. Do you know whether it was going on prior to October 4th,  
17 2013?

18 MR. BAILEY: Asked and answered.

19 THE COURT: Overruled.

09:36:52AM 20 THE WITNESS: Yes.

21 BY MS. DINEEN JERRETT:

22 Q. Is it common for DEA, in your experience as a task force  
23 officer, to have investigations that occur over more than a  
24 single day?

09:37:07AM 25 MR. BAILEY: Objection.

1                   THE COURT: I think I know the answer, but you can  
2 answer that if you want.

3                   THE WITNESS: Yes.

4 BY MS. DINEEN JERRETT:

09:37:12AM 5 Q. And is it common to in these investigations that occur  
6 longer than a single day to be concerned about information  
7 being conveyed or released, so to speak, to compromise the  
8 investigation?

9                   MR. BAILEY: Objection.

09:37:36AM 10 MS. FRIED: Same objection. Leading.

11                   THE COURT: Sustained.

12 BY MS. DINEEN JERRETT:

13 Q. On October 4th, 2013, did you specifically have any  
14 concern about relaying information that might have compromised  
09:37:51AM 15 a longer term investigation?

16                   MS. FRIED: Objection.

17                   MR. BAILEY: Objection.

18                   THE COURT: Sustained.

19 BY MS. DINEEN JERRETT:

09:37:57AM 20 Q. On October 4th -- well, strike that.

21                   In your conversations with Sergeant Maki on  
22 October 4th, 2013, did you discuss what information could be  
23 used to effectuate a stop of the vehicle?

24 A. Yes.

09:38:27AM 25 Q. And what was that conversation?

1 A. That the stop would be conducted absent of the information  
2 with regards to the drug transaction that had occurred earlier.

3 Q. And who made that decision?

4 A. Sergeant Maki.

09:38:47AM 5 Q. Did he tell you why?

6 A. No, he simply said that the stop would be conducted absent  
7 of that information.

8 Q. Okay. And did you have an understanding as to why that  
9 stop would be conducted absent that information?

09:39:03AM 10 MR. BAILEY: Objection.

11 MS. FRIED: Objection. Relevance.

12 THE COURT: Sustained.

13 BY MS. DINEEN JERRETT:

14 Q. Did it surprise you that Sergeant Maki wanted to have the  
09:39:15AM 15 stop effectuated absent the information that you had provided?

16 MR. BAILEY: Objection.

17 MS. FRIED: Objection. Relevance.

18 THE COURT: Sustained.

19 BY MS. DINEEN JERRETT:

09:39:28AM 20 Q. Did you say anything in response to Sergeant Maki telling  
21 you that the car stop should be effectuated absent the  
22 information that he had provided?

23 A. I apologize. I did not have a response for him. I simply  
24 moved on to the next step, which was contacting the trooper.

09:39:53AM 25 MS. DINEEN JERRETT: Okay. If I can have a moment,

1 your Honor.

2 THE COURT: Uh-huh.

3 MS. DINEEN JERRETT: I have no further questions, your  
4 Honor.

09:40:27AM 5 THE COURT: Ms. Fried?

6 MS. FRIED: Yes. May I?

7 THE COURT: You may.

8 RECROSS EXAMINATION

9 BY MS. FRIED:

09:40:40AM 10 Q. Good morning, Trooper Vitale.

11 A. Good morning.

12 Q. All right. I want to following up on some of the  
13 questions Attorney Dineen Jerrett was asking you, conversations  
14 and this issue with stopping the car. Okay? And just a few  
09:40:52AM 15 basics.

16 You're aware that whether an investigation is one day  
17 old or six months old if you're going to conduct a motor  
18 vehicle stop, you have to have probable cause to stop the car  
19 for something; correct?

09:41:03AM 20 MS. DINEEN JERRETT: Objection.

21 THE COURT: Sustained.

22 BY MS. FRIED:

23 Q. Now, at the time that you were in communication with  
24 duper -- Trooper DiCrescenzo about effecting a motor vehicle  
09:41:17AM 25 stop of the Lexus, it's true, isn't it, that the Lexus had

1 already left, had been gone from the garage at 105-107 Union  
2 Street for about an hour; correct?

3 A. Maybe 40 minutes, but, yes, it was gone from the garage.

4 Q. It was gone from the garage, and it was -- well, let me  
09:41:39AM 5 ask you this, if you know, what is the distance in miles  
6 between these garages in Leominster and that interchange at  
7 I-290 and 84, if you know?

8 A. I have no idea. The travel time, as I've testified to  
9 before, is over half an hour, but under an hour. I do not know  
09:41:59AM 10 specifically.

11 Q. Okay. But it's over -- it's at least a half an hour going  
12 highway speed, right, going 60 miles an hour; right?

13 A. Correct.

14 Q. Okay. So it's at least somewhere more than 20 miles away  
09:42:10AM 15 and maybe as far away as 30 or 40 miles; right?

16 MS. DINEEN JERRETT: Objection.

17 THE COURT: Overruled.

18 BY MS. FRIED:

19 Q. You can answer.

09:42:16AM 20 A. It could be, yes.

21 Q. Okay. Now, so at the time that you got information from  
22 the people who were back at the garage, whether it was  
23 Trooper Maki or some other person who was working for the DEA,  
24 the Lexus that you were following was somewhere more than  
09:42:33AM 25 20 miles away from that spot; right?

1 A. Yes.

2 Q. Okay. And the information that you had about the fact  
3 that a drug transaction had taken place in the garage was  
4 simply that a drug transaction had taken place at the garage  
09:42:51AM 5 within that immediate time frame; correct? Within the  
6 immediate time frame that you got the information; right?

7 A. I apologize. If you could repeat the question.

8 Q. Okay. Yeah, okay.

9 A. There is more information other than just a drug  
09:43:09AM 10 transaction took place so I don't want to paint it as such.

11 Q. Well, okay. I'm just really concerned about trying to  
12 address the timing issue. Okay. And let me try to break down  
13 the question to see whether we can move forward with this.

14 Okay. Around the time -- the time that you got the  
09:43:26AM 15 radio communication about the fact that a drug transaction had  
16 taken place in Leominster was after you had been following this  
17 car at least 40 minutes; correct?

18 A. Yes.

19 Q. All right. And it might have been as long as an hour  
09:43:43AM 20 after you had been following this car; correct?

21 A. I don't believe so, but...

22 Q. Okay. Okay. But you'll -- you'll -- you'll -- you'll  
23 agree that it was at least 40 minutes afterwards?

24 A. Yes.

09:43:53AM 25 MS. DINEEN JERRETT: Objection.

1                   THE COURT: Overruled.

2 BY MS. FRIED:

3 Q. Okay. And the information -- let me ask you whether this  
4 is true -- is it true that the information that you got  
09:44:03AM 5 to -- got from Maki, you understood to mean that at that moment  
6 or within the preceding five minutes or so or 10 minutes or so,  
7 that that is when the drug transaction had taken place; is that  
8 fair to say?

9 A. Yes.

09:44:21AM 10 Q. Okay. All right. So you knew that the drug transaction  
11 that you were learning about from Judge Mak -- from  
12 Trooper Maki had taken place a good 20, 30, 40 minutes after  
13 the Lexus had left the garage; right?

14                   MS. DINEEN JERRETT: Objection.

09:44:42AM 15 THE COURT: What's your objection?

16                   MS. DINEEN JERRETT: The 20, 30, 40 minutes.

17 BY MS. FRIED:

18 Q. Some substantial period of time?

19 THE COURT: There we go. You may answer that.

09:44:52AM 20 THE WITNESS: Yes.

21 BY MS. FRIED:

22 Q. All right. So you knew, putting two and two together,  
23 that at least with regard to the hand-to-hand transaction, that  
24 whatever hand-to-hand transaction took place at that garage,  
09:45:05AM 25 that it did not involve the two occupants of the Lexus; right?

1 MS. DINEEN JERRETT: Objection.

2 BY MS. FRIED:

3 Q. Because they weren't there?

4 THE COURT: Sustained.

09:45:15AM 5 BY MS. FRIED:

6 Q. Well, let me ask you this. You knew that the people at  
7 the Lexus were not there at the Union Street garage at the time  
8 that drug transaction took place, didn't you?

9 A. Between the -- between the subjects at the garage and the  
09:45:31AM 10 cooperator --

11 Q. Correct.

12 A. -- the hand-to-hand transaction?

13 Q. Exactly. I'm asking about the hand-to-hand transaction at  
14 the garage.

09:45:38AM 15 A. That is correct.

16 Q. Okay. You knew that the people you were following were  
17 not there at the time that that transaction took place;  
18 correct?

19 A. That is correct.

09:45:45AM 20 Q. All right. And you also knew or -- well, let me -- let  
21 me -- let me rephrase that question.

22 I think as Mr. Bailey sort of went over, you didn't  
23 have any information that the people in the Lexus had drugs in  
24 the car; right?

09:46:04AM 25 MS. DINEEN JERRETT: Objection.

1                   THE COURT: Sustained.

2 BY MS. FRIED:

3 Q. Okay. Okay. So what you knew in terms of tying the Lexus  
4 to whatever had happened at the garage was simply at that point  
09:46:27AM 5 that the Lexus had been at the garage under surveillance;  
6 correct?

7                   That's one of the things you knew. You'll agree that  
8 that was one of the things you knew?

9 A. Yes.

09:46:41AM 10 Q. Okay. Another thing that you knew was that the Lexus had  
11 left the garage some fairly long period of time, at least  
12 20 minutes, perhaps as long as 30 or 40 minutes before this  
13 transaction took place; correct?

14                   MS. DINEEN JERRETT: Objection.

09:46:56AM 15 THE WITNESS: Correct.

16                   THE COURT: Overruled.

17 BY MS. FRIED:

18 Q. Okay. And you had no information either through direct  
19 observation or from information from any of your other  
09:47:06AM 20 coworkers that drugs were ever seen in that car; correct?

21 A. Correct.

22                   MS. DINEEN JERRETT: Objection.

23                   THE COURT: Overruled.

24 BY MS. FRIED:

09:47:13AM 25 Q. You also had no information that the people who were in

1 that Lexus had had any direct contact with the cooperating  
2 source, who had consummated the drug transaction at the garage;  
3 isn't that right?

4 MS. DINEEN JERRETT: Objection, your Honor.

09:47:28AM 5 THE COURT: Sustained.

6 MS. FRIED: Your Honor, I would simply say that this  
7 goes to the probable cause question.

8 THE COURT: Next question, please.

9 MS. FRIED: All right. Okay.

09:47:38AM 10 THE COURT: You can use it on your closing.

11 MS. FRIED: All right.

12 THE COURT: It's -- you're just asking a question you  
13 should be making an argument about, not asking him about.

14 MS. FRIED: All right.

09:47:47AM 15 BY MS. FRIED:

16 Q. Now -- and it's fair to say, isn't it, Trooper Vitale,  
17 that the reason you did not -- well, the reason that you did  
18 not personally stop the Lexus yourself with the information  
19 that you had was that you didn't believe subjectively that you  
09:48:16AM 20 had probable cause to effect an automobile stop for a drug  
21 transaction; isn't that right?

22 A. That is not correct.

23 Q. Well, didn't you just say when Ms. Dineen Jerrett was  
24 asking you questions one of the answers that you gave her was  
09:48:30AM 25 that I was not aware if it, meaning the information you had,

1 rose to the level of probable cause?

2 Didn't you say that just five minutes ago?

3 A. Yes.

4 Q. All right. And let me ask you this. Have you ever  
5 effected a motor vehicle law enforcement stop in a motor  
6 vehicle that you were driving while the car was unmarked?

7 A. Yes.

8 Q. Okay. So the fact that you were driving an unmarked  
9 vehicle was not in and of itself a reason for you not to effect  
0 a motor vehicle stop if you had probable cause to effectuate  
1 such a stop; correct?

12 A. In these given circumstances or just generally speaking?

13 Q. Generally speaking?

14 A. Correct.

15 Q. All right.

16 MS. FRIED: I don't have any further questions, your  
17 Honor.

18 THE COURT: Anything, Mr. -- any clean up?

19 MR. BAILEY: I do not, your Honor. Thank you.

THE COURT: Thank you, Trooper. You may step down.

21 THE WITNESS: Thank you, your Honor.

22 THE COURT: Ms. Dineen Jerrett.

23 MS. DINEEN JERRETT: Your Honor, if I could have a  
24 minute to see --

09:49:50AM 25 THE COURT: Of course.