No. 21-

IN THE

# Supreme Court of the United States

ONIEL MCKENZIE,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI

BRIAN E. SPEARS
*Counsel of Record*
JANNA DOUVILLE EASTWOOD
SPEARS MANNING & MARTINI LLC
2425 Post Road, Suite 203
Southport, CT 06890
(203) 292-9766
bspears@spearsmanning.com

*Counsel for Petitioner*

311485

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Whether a warrantless canine sniff of the exterior of a private storage unit to detect contraband inside the unit constitutes a search in violation of the Fourth Amendment.

## PARTIES TO THE PROCEEDING

Oniel McKenzie is the petitioner here and was the defendant-appellant in the court of appeals. The United States of America is the respondent here and was the appellee in the court of appeals.

## RELATED PROCEEDINGS

The proceedings directly related to this petition are:

*United States of America v. McKenzie*, No. 1:14-cr-169 (MAD) United States District Court for the Northern District of New York. Judgment entered on March 22, 2018.

*United States of America v. McKenzie*, No. 18-1018, United States Court of Appeals for the Second Circuit. Judgment entered September 9, 2021.

## TABLE OF CONTENTS

**Page**

## TABLE OF CITED AUTHORITIES

**Page(s)**

**Cases:**

**Statutes & Other Authorities:**

## INTRODUCTION

In this petition for a writ of certiorari, Oniel McKenzie respectfully asks this Court to address a significant gap in the Court's Fourth Amendment jurisprudence. Law enforcement's use of canine sniffs is now commonplace—and so is the use by our citizenry of private storage units to store personal effects. In this case, the two intersect. Yet there is no decision by the Supreme Court of the United States that has ever addressed the question presented here, *i.e.,* whether a canine sniff of a storage unit constitutes a search for which the Fourth Amendment requires a warrant. Nor is there any precedent from this Court that offers sufficient guidance on how this Court might decide the issue. Instead, the Court's decisions only address opposite ends of the spectrum: on one end, the Court has determined that movable public objects such as luggage and cars can be sniffed by canines without a warrant; and on the other end, the Court has determined that a warrant is required for a canine to sniff a home or its curtilage. Of course, many factual scenarios exist in between.

This case offers the Court a much-needed opportunity to clarify application of its Fourth Amendment jurisprudence. McKenzie's position is that his private storage unit, which was not accessible to the general public, is more akin to the home and its curtilage than to a piece of luggage or a car. The Second Circuit disagreed. But it also recognized that its decision was in conflict with prior Second Circuit decisions. This Court can—and respectfully should—settle the question and, in the process, further explain when a canine sniff constitutes a search.

## OPINIONS BELOW

The Second Circuit's opinion is reported at 13 F.4th 223 and reprinted at App.A. The district court's opinion denying Petitioner's motion to suppress is not reported but is available at 2015 WL 13840885 and reprinted at App.B.

## JURISDICTION

The Second Circuit issued its opinion on September 9, 2021. On November 8, 2021, Petitioner filed a Petition for Panel Rehearing and Rehearing *En Banc*, which the Second Circuit denied on December 15, 2021. App.C. On March 4, 2022, this Court issued an order extending the time to file a petition for certiorari to thirty-six days, making the deadline for this petition April 20, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> 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.

## STATEMENT OF THE CASE

### A. Factual Background

On April 30, 2014, a grand jury returned a one count Indictment against McKenzie charging him with knowingly and intentionally

possessing with intent to distribute one or more controlled substances in violation of 21 U.S.C. § 841(a)(1). C.A.App, at 33. The Indictment alleged a violation involving 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine, and 100 kilograms or more of a mixture and substance containing a detectable amount of marijuana. 21 U.S.C. §§ 841(b)(1)(A) & (B).

The Government alleged that in the months prior to the Indictment, a confidential informant told agents of the Albany, New York office of the Drug Enforcement Agency ("DEA") about McKenzie's drug trafficking operations. The informant told the DEA agents that McKenzie employed women (later identified as Deondra Forney and Latrina Riggins) to transport packages containing marijuana or cocaine from United Parcel Service ("UPS") mailboxes to storage units rented by McKenzie or the women.

The Government's case against McKenzie was based substantially on the evidence seized on October 4, 2013 from a private storage unit ("Unit 296") at the Mabey's Self Storage in East Greenbush, New York ("Mabey's). Mabey's is a business that rents storage space to individuals. Persons renting storage space are given access to the premises through a gate near the perimeter of the business's property. C.A.App, at 45-46. To open the gate, the renter must enter an assigned passcode. C.A.App, at 45-46. After accessing the secure gate, the renter can then access the specific storage unit assigned to him or her. C.A.App, at 46-47. Throughout the

proceedings in this case, the Government maintained that McKenzie rented Unit 296 from Mabey's under the name of Darrin Clark. C.A.App, at 47-48.

Investigator Christopher Gilroy prepared and signed an application to search Unit 296. C.A.App, at 49. The application set forth generalized informant and background information as well as surveillance efforts occurring in September and October 2013. C.A.App, at 41-48. Gilroy's description of the surveillance that law enforcement officers conducted made no mention of McKenzie. C.A.App, at 43-48. Instead, law enforcement observed Riggins on multiple occasions, including on September 26, 2013, when officers observed Riggins access the security gate to Mabey's. C.A.App, at 45-46.

According to Gilroy, on October 3, 2013, law enforcement officers followed Riggins from a UPS store to Mabey's. C.A.App, at 47. With no explanation of how law enforcement officers were able to access the secure gate, Gilroy reported that one of his colleagues saw Riggins transfer boxes from a car she was driving to Unit 296. C.A.App, at 47. Riggins then secured Unit 296 and left the area. C.A.App, at 47.

Later that evening, law enforcement officers returned to Mabey's with a dog and a dog handler, each of which purportedly were trained in narcotics detection. C.A.App, at 47. Again, without any explanation of how law enforcement officers were able to enter the locked gate, Gilroy stated that the dog and handler "examined several units," including Unit 296. C.A.App, at 47. The dog "gave a positive alert on Unit #296 for the presence of a narcotic and/or marijuana." C.A.App, at 47.

On October 4, 2013, the Albany County Supreme Court ("New York Court") issued a warrant to search Unit 296. C.A.App, at 51. Shortly thereafter, law enforcement executed the warrant and seized 100 pounds of marijuana. C.A.App, at 59. The seizure of marijuana from Unit 296 was a key predicate for subsequent search warrant applications and warrants issued later that same day, including a search of a 2006 Jeep Grand Cherokee ("Jeep") and a residential property located at 6707 Oak Hill Circle (the "Oak Hill Residence"). C.A.App, at 59, 79.

**B. Motion to Suppress**

On July 2, 2015, Mr. McKenzie filed a Motion to Suppress evidence seized from the unlawful searches conducted on October 4, 2013 and requested an evidentiary hearing. C.A.App, at 35. Among other challenges, McKenzie claimed that the canine examination of Unit 296 and the search of the Jeep violated the Fourth Amendment. McKenzie thus sought to suppress the evidence seized from these locations and other evidence tainted by the Fourth Amendment violations, including the evidence seized from the Oak Hill Residence. C.A.App, at 35.

On November 4, 2015, the District Court issued a Memorandum of Decision and Order denying Mr. McKenzie's Motion to Suppress. App.B. Regarding the canine examination of Unit 296, the court held that "the warrantless canine sniff here did not constitute a physical intrusion into [a] constitutionally protected area[]; and, therefore, did not violate Defendant's rights under the Fourth Amendment's property-rights baseline." App.B, at 13. The District Court further determined that

McKenzie did not have a reasonable expectation of privacy in the area outside of Unit 296, which the court regarded as "generally open to the public." App.B, at 17.

### C. Trial

A three-day jury trial commenced on October 2, 2017 before the District Court. At the close of the Government's evidence, McKenzie moved for a judgment of acquittal, which the District Court denied. C.A.App, at 176-177. McKenzie, representing himself *pro se*, did not offer any evidence, nor did he testify on his own behalf. C.A.App, at 177. On October 4, 2017, the jury returned a verdict finding McKenzie guilty as to Count One of the Indictment. C.A.App, at 178-180.

On March 22, 2018, the District Court sentenced McKenzie to 188 months of imprisonment. C.A.App, at 19-20. Judgment entered on March 22, 2018. C.A.App, at 215-221. On April 6, 2018, McKenzie filed a Notice of Appeal. C.A.App, at 222, C.A.App, at 22, #172.

McKenzie has been incarcerated in connection with this case for eight years. C.A.App, at 4-5.

### D. The Second Circuit's Decision

On appeal, McKenzie challenged the district court's denial of his motion to suppress the evidence obtained from Unit 296. McKenzie's primary argument was that the warrantless dog sniff outside of his private storage unit was an illegal search that violated his Fourth Amendment rights under both the "baseline property rights" test and the "reasonable expectation of privacy" test.

The Second Circuit recognized that it was deciding an issue of first impression in its Circuit and properly acknowledged that "defendants generally enjoy a reasonable expectation of privacy in the internal spaces of storage units and commercial lockers." App.A, at 16, 18. In "consideration of applicable Supreme Court precedent," however, the Second Circuit concluded that the canine sniff outside the closed door of Unit 296 did not violate McKenzie's constitutional rights "because it was not a search within the meaning of the Fourth Amendment." App.A, at 16.

The court analyzed McKenzie's interests under both the "property rights baseline" test and the "reasonable expectation of privacy" test. With respect to the "property rights baseline" test, articulated in *Florida v. Jardines*, 569 U.S. 1, 5 (2013), the Second Circuit acknowledged that McKenzie "avoid[ed] a curtilage argument by correctly noting that the baseline analysis is not limited to houses but also extends to 'effects' and commercial property." App.A, at 16. The court, however, found "two problems" with McKenzie's "property rights baseline" argument, which focused on the officers' entry into the enclosed area of Mabey's "since there was no pre-warrant incursion into Unit 296 itself." App.A, at 16-17.

First, the court held that McKenzie had not met his burden of showing that the officers violated anyone's property rights when they entered the Mabey's facility. App.A, at 17. Second, the court found that even if McKenzie had offered evidence showing that the officers had trespassed onto Mabey's property, the "objection" belonged to Mabey's, as "McKenzie had no authority to exclude people from Mabey's grounds."

App.A, at 17. The court therefore held that McKenzie "only rented storage units *within* the facility," and [b]ecause the officers . . . did not physically intrude on Unit 296 prior to obtaining a warrant," his argument under the property rights baseline test "[came] up short." App.A, at 18 (emphasis in original).

With respect to the "reasonable expectations of privacy" test, the Second Circuit concluded that "[e]ven accepting that McKenzie had a reasonable expectation of privacy in the *internal* area of Unit 296, he did not have a reasonable expectation of privacy in the air *outside* of Unit 296." App.A, at 19 (emphasis in original).

Citing this Court's decision in *United States v. Karo*, 468 U.S. 705, 720-21 (1984), as well as its own prior opinion in *United States v. Iverson*, 897 F.3d 450 (2d. Cir. 2018), the court found that because "[t]he canine here was legally positioned outside Unit 296, in an area accessible to Mabey's employees and anyone renting one of the hundreds of units in the facility," the canine sniff outside of McKenzie's unit "did not violate [his] reasonable expectation of privacy." App.A, at 19-20.

The court admitted that its decision "could be seen as conflicting" with its prior holding in *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985), "that a canine unit's alert while legally positioned outside a closed apartment door constitutes a search under the Fourth Amendment." App.A, at 20. The court acknowledged: "Both concern a space in which the defendant enjoyed a reasonable expectation of privacy" and "[b]oth involve a canine alert for drugs outside the closed door of that space in an area

open to others. Yet, the two cases reach divergent outcomes on whether the sniff violated the defendant's reasonable expectation of privacy." App.A, at 20-21.

The Court distinguished its holding in *Thomas* by focusing on the "nature of the space" at issue. App.A, at 21. The court noted that its holding in *Thomas* "rested upon the 'heightened privacy interest that an individual has in his dwelling place.'" App.A, at 21 ("The expectation of privacy reaches its zenith in the home.") Relying on *United States v. Place*, 462 U.S. 696, 697 (1983), *Illinois v. Caballes*, 543 US. 405, 409 (2005), and *United States v. Kyllo*, 533 U.S. 27, 37 (2001), the court held that commercial storage units "are closer to luggage in an airport . . . or an automobile detained during a traffic stop . . . than a dwelling," because such units "do not present the privacy interests associated with the 'intimate details' of one's life which are inherently associated with the home." App.A, at 22 (citations omitted).

## REASON FOR GRANTING CERTIORARI

### I. THE SECOND CIRCUIT'S DECISION DECIDED AN IMPORTANT QUESTION OF FOURTH AMENDMENT LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

#### A. Canine Sniffs and The Fourth Amendment

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend IV. The "basic purpose of this Amendment," this Court has recognized, "is to

safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (internal quotations omitted).

This Court has established a "simple baseline" at which the Fourth Amendment analysis begins: "When the Government obtains information by physically intruding on persons, houses, papers or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (internal quotations omitted). The physical intrusion onto the person's property is the operative fact under the property-rights baseline analysis. *Id.* at 11.

Beyond the property-rights baseline test, the Supreme Court, in *Katz v. United States*, 389 U.S. 347 (1967), added the "reasonable expectation of privacy analysis." In *Katz*, the Court held that "the Fourth Amendment protects people, not places," and "expanded [its] conception of the Amendment to protect certain expectations of privacy as well." *Carpenter*, 138 S. Ct. at 2213 (internal quotations omitted). "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' [the Court] ha[s] held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Id.* (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

This Court first evaluated the Fourth Amendment with respect to canine sniffs in *United States v. Place*, 462 U.S. 696 (1983). In *Place*, this Court held in dicta that "[a] 'canine sniff' by a well-trained narcotics

detection dog" of an individual's "luggage, which was located in a public place"—*i.e.,* an airport, did not constitute a "search" within the meaning of the Fourth Amendment. *Id*. at 707. The Court stated: "[T]he canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id*. at 707.

Justice Brennan wrote a concurring opinion (joined by Justice Marshall) in which he found the majority's discussion as to whether the canine sniff of the luggage constituted a search "unnecessary to the judgment" since the respondent had not contested the validity of the canine sniff. *Id*. at 719. Noting that the issue was "more complex than the Court's discussion would lead one to believe," he wrote:

> [A] dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual's privacy. Such use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic detection devices.

*Id*. at 719-20.

A few years after deciding *Place*, this Court issued its decision in *Kyllo v. United States*, 533 U.S. 27 (2001). Although the facts did not involve a canine sniff, the decision called into question the continued validity of the dicta in *Place* as to what conduct constitutes an illegal search. In *Kyllo*, this Court was presented with the question of whether the use of a thermal-imaging device aimed at a private home from a public street to

detect relative amounts of heat within the home constituted a "search" within the meaning of the Fourth Amendment. *Id.* at 29. In concluding that the use of the thermal imager constituted a "search" for which a warrant was required, the Court concluded: "[O]btaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' . . . constitutes a search—at least where (as here) the technology in question is not in general public use." *Id.* at 34 (citing *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

Thereafter, in *Illinois v. Caballes*, 543 U.S. 405, 409 (2005), this Court reaffirmed its holding in *Place* with respect to a canine sniff that was performed on the exterior of a vehicle while the respondent was lawfully seized for a traffic violation. The Court concluded that "the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,'. . . during a lawful traffic stop, generally does not implicate legitimate privacy interests." *Id.* (citing *Place*, 462 U.S. at 707).

In *Florida v. Jardines*, 569 U.S. 1 (2013), this Court concluded that a canine sniff *can* constitute a search for purposes of the Fourth Amendment. In *Jardines*, the defendant was charged with trafficking in cannabis and theft of electricity and moved to suppress evidence that was seized pursuant to a search warrant that was obtained after a canine sniff was performed on the front porch of the defendant's home. *See id.* at 5. Applying the property rights baseline analysis, the Court first concluded that it regarded the area

"'immediately surrounding and associated with the home'- what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'" *Id.* at 6 (citing *Oliver v. United States*, 466 U.S. 170, 180 (1984)). The Court concluded that the officers' intrusion on a constitutionally protected space constituted a search within the meaning of the Fourth Amendment: "That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Id.* at 11.

Although the Court decided the issue based on the property rights baseline analysis, Justice Kagan wrote a concurring opinion (joined by Justices Ginsburg and Sotomayer) in which she stated that she "could just as happily have decided it" under the reasonable expectation of privacy interests test. *Id.* at 13. Justice Kagan wrote:

> A decision along those lines would have looked ... well, much like this one. It would have talked about "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" . . . It would have insisted on maintaining the "practical value" of that right by preventing police officers from standing in an adjacent space and "trawl[ing] for evidence with impunity." . . . It would have explained that "'privacy expectations are most heightened'" in the home and the surrounding area. . . . And it would have determined that police officers invade those shared expectations when they use trained canine assistants to reveal within the confines of a home what they could not otherwise have found there. . . .

*Id.* (citations omitted).

With respect to canine sniffs, it is clear that a spectrum of privacy interests has evolved from this Court's established precedent. At one end of

the spectrum—and afforded the greatest protection—is an individual's heightened privacy in the home. *See Jardines*. At the opposite end of the spectrum is an individual's limited privacy interest in luggage and automobiles—movable items located in public spaces. *See Place, Caballes*. However, when a canine sniff occurs in a location other than a personal residence, but where there nonetheless is a recognized expectation of privacy—*i.e.*, a private storage unit—this Court has not provided clear guidance on whether and when the canine sniff may constitute a search under the Fourth Amendment.

### B. The Privacy Interests at Issue Do not Fall Neatly Within this Court's Existing Precedent

As the Second Circuit aptly noted in its ruling below, "[t]hat different degrees of privacy interests attach to different settings is well-established in Fourth Amendment jurisprudence." App.A, at 21 (citing *New York v. Burger*, 482 U.S. 691, 700 (1985)). The Second Circuit's disavowal of its holding in *United States v. Thomas,* 757 F.2d 1359, which remains good law, showcases the significant—and problematic—gap that exists along the privacy spectrum.

In *United States v. Thomas*, which was decided pre-*Jardines*,[1] the Second Circuit rejected the idea that "a [canine] sniff can *never* be a

[1] Although decided prior to *Jardines*, at least one state court has held that the Second Circuit's opinion in *Thomas* was "prescient." *See State v. Kono*, 2014 WL 7462049, at *3, 59 Conn. L. Rptr. 279 (Conn. Super. Ct. Nov. 18, 2014), *aff'd on different grounds*, 324 Conn. 80 (2016) ("Subsequent decisions by the U.S. Supreme court, specifically *Kyllo v. U.S.*, 533 U.S. 27 (2001) and *Florida v. Jardines*, [569 U.S. 1(2013)], have proved the *Thomas* court prescient as those decisions support the view that a canine

search." *Id.* at 1366 (emphasis in original). In *Thomas*, this Court held that law enforcement's use of a dog's "far superior, sensory instrument" to sniff the air outside of a person's apartment while positioned in the common area of the apartment building constituted an illegal search. 757 F.2d at 1367. The Court concluded that the occupant of the apartment "had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door." *Id.; see also United States v. Hayes,* 551 F.3d 138, 144 (2d Cir. 2008) (reaffirming *Thomas*).

While the Second Circuit acknowledged that its holding concerning McKenzie was "in tension" with *Thomas*, it justified its decision by emphasizing that its "holding in *Thomas* rested upon the 'heightened privacy interest that an individual has in his *dwelling place*'"—where "[t]he expectation of privacy reaches its zenith." App.A, at 21 (emphasis added). The Second Circuit then improperly likened private storage units to "luggage in an airport" or "an automobile detained during a traffic stop," which it held do not present the same expectation of privacy interests as those of a home. App.A, at 22.

Such reasoning, however, ignores the very premise stated in *Thomas*—that a dog sniff for narcotics "remains a way of detecting the contents of a private, enclosed space," and as such may intrude upon the

---

sniff outside an apartment door for purposes of drug detection constitutes a search for purposes of the fourth amendment.")

legitimate expectation of privacy one maintains in such a space, especially one as personal and shielded from public view as a unit used for storing personal effects. *Thomas*, at 1367.

The Second Circuit minimized the fact that this Court has recognized that personal storage units command a high degree of privacy. *See United States v. Karo*, 468 U.S. 705, 720 n. 6 (1984) ("surely [the defendants] had a reasonable expectation of privacy in their own storage locker."); *see also United States v. Hamilton*, 538 F.3d 162, 169 (2d Cir. 2008) ("privacy interests have been found with respect to . . . storage lockers."); *United States v. Johnson*, 584 F.3d 995, 1001 (10th Cir. 2009) ("[S]torage units are secure areas that 'command a high degree of privacy.'")

The general notion that a person has an expectation of privacy in a storage unit was particularly evident in McKenzie's case since Unit 296 was located inside a locked and enclosed space that was accessible only through a password-protected security gate and was not open to the general public.[2] In contrast, there was no suggestion in the *Thomas* opinion that public access to the common areas of the apartment building was restricted in any manner. Nevertheless, the *Thomas* opinion still held that the occupant had a reasonable expectation of privacy in the air outside of his individual apartment.

[2] The Second Circuit acknowledged in its ruling below that the district court had committed clear error in erroneously describing the storage facility as "unenclosed" and "generally open to the public," but improperly held that such error was harmless. App.A, at 17 n. 7.

Moreover, the Second Circuit's reliance on *United States v. Karo*, 468 U.S. 705, 720–21 (1984), in which "the Court indicated that *the police* had not transgressed the defendants' 'reasonable expectation of privacy in their own storage locker' by using *their* sense of smell to identify an odor present outside the unit and thus to identify which unit contained the contraband," is misplaced. App.A, at 19 (emphasis added). In *Thomas,* the court emphasized that it was the use of a trained canine as a "far superior, sensory instrument"—not the officer's own sense of smell—that constituted the impermissible intrusion:

> With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, *but is a significant enhancement accomplished by a different, and far superior, sensory instrument*.

757 F.2d at 1367 (emphasis added).

Ignoring the broader applicability of *Thomas's* logic, the Second Circuit relegated McKenzie's interest to the lowest end of the privacy spectrum—on par with transient luggage and automobiles located in public spaces. In effect, the Second Circuit has now held that a canine sniff can only constitute a search if the sniff occurs at one's home, where "[t]he expectation of privacy reaches its zenith." In doing so, the Second Circuit not only marginalized an interest that has been found to "command[] a high degree of privacy," but also underscored the need for this Court's

review to provide necessary guidance as to a significant privacy interest that is deserving of greater Fourth Amendment protection.

### C. The Limited Circuit Court Cases Addressing Warrantless Canine Sniffs of Private Storage Units were Decided Pre-*Jardines* and Provide Little Guidance.

There is limited caselaw at the circuit level addressing whether a warrantless canine sniff of a private storage unit constitutes an illegal search under the Fourth Amendment. In fact, it appears that, in addition to the Second Circuit's decision below, there are only a handful of other circuit courts that have ruled on this exact issue, all of which were decided pre-*Jardines* and one decided pre-*Place*. As such, these cases provide little guidance for the lower courts in determining the degree of privacy that should attach to a private storage unit when considering a warrantless canine sniff.

In *United States v. Venema*, 563 F.2d 1003 (10th Cir. 1977), the Tenth Circuit held that the use of a cannabis sniffing canine by police outside a private locker located at a storage company did not constitute a search under the Fourth Amendment. The Tenth Circuit's decision was based largely on the fact that the defendant did not rent the areaway in front of his locker, which the court found was " at least semipublic" in nature, as well as the fact that the agents brought the canine onto the premises with the express consent of the owner of the storage facility. *See id*. at 1005. The Tenth Circuit further rejected the defendant's argument under *Katz* that he had a reasonable expectation of privacy in the areaway

outside his locker where he was specifically warned by the manager of the facility when he initially rented the locker that "from time to time she allowed the police on the premises and permitted them to use their dogs for the purpose of detecting marijuana, and that should he store marijuana in his locker, he did so at his own risk." *Id.* at 1006.

In *United States v. Cook*, 904 F.2d 37, 1990 WL 70703 (6th Cir. 1990) (unpublished), Memphis police officers were conducting a training exercise for narcotics-sniffing canines at a storage locker facility when one of the dogs alerted to "Bin 551" which was not one of the bins subject to the training. *Id.* at *1. After a search warrant was obtained for Bin 551, the police uncovered cocaine in the locker. *Id.* at *1. The defendant claimed that the warrantless canine sniff violated his Fourth Amendment rights. *Id.* at *2. Specifically, the defendant argued that he had a reasonable expectation of privacy in the commercial facility containing his rented storage bin. *See id.* In reliance on *Venema* and *Place*, the Sixth Circuit found that the canine sniff was not a warrantless search subject to the Fourth Amendment. *See id.* at *3. The court found that the officer was lawfully on the premises of the storage facility conducting a training exercise, which provided a reasonable explanation for why the canines were sniffing the air outside all of the lockers, and that the defendant had no reasonable expectation of privacy in the areaway outside his bin, which was located in a commercial building that was "open to the public for business." *See id.* at *2-3.

In *United States v. Lingenfelter*, 997 F.2d 632, 637-639 (9th Cir. 1993), the Ninth Circuit similarly concluded that a warrantless canine sniff from a public alleyway outside a commercial warehouse,[3] did not constitute a "search" within the meaning of the Fourth Amendment. The respondent, relying on *Thomas*, argued that "he had a legitimate and reasonable expectation of privacy within the interior of the warehouse and that 'the use of a trained dog to sense what [was] concealed inside' that warehouse violated his rights under the Fourth Amendment." *Id.* at 638. The Ninth Circuit rejected the reasoning of the *Thomas* decision, while relying on *Place's* directive that "a dog sniff is not a search in part because it 'discloses only the presence or absence of narcotics.'" *Id.*

In addition to having been decided before this Court in *Jardines* recognized that a canine sniff can constitute a search, each of these cases is factually distinguishable from McKenzie in that his expectation of privacy in Unit 296 was greater due to the enclosed, non-public nature of the Mabey's facility.

### D. This Court Should Clarify that an Individual's Privacy Interest in a Storage Unit Demands Greater Protection When Determining Whether a Warrantless Canine Sniff Constitutes a Search

State courts addressing warrantless canine sniffs have recognized the important privacy interests in private storage units and, under state constitutions, elevated such interests' position on the "privacy spectrum."

---

[3] The court described the "warehouse" at issue as "one of 30 to 35 units in a light industrial complex" where "[e]ach unit had an office entrance in the front and a roll-up door in the back." *Id.* at 635.

For example, in *State v. Carter*, 697 N.W.2d 199, 208 (Minn. 2005), the Supreme Court of Minnesota addressed "whether a drug-detection dog sniff outside of a storage unit is a search under the Fourth Amendment." The court held that while the expectation of privacy under the Fourth Amendment is less for a storage unit than for a home, it "agree[d] that the privacy interest in an area outside a fixed structure such as a storage unit is greater than that outside a mobile but temporarily stopped automobile." *Id.* at 209 ("Unlike an automobile, a storage unit is not subject to substantial governmental regulation and is designed specifically for the purpose of storing personal effects in a fixed place.")

The court concluded:

> [A] person's expectation of privacy in a self-storage unit is greater for the purpose of the Minnesota Constitution than it has been determined to be under the Fourth Amendment. This is particularly true of storage units like appellant's that are equivalent in size to a garage and are large enough to contain a significant number of personal items and even to conduct some personal activities. *Unlike an automobile or luggage, the dominant purpose for such a unit is to store personal effects in a fixed location.*

*Id.,* at 210–11 (emphasis added); see also *Commonwealth v. Johnston*, 515 Pa. 454 (1987) (finding that canine sniff of individual storage locker from common area of storage facility constituted search under Pennsylvania Constitution).

As this Court recently reaffirmed in *Carpenter v. United States*, 138 S. Ct. at 2217, "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one]

seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" (citing *Katz*, 389 U.S., at 351–352).

## CONCLUSION

For the foregoing reasons, this Court respectfully should grant Mr. McKenzie's petition for certiorari and review the important question presented. A decision by this Court addressing the interplay between canine sniffs and privacy interests associated with storage units will provide much needed guidance for factual scenarios falling within the wide gulf between automobile searches and residential searches.

Respectfully submitted,

BRIAN E. SPEARS
*Counsel of Record*
JANNA D. EASTWOOD
SPEARS MANNING & MARTINI LLC
2425 Post Road, Suite 203
Southport, Connecticut 06890
(203) 292-9766
bspears@spearsmanning.com

Counsel for Petitioner

April 20, 2022

# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

August Term 2020

(Argued: April 7, 2021 | Decided: September 9, 2021)

Docket No. 18-1018

UNITED STATES OF AMERICA,

*Appellee*,

v.

ONIEL MCKENZIE, AKA DARRIN CLARK, AKA SHOWER

*Defendant-Appellant*.[†]

---

Before:

LIVINGSTON, *Chief Judge*, WESLEY, CARNEY, *Circuit Judges*.

In October 2017, a jury convicted Oniel McKenzie of knowingly and intentionally possessing with intent to distribute controlled substances in violation of 21 U.S.C. § 841(a)(1). At trial, the Government introduced evidence showing that law enforcement officers recovered approximately 100 pounds of marijuana from a storage unit linked to McKenzie. McKenzie argues that the district court (D'Agostino, *J.*) should have suppressed this evidence because a warrantless dog sniff outside of the unit violated his Fourth Amendment rights. We hold that the dog sniff was not a search within the meaning of the Fourth Amendment.

---

[†] The Clerk of the Court is directed to amend the official caption as set forth above.

McKenzie also contends that the district court should have held an evidentiary hearing to address his claim that police investigators knowingly misled a New York court in an application for a search warrant. We disagree and hold that the district court was not required to conduct such a hearing. We have considered McKenzie's remaining arguments and find them to be without merit. We therefore **AFFIRM** the judgment of the district court.

---

ONIEL MCKENZIE, *pro se*, FCI Fort Dix, Joint Base MDL, NJ.

RAJIT S. DOSANJH, Assistant United States Attorney, *for* Antoinette T. Bacon, Acting United States Attorney for the Northern District of New York, Syracuse, NY, *for Appellee*.

BRIAN E. SPEARS (Janna D. Eastwood, *on the brief*), Spears Manning & Martini LLC, Southport, CT, *for Defendant-Appellant*.

---

WESLEY, *Circuit Judge*:

Oniel McKenzie was convicted of possessing marijuana and cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) following a jury trial in the United States District Court for the Northern District of New York. He was sentenced to a below-Guidelines term of 188 months' imprisonment and five years of supervised release. In a counseled brief, he argues that the district court wrongly denied his motion to suppress evidence, failed to hold a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), erroneously calculated his Guidelines sentencing range, and entered a judgment of conviction despite insufficient

evidence. In a *pro se* brief, McKenzie additionally argues that the district court erred by admitting testimony about uncharged drug offenses, relying at sentencing upon drug quantities destroyed by the Government, violating his right to a speedy trial, and exercising jurisdiction despite his crime not being a federal offense. Having considered these arguments, we find no reversible error in the decisions of the district court and affirm the judgment of conviction.

## BACKGROUND

### I. Facts[1]

On April 30, 2014, a federal grand jury indicted Oniel McKenzie on one count of possessing with an intent to distribute five or more kilograms of cocaine and 100 or more kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1). The indictment capped a months-long investigation by the Albany, New York office of the Drug Enforcement Administration ("DEA") into McKenzie's drug trafficking operation. A confidential informant originally identified McKenzie as the leader of an enterprise wherein two women (later identified as Deondra Forney and

[1] These facts are drawn from the Memorandum Decision and Order entered by U.S. District Court Judge Mae A. D'Agostino on November 4, 2015, the appendix filed by McKenzie with his counseled brief (hereinafter "A"), the pre-sentencing report ("PSR"), and relevant district court docket entries.

Latrina Riggins) picked up packages of cocaine and marijuana from UPS mailboxes and transported them to storage units controlled by McKenzie in the Albany area.

*The First Search*

DEA agents were able to confirm many of the confidential informant's allegations through first-hand observation. In late September 2013, they began conducting surveillance on Riggins. On October 3, an agent observed her pick up eleven boxes from a UPS store in Troy, New York, and transport them to Mabey's Self Storage ("Mabey's") in Rensselaer, New York. Agents interviewed the Site Manager for Mabey's and reviewed surveillance footage showing Riggins accessing storage units throughout the facility.

The storage units at Mabey's are enclosed by a fence and a security gate in an open air area. When Riggins arrived at Mabey's, the agent continued his surveillance within the enclosed area.[2] Riggins opened unit 296 ("Unit 296"), placed several boxes inside, locked the door, and left at approximately 5:35 p.m. When she departed, the agents called in a canine unit. The dog—certified in

[2] The record is not clear as to how the agent gained access to the enclosed area.

narcotics detection—examined the outside of several storage units and alerted on Unit 296. In an interview with the Site Manager the next day, agents learned that Unit 296 was rented by "Darrin Clark."

New York State Police Investigator Christopher T. Gilroy prepared and signed an application for a warrant to search Unit 296. His affidavit accompanying the application described the informant's tips, the surveillance operation, and the canine alert. The Hon. Thomas A. Breslin of the Albany County Supreme Court signed the warrant that afternoon; law enforcement officers commenced a search of Unit 296 and ultimately seized approximately 100 pounds of marijuana. The marijuana was packaged in cardboard boxes, white construction buckets, and trash bags.

*The Second Search*

Later that afternoon, Investigator Gilroy applied for a second warrant. He indicated in his affidavit that officers were surveilling Unit 296 at approximately 12:10 p.m. when a Jeep entered Mabey's, its driver opened Unit 296, paid rent at the front office, and then drove away. The officers followed the Jeep to 27 Thornton Street, where it parked and the driver exited and began talking with a man on the sidewalk. At the request of a DEA agent, the officers approached the

driver and asked for identification. The driver, later identified in court as McKenzie, presented a California driver's license in the name of Darrin Clark—the name registered to Unit 296. Following this brief interaction with the officers, McKenzie dropped the Jeep's keys into the open engine block compartment of a nearby truck and walked away. He left the scene in a different vehicle.

The police then called a canine unit which alerted for drugs within the Jeep. Investigator Gilroy stated in his affidavit that six cardboard boxes similar to the ones Riggins placed in Unit 296 were plainly visible in the Jeep. He also referenced the marijuana recovered from Unit 296. Justice Breslin signed the warrant to search the Jeep at 3:54 p.m. An initial search revealed approximately fifty-six kilograms of marijuana. A handgun, ammunition, and $68,780 in cash were later discovered in a "sophisticated trap" in the back of the vehicle. PSR ¶ 17.

McKenzie contends that the officers searched the Jeep before Justice Breslin issued the warrant. He relies upon the affidavit of Paul Breslin, a mechanic who claimed to have witnessed the search.[3] In Breslin's account, "[t]he police . . . stated the vehicle was unlocked and opened the doors to the jeep at approximately 11:00

[3] Paul Breslin is the nephew of Justice Thomas Breslin, who issued the warrants.

a.m." A 72. He claimed the Jeep was parked on Thornton Street from "approximately 10:00 a.m.," contradicting Investigator Gilroy's account of the officers seeing it at Mabey's that afternoon. *Id*. Breslin stated he was "certain the police searched the vehicle before the warrant arrived" because he "watched them do so" and "heard when they stated they had the warrant which was much later then [sic] when they first opened the doors." A 72–73.

The Government responded with two sworn affidavits. Investigator Gilroy acknowledged in his affidavit that he was not present on the scene, but asserted that he had "spoken to members of the Drug Enforcement Administration who were present, and learned that there was no search [of the Jeep] prior to the time of the issuance of the warrant." A 121. DEA Special Agent Ronald Arp stated in his affidavit that he was "personally present and maintaining surveillance of the Jeep from the time it was parked by an individual later identified as Oniel McKenzie until the time that the search was conducted pursuant to a warrant issued by Justice Breslin at 3:54 pm . . . ." A 129. He asserted that "[a]t no point during this interval was the Jeep opened or searched." *Id*.

*The Third Search*

Later that day, Investigator Gilroy applied for a search warrant for an apartment located at 6707 Oak Hill Circle (the "Oak Hill Residence") in nearby North Greenbush, New York. According to the application, records obtained from the landlord showed that the Oak Hill Residence was rented in the names of Chantell Chambers and Darrin Clark. A Jeep of the same model and year as the one from which the marijuana had been recovered on Thornton Street was registered to the apartment. The application also noted the marijuana recovered from Unit 296 as a predicate for probable cause. Justice Breslin issued the warrant.

Upon execution of that search warrant, law enforcement officers seized approximately 60 kilograms of cocaine from the Oak Hill Residence. The cocaine was packaged in a manner similar to the marijuana recovered from Unit 296—cardboard boxes, white construction buckets, garbage bags, and packing peanuts. DEA Special Agent James Cryan testified that the agents also found a booklet containing names, quantities, and dollar amounts—i.e., what appeared to be a drug ledger—in the Oak Hill Residence. Fingerprints recovered from the scene matched McKenzie's, according to expert testimony introduced at trial.

## II. Procedural History

McKenzie was charged with knowing and intentional possession of cocaine and marijuana with an intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(a). McKenzie's counsel moved to suppress the evidence acquired during the searches and requested a hearing to challenge the warrant applications under *Franks*. The district court denied the motion, ruling that the dog sniff outside of Unit 296 was not a search within the meaning of the Fourth Amendment. It made two alternative holdings on the search of the Jeep: (1) that McKenzie lacked standing to challenge the search of the Jeep because he abandoned any expectation of privacy by discarding the keys, and (2) even assuming the Jeep was searched prior to the issuance of the warrant, the inevitable discovery rule made the evidence recovered from it admissible. Based upon the validity of the warrants to search Unit 296 and the Jeep, the district court found that the Oak Hill Residence warrant was "undoubtedly supported by probable cause." A 154. It also rejected McKenzie's request for a *Franks* hearing.

In a motion *in limine*, the Government sought to admit evidence of McKenzie's prior drug trafficking activity under Federal Rule of Evidence 404(b), arguing that it would establish his connection to accomplices and knowledge of

wrongdoing. McKenzie objected, contending that the evidence would impermissibly connect him to uncharged offenses. The district court denied the Government's request without prejudice to renew at trial and ultimately admitted some of the testimony.

Forney testified that she opened a post office box for McKenzie in January 2013, picked up packages for him, and that McKenzie once showed her a package containing marijuana. Chambers testified that she knew McKenzie for a year prior to his arrest, knew that he was a drug dealer, and rented an apartment for him. Riggins testified that in September and October 2013 she picked up packages and delivered them to the storage facility. The district court instructed the jury not to consider this testimony as proof that McKenzie had committed the acts charged in the indictment, but rather only as proof that he had acted knowingly.[4]

The jury found McKenzie guilty of possessing the controlled substances with an intent to distribute. It further found that the offenses involved at least five kilograms of cocaine and at least 100 kilograms of marijuana. The PSR calculated a base offense level of thirty-four under the Guidelines and recommended a term

[4] In July 2017, the district court granted McKenzie's request to proceed pro se. He represented himself from that point forward, including through the trial.

of imprisonment of 292 to 365 months. McKenzie objected, arguing that fifty of the sixty kilograms had been destroyed. The district court rejected this argument, noting that the Government had presented evidence regarding the total amount of drugs recovered and followed its usual practice of destroying excess quantities. The district court adopted the PSR's Guidelines calculation but imposed a below-Guidelines sentence of 188 months' imprisonment.

## DISCUSSION

### I. The District Court Did Not Err in Denying McKenzie's Motion to Suppress

On appeal from a motion to suppress, we review a district court's conclusions of law *de novo* and its conclusions of fact for clear error. *United States v. Alexander*, 888 F.3d 628, 631 (2d Cir. 2018). Factual determinations about use, privacy, and the physical characteristics of a property are reviewed for clear error. *Id*. "Whether the untainted portions [of a warrant application] suffice to support a probable cause finding is a legal question" that is reviewed *de novo*. *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000). A district court's error in deciding a motion to suppress is further reviewed for harmlessness. *United States v. Cacace*, 796 F.3d 176, 188 (2d Cir. 2015) (per curiam).

### A. Applicable Law

The Supreme Court has articulated two tests to determine when a search occurs within the meaning of the Fourth Amendment.[5] The first, the 'property rights baseline' test, recognizes a search when the Government obtains information by physically intruding on persons, houses, papers, or effects. *Florida v. Jardines*, 569 U.S. 1, 5 (2013). This language tracks the categories listed in the

---

[5] The Fourth Amendment does two things: (1) it prohibits unreasonable searches and seizures and (2) it specifies the conditions under which a warrant can be issued. *See* U.S. CONST. amend. IV; *Mendez v. Cty. of L.A.*, 897 F.3d 1067, 1075 (9th Cir. 2018). It does not, however, proscribe the use of unconstitutionally obtained evidence against a criminal defendant at trial. *See United States v. Hightower*, 950 F.3d 33, 36 (2d Cir. 2020) (per curiam). Until the 20th century, unconstitutional searches and seizures were remedied through civil suits against the trespassing officers. *See Utah v. Strieff*, 136 S. Ct. 2056, 2060–61 (2016).

Courts have since developed the 'exclusionary rule'—which requires trial courts to exclude unlawfully seized evidence from criminal trials—as the "principal judicial remedy to deter Fourth Amendment violations." *See id*. at 2061 (citing *Mapp v. Ohio*, 367 U. S. 643, 655 (1961)). The rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and secondary "evidence later discovered and found to be derivative of an illegality." *Id*. (citing *Segura v. United States*, 468 U. S. 796, 804 (1984) (internal quotation marks omitted)).

"To be sure, the Supreme Court has declined to apply the exclusionary rule where evidence is obtained as a result of simply negligent, as opposed to "deliberate, reckless, or grossly negligent conduct," *Herring v. United States*, 555 U.S. 135, 144 (2009), or where evidence is obtained from a search conducted in "reasonable reliance" on binding precedent, *see Davis v. United States*, 564 U.S. 229, 241 (2011); *see also Hudson v. Michigan*, 547 U.S. 586, 591–96 (2006) (recognizing the exclusionary rule as a "last resort" means of upholding the Fourth Amendment and holding it inapplicable in knock-and-announce cases). Here, the parties do not dispute that if a Fourth Amendment violation occurred here, suppression would have been appropriate.

Fourth Amendment. *See* U.S. CONST. amend. IV. One advantage of this test is that it "keeps easy cases easy" through a bright-line rule of general application. *Jardines*, 569 U.S. at 11.

The second test protects a more nuanced realm of interests. It forbids warrantless searches that violate a person's reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, *J.*, concurring). Courts employ a two-part inquiry to assess the legitimacy of a privacy expectation: "first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211 (1986). Searches conducted pursuant to a defendant's consent, observations of items in plain view (or plain hearing, smell, or feel), and recoveries of abandoned property are not protected by the Fourth Amendment under this test. *See United States v. Iverson*, 897 F.3d 450, 458 (2d Cir. 2018); *United States v. Gori*, 230 F.3d 44, 50 (2d Cir. 2000); *United States v. Levasseur*, 816 F.2d 37, 44 (2d Cir. 1987).

A canine sniff outside a residence can be considered a search within the meaning of the Fourth Amendment under both tests. For example, in *Jardines* the Court found that the canine sniff performed *on the curtilage* of the defendant's

freestanding home was a physical intrusion on a protected property interest under the baseline test.[6] 569 U.S. at 4–6. The location of the dog was determinative, not the particular method (the dog's sensitivity to a substance's odor) of the search. *See id*. But Unit 296 is not a home. While the Fourth Amendment applies to businesses and offices (and storage units), *see See v. City of Seattle*, 387 U.S. 541, 543 (1967), the Court has not extended the concept of curtilage and its Fourth Amendment protections to commercial property. *See Dow Chemical Company v. United States*, 476 U.S. 227, 236, 239 (1986) (finding that open areas of a large industrial plant complex were not analogous to the curtilage of a dwelling for purposes of aerial surveillance). In *United States v. Dunn*, the Court identified the "centrally relevant consideration" for "extent-of-curtilage questions" as "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." 480 U.S. 294, 301 (1987). When one rents a storage unit, no curtilage comes with it.

[6] Curtilage is the area "immediately surrounding and associated with home" and is considered "part of [the] home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984).

We have held that a canine sniff can also be a search under the reasonable expectation of privacy test. In *United States v. Thomas* we determined that a dog sniff outside a closed apartment door violated the defendant's reasonable expectation of privacy. 757 F.2d 1359, 1367 (2d Cir. 1985). Our analysis in *Thomas* turned on the heightened expectation of privacy **in the home** as opposed to other settings. *Id*. at 1366–67. We found that "the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door" and concluded that the "[u]se of the trained dog impermissibly intruded on that legitimate expectation." *Id*. In the thirty-six years since *Thomas*, our expectation of privacy analysis in this context has fallen out of favor with our sister circuit courts. *See*, *e.g.*, *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993) (criticizing *Thomas*); *United States v. Colyer*, 878 F.2d 469, 475 (D.C. Cir. 1989) (same); *United States v. Reed*, 141 F.3d 644, 649–50 (6th Cir. 1998) (same). Despite unfavorable reviews, *Thomas* has never been overruled and remains binding on this panel. *See United States v. Hayes*, 551 F.3d 138, 142 (2d Cir. 2008) (affirming the validity of *Thomas* but declining to extend it to an area "65 feet behind the back door of the home").

### B. Unit 296

Whether the area outside a commercial storage unit enjoys the protections of the Fourth Amendment is an issue of first impression in this Circuit. Nevertheless, a clear answer emerges upon consideration of applicable Supreme Court precedent: the canine sniff outside the closed door of Unit 296 did not violate McKenzie's constitutional rights because it was not a search within the meaning of the Fourth Amendment.

McKenzie argues that the canine alert outside Unit 296 constituted a search under both the property rights baseline and reasonable expectation of privacy tests. He avoids a curtilage argument by correctly noting that the baseline analysis is not limited to houses but also extends to "effects" and commercial property. Appellant's Counseled Br. at 25 (citing *United States v. Jones*, 565 U.S. 400, 410–11 (2012); *United States v. Rahman*, 805 F.3d 822, 831 (7th Cir. 2015)). His argument focuses on the officers' entry into the enclosed area of Mabey's, since there was no pre-warrant incursion into Unit 296 itself. He insists that "[a]bsent any justification for how the officers accessed the gate," the District Court erred in its

determination that his property interests were confined solely to Unit 296.[7] Appellant's Counseled Br. at 24.

McKenzie's argument has two problems. First, he has not shown that the officers violated anyone's property rights when they entered the Mabey's facility. The record indicates that Mabey's management cooperated with the investigation: Investigator Gilroy stated that officers interviewed Mabey's Site Manager, reviewed its surveillance footage, and accessed its rental records. A 45–46. The district court could have inferred, without approaching clear error, that Mabey's management provided the officers access to the front gate. The burden to show a Fourth Amendment violation rests with the defendant. *See, e.g.*, *United States v. Quashie*, 162 F. Supp. 3d 135, 139 (E.D.N.Y. 2016). McKenzie offers no evidence suggesting that the officers trespassed onto the property.

Second, even if McKenzie had offered such evidence, the objection belongs to Mabey's. McKenzie had no authority to exclude people from Mabey's grounds.

---

[7] McKenzie points out that the district court erroneously described the storage facility as "unenclosed" and "generally open to the public." *See United States v. McKenzie*, No. 1:14-CR-169, 2015 WL 13840885, *6, *8 (N.D.N.Y. 2015). The Government acknowledges that a "security gate key pad" regulates access to the area where the units are located. Appellee's Br. at 15. While these descriptions constitute clear error on the part of the district court, the error was harmless. *See Alexander*, 888 F.3d at 631; *Cacace*, 796 F.3d at 188.

He only rented storage units *within* the facility. Because the officers did not infringe on McKenzie's interests by entering Mabey's, and did not physically intrude on Unit 296 prior to obtaining a warrant, McKenzie's objection under the baseline property rights test comes up short. *See United States v. Boden*, 854 F.2d 983, 990 (7th Cir. 1988) (law enforcement agents' initial warrantless entry into the commercial storage facility did not implicate the Fourth Amendment rights of the defendant, who had rented a unit in the facility); *Rakas*, 439 U.S. at 138 ("[T]he rights assured by the Fourth Amendment are personal rights").

McKenzie's objection fares no better under the reasonable expectation of privacy test. It is true that defendants generally enjoy a reasonable expectation of privacy in the internal spaces of storage units and commercial lockers. In *United States v. Karo*, for example, the Supreme Court considered the case of several defendants who had purchased drums of ether from a government informant. 468 U.S. 705, 708–10 (1984). The informant consented to the installation of a location-sensing 'beeper' in one of the drums before delivering them to the defendants. *Id*. at 709. The DEA used the beeper to locate the ether in a commercial storage facility, but its signal was not precise enough to reveal which storage unit contained the ether. *Id*. at 720. While traversing generally accessible parts of the

facility, the agents identified the smell of ether coming from a specific unit (they did not use a dog). *Id*. at 720–21. The Court held that this did not constitute a search within the meaning of the Fourth Amendment, but noted that "[h]ad the monitoring disclosed the presence of the container within a particular locker the result would be otherwise, for surely [the defendants] had a reasonable expectation of privacy in their own storage locker." *Id*. at 720 n. 6.

Even accepting that McKenzie had a reasonable expectation of privacy in the *internal* area of Unit 296, he did not have a reasonable expectation of privacy in the air *outside* of Unit 296. *United States v. Karo* is again instructive: the Court indicated that the police had not transgressed the defendants' "reasonable expectation of privacy in their own storage locker" by using their sense of smell to identify an odor present outside the unit and thus to identify which unit contained the contraband. 468 U.S. at 720–21.[8]

The officers' use of a canine in McKenzie's case is no different. In *Iverson* we noted that "as long as the observing person or the sniffing canine *are legally present* at their vantage [points] when their respective senses are aroused by obviously

[8] Similarly, a person smoking marijuana in their apartment could not reasonably expect that activity to be private if the odor carries through an open window onto the street.

incriminating evidence, a search within the meaning of the Fourth Amendment has not occurred." *See* 897 F.3d at 461 (quoting *Reed*, 141 F.3d at 649) (emphasis added). This standard, taken at face value, could be seen as conflicting with our holding in *Thomas* that a canine unit's alert while legally positioned outside a closed apartment door constitutes a search under the Fourth Amendment. *See* 757 F.2d at 1367. However, it is consistent with our own precedent where a defendant has granted the officers consent to be at their vantage point near or within a home (as was the case in *Iverson*).

We also find the *Iverson* standard well-adapted to canine sniffs of non-residential properties, as in McKenzie's case. The canine here was legally positioned outside Unit 296, in an area accessible to Mabey's employees and anyone renting one of the hundreds of units in the facility. Under these circumstances, the canine sniff outside Unit 296 did not violate McKenzie's reasonable expectation of privacy.

We are confident that this is the correct result under Supreme Court precedent, even despite our holding in *Thomas*. We acknowledge that today's decision and *Thomas* may be in tension. Both concern a space in which the defendant enjoyed a reasonable expectation of privacy (Unit 296 here, the

apartment in *Thomas*). Both involve a canine alert for drugs outside the closed door of that space in an area open to others. Yet, the two cases reach divergent outcomes on whether the sniff violated the defendant's reasonable expectation of privacy.

The crucial difference between the two cases is in the nature of the space. Our holding in *Thomas* rested upon the "heightened privacy interest that an individual has in his dwelling place." *See* 757 F.2d at 1366. We repeatedly emphasized that "a practice that is not intrusive in a public [setting] may be intrusive when employed at a person's home." *Id*. That different degrees of privacy interests attach to different settings is well-established in Fourth Amendment jurisprudence. *See*, *e.g.*, *New York v. Burger*, 482 U.S. 691, 700 (1987) ("An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."). The expectation of privacy reaches its zenith in the home. Observing officers' "significant enhancement" of their natural senses "accomplished by a different, and far superior, sensory instrument" cannot overcome the unique protections of the home in Fourth Amendment jurisprudence. *Thomas*, 757 F.2d at 1367; *see also United States v. Taborda*, 635 F.2d 131, 139 (2d Cir. 1980) (holding that officers'

warrantless use of a telescope to observe objects and activities within a home violated the Fourth Amendment); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (finding that use of a thermal-imaging device aimed a private home constituted a search within the meaning of the Fourth Amendment). But courts have declined to extend those same protections against enhanced sensory instruments to non-residential properties. *See, e.g., United States v. Johnson*, 42 F. App'x 959, 962 (9th Cir. 2002) (mem.) (holding that a warrantless thermal imaging search of a barn was not an illegal warrantless search because "*Kyllo* applies only to a home").

Commercial storage units are closer to luggage in an airport, *see United States v. Place*, 462 U.S. 696, 697 (1983), or an automobile detained during a traffic stop, *see Illinois v. Caballes*, 543 U.S. 405, 409 (2005), than a dwelling. They do not present the privacy interests associated with the "intimate details" of one's life which are inherently associated with the home. *See Kyllo*, 533 U.S. at 37. We agree with our sister circuits and district courts in this Circuit that dog sniffs outside of storage units do not violate the renter's reasonable expectation of privacy. *See, e.g., United States v. Cook*, 904 F.2d 37 (6th Cir. 1990) (unpublished); *United States v. Mikelic*, No. 10 Cr. 132 (CFD), 2011 WL 4368565, *5 n.13 (D. Conn. Sept. 19, 2011) (declining to extend *Thomas* to a canine sniff of a commercial storage unit).

### C. The Jeep and Oak Hill Residence

McKenzie argues that the warrants approving the searches of the Jeep and the Oak Hill Residence were predicated on an unconstitutional canine sniff of Unit 296. Consequently, he insists, the evidence seized pursuant to those warrants should have been suppressed. However, since the canine sniff of Unit 296 was constitutional, the district court's decision to admit the evidence seized from the Jeep and the Oak Hill Residence was not in error.

## II. The District Court Did Not Err in Denying McKenzie's Request for a Suppression Hearing

### A. Applicable Law

A *Franks* hearing permits a criminal defendant to challenge the veracity of a warrant affidavit under certain circumstances. To trigger the hearing, a defendant must make a "substantial preliminary showing" that (1) the warrant application contains a false statement, (2) the false statement was included intentionally or recklessly, and (3) the false statement was necessary to the finding of probable cause. *Franks*, 438 U.S. at 155–56; *see also Levasseur*, 816 F.2d at 43. The Supreme Court has interpreted the warrant clause as containing an implicit guarantee that the information in a warrant application is "'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true."

*Franks*, 438 U.S. at 165. The fruits of the search must be excluded if the allegation of perjury or recklessness is established by a preponderance of the evidence and the affidavit's remaining content with the falsehoods set aside is insufficient to establish probable cause. *Id*. at 156.

Probable cause requires a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). When the available facts would "warrant a person of reasonable caution" to believe that contraband or evidence of a crime is present, an officer has probable cause to conduct a search. *Florida v. Harris*, 568 U.S. 237, 243 (2013). The Supreme Court instructs us to consider the "totality of the circumstances" in making probable cause assessments, and has rejected "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Id*. at 244.

In *Florida v. Harris*, the Court held that a canine alert may be sufficient to establish probable cause when a court is presented with "evidence of a dog's satisfactory performance in a certification or training program." *Id*. at 246. "If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court

should find probable cause." *Id*. at 248. However, if the defendant challenges the State's case, for example by disputing the reliability of the dog or the alert, then the court should weigh the competing evidence to determine whether a reasonably prudent person would have believed that contraband or evidence of a crime was present based upon the alert. *Id*.

There is mixed authority regarding the standard of review for denial of a *Franks* hearing in the Circuit. *See United States v. Papadakos*, 729 F. App'x 41, 44 n. 2 (2d Cir. 2018) (summary order). There is also a circuit split on the question. *See id*. However, a district court's conclusions of law are reviewed *de novo* and its conclusions of fact for clear error. *See United States v. Rajaratnam*, 719 F.3d 139, 153 (2d Cir. 2013) (citing *United States v. Moore*, 968 F.2d 216, 220–21 (2d Cir. 1992)). We review denial of a *Franks* hearing for clear error to the extent that it rests on factual findings. *United States v. One Parcel of Property Located at 15 Black Ledge*, 897 F.2d 97, 100 (2d Cir. 1990).

Whether an affiant acted with intent or recklessness is a factual question subject to the clearly erroneous standard. *Rajaratnam*, 717 F.3d at 153 (citing *United States v. Trzaska*, 111 F.3d 1019, 1028 (2d Cir. 1997)). Whether a false statement was material to the probable cause determination is a mixed question of law and fact

reviewed *de novo*. *Id*. (citing *United States v. Awadallah*, 349 F.3d 42, 65 (2d Cir. 2003)). That mixed standard is workable in this case, and we need not reconcile the conflicting authorities on this subject, since we find that denial was proper even under the more exacting *de novo* review.

**B. Analysis**

McKenzie focuses his argument in support of a *Franks* hearing on the conflicting evidence surrounding the search of the Jeep. The affidavit from Paul Breslin contradicts Investigator Gilroy's warrant affidavit in two ways. First, Breslin claims to have seen the officers search the vehicle before they received the warrant. Second, his affidavit states that the Jeep was parked on Thornton Street from 10:00 a.m. to 4:00 p.m., contrary to the officers' account of observing the Jeep at Mabey's within that timeframe.

The district court correctly denied McKenzie's request for a *Franks* hearing because McKenzie failed to call into question the facts material to the legitimacy of the warrant. *See Franks*, 438 U.S. at 155–56. Breslin's affidavit fails to contradict the warrant application's assertion that the canine "gave a positive alert for the presence of a narcotic and/or marijuana." A 59. In his affidavit supporting the warrant application, Investigator Gilroy attested that the canine was "trained in

the detection of narcotics and/or marijuana." *Id*. The description of the dog's training is not detailed, but McKenzie has not challenged the reliability of the dog or the alert as to the Jeep. McKenzie did raise the issue of the dog's training with respect to the sniff of Unit 296, but "failed to submit any evidence that would call into question the reliability of the hits in this case." *McKenzie*, 2015 WL 13840885 at *13. The uncontested canine alert on the Jeep is sufficient to support a finding of probable cause.

Nor does McKenzie dispute the warrant application's assertion that officers observed six cardboard boxes "similar to the boxes that Latrina Riggins placed into Unit 296" the previous day in plain view inside the Jeep. *Id*. at *11. Considering the totality of the circumstances, a reasonably prudent person would understand the presence of these boxes to imply that they contained contraband. The police were acting on a tip from a confidential informant regarding a drug smuggling ring involving McKenzie. They observed Riggins pick up packages from a UPS store and deliver them to Unit 296, as anticipated by the informant. McKenzie then visited Unit 296, driving the Jeep, and was placed under surveillance. After he left, the police searched Unit 296 and recovered approximately 100 pounds of marijuana. The fact that boxes similar to the ones Riggins delivered to Unit 296

were in plain sight inside the Jeep supports a finding of probable cause under these circumstances. *See, e.g.*, *United States v. Clark*, 559 F.2d 420, 426 (5th Cir. 1977) (holding that probable cause existed to search a station wagon because police officers previously observed defendants loading similar burlap bags containing marijuana into another vehicle).

The Government's corroboration of the informant's allegations further supports a finding of probable cause and is not contradicted by the Breslin affidavit. When assessing the existence of probable cause based on an informant's information, "the core question . . . is whether the information is reliable." *United States v. Wagner*, 989 F.2d 69, 72 (2d Cir. 1993). In *Gates*, the Supreme Court found that police surveillance corroborating an informant's tip that a suspect would drive to Florida, that another suspect would fly into the state, and that the second suspect would drive the first suspect's vehicle back towards Illinois established probable cause to search the car. 462 U.S. at 244–45. "It is enough, for purposes of assessing probable cause, that '[corroboration] through other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay.'" *Id*. (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)); *see also Wagner*, 989 F.2d at 73.

The record here indicates that the informant's tip was reliable enough to establish probable cause to search the Jeep. Investigator Gilroy's warrant affidavit stated that the informant's information was "derived from their [sic] personal interaction with members of this criminal organization." A 56; *see Caldarola v. Calabrese*, 298 F.3d 156, 162–63 (2d Cir. 2002) (listing the "basis for the informant's knowledge" as one among several factors to consider in assessing the reliability of a tip). As discussed above, many of the informant's allegations were corroborated via the first-hand observations of law enforcement officers. The informant accurately predicted the participation of female couriers, the use of the storage unit, and the packaging of the narcotics. The corroboration here is even stronger than in *Gates*, given that the officers recovered contraband consistent with the informant's tip *before* searching the Jeep. *See Gates*, 462 U.S. at 244–45.

These three elements of the warrant application—the canine alert, the boxes in plain view, and the corroboration of the informant's allegations—independently support a finding of probable cause. Since these elements are uncontested, McKenzie cannot show that the warrant application would have

been denied but for the allegations contradicted by Breslin's affidavit.[9] McKenzie has not shown that the alleged misinformation was material. *See Franks*, 438 U.S. at 155–56. The district court did not err by denying his request for a *Franks* hearing.

## III. The Government Presented Sufficient Evidence to Establish McKenzie's Knowing Possession of the Cocaine Found at the Oak Hill Residence Beyond a Reasonable Doubt.

### A. Applicable Law

We review *de novo* challenges to the sufficiency of the evidence on appeal. *United States v. Hassan*, 578 F.3d 108, 122 (2d Cir. 2008). We analyze the evidence in the light most favorable to the Government, "crediting every inference that the jury may have drawn in the government's favor." *Id*. (internal quotation marks omitted). We remain mindful that "the government is entitled to prove its case solely through circumstantial evidence." *United States v. Coplan*, 703 F.3d 46, 69 (2d Cir. 2012) (internal quotation marks omitted).

[9] Indeed, because the officers had probable cause based on the undisputed facts, and because the discrepancies raised in Breslin's affidavit did not contradict these facts, a warrant was not actually required. *See United States v. Jones*, 893 F.3d 66, 71 (2d Cir. 2018); *United States v. Howard*, 489 F.3d 484, 494 (2d Cir. 2007) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." (citing *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (alterations omitted))).

McKenzie was convicted of violating 21 U.S.C. § 841(a)(1) for unlawfully possessing cocaine and marijuana with an intent to distribute. To secure McKenzie's conviction with respect to the cocaine, the Government had to prove beyond a reasonable doubt that (1) he possessed the sixty kilograms of cocaine found in the Oak Hill Residence; (2) he possessed the cocaine with the intent to distribute; and (3) he did so knowingly. *See United States v. Gore*, 154 F.3d 34, 45 (2d Cir. 1998). "Possession with intent to distribute narcotics may be established by proof of the defendant's actual or constructive possession of the narcotics." *United States v. Snow*, 462 F.3d 55, 69 (2d Cir. 2006) (internal quotation marks omitted). Constructive possession requires that the defendant have the "power and intention" to exercise "dominion and control" over the narcotics, "either directly or through others." *United States v. Albarran*, 943 F.3d 106, 118 (2d Cir. 2019) (quoting *United States v. Facen*, 812 F.3d 280, 287 (2d Cir. 2016)). Dominion and control "need not be exclusive." *Snow*, 462 F.3d at 69.

**B. Analysis**

The Government presented sufficient evidence for the jury to conclude beyond a reasonable doubt that McKenzie was guilty of possessing the cocaine seized at the Oak Hill Residence with an intent to distribute. The evidence showed

that McKenzie controlled the Oak Hill Residence and the items within it. His former girlfriend, Chambers, testified that she rented the apartment at his direction for his use. She rented it in the name of Darrin Clark, the same alias McKenzie provided to police officers on Thornton Avenue and used to rent Unit 296. She further testified that McKenzie apologized for having ensnared her in his troubles and admitted to storing cocaine in the Oak Hill Residence. The similarities between the shipping and packaging of the contraband recovered from the Oak Hill Residence, the Jeep, and Unit 296 further indicate McKenzie's control over the cocaine in the apartment. In each case, the drugs were contained in white construction buckets, packaged inside cardboard boxes, and wrapped in white garbage bags. This evidence is sufficient to show beyond a reasonable doubt that McKenzie knowingly possessed the cocaine in the Oak Hill Residence. *See*, *e.g.*, *United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996) (holding that evidence showing a defendant possessed and sold several bags of cocaine outside a building less than a week before identically packaged cocaine was recovered from within the building was sufficient to establish knowing possession).

## IV. The District Court Did Not Err in Calculating McKenzie's Guidelines Sentencing Range

### A. Applicable Law

The Sentencing Guidelines require district courts to apply a two-level increase to the base offense level for drug trafficking crimes "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). "The enhancement should be applied if the weapon was present, unless it is *clearly improbable* that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1), Application Note 11(A) (emphasis added). The burden to make the "clearly improbable" showing rests with the defendant. *United States v. Smith*, 215 F.3d 237, 241 (2d Cir. 2000) (per curiam). "In order for a defendant's projected Guidelines sentence to be enhanced under § 2D1.1(b)(1), '[t]he defendant need not have had personal possession, or even actual knowledge of the weapon's presence; the enhancement is required so long as the possession of the firearm was reasonably foreseeable to the defendant.'" *United States v. Batista*, 684 F.3d 333, 343 (2d Cir. 2012) (quoting *United States v. Giraldo*, 80 F.3d 667, 677 (2d Cir.1996)).

"We review the District Court's factual findings at sentencing for clear error." *United States v. Stephens*, 369 F.3d 25, 27 (2d Cir. 2004) (per curiam). We review "*de novo* the application of the Guidelines to the facts." *Id*. The clear error

standard applies to McKenzie's claim that the district court erred by applying the two-level enhancement for possession of a firearm under Section 2D1.1(b)(1) of the Sentencing Guidelines.

**B. Analysis**

McKenzie has not shown that the district court clearly erred by applying the two-level enhancement under Guidelines Section 2D1.1(B)(1). The firearm, ammunition, and $68,000 in cash were found in a "sophisticated trap" in the trunk area of the Jeep that McKenzie was operating. PSR ¶¶ 10, 17. McKenzie had long-standing control over the Jeep: he told police that he owned the Jeep, Chambers testified that she registered the car in her name at McKenzie's request and never drove it herself, and a confidential informant (whose other allegations were corroborated) claimed to have purchased and insured the Jeep for McKenzie. The Jeep was kept under constant surveillance by officers between the time that McKenzie drove it from Unit 296 and when the officers conducted their search—no one accessed the vehicle in the meantime to add the marijuana or the firearm. Fifty-six kilograms of marijuana were recovered from the Jeep, meaning that the gun was present in the vehicle while it was being used to transport narcotics.

Under these facts, it is not "clearly improbable" that the weapon was connected with McKenzie's drug trafficking activities. *See United States v. Pellegrini*, 929 F.2d 55, 56 (2d Cir. 1991) (per curiam). The Sentencing Guidelines provide an example of such an "improbable" circumstance: a defendant arrested in his residence with "an unloaded hunting rifle in the closet." U.S.S.G. § 2D1.1(b)(1), Application Note 11(A). McKenzie's case is a far cry from that example. To the contrary, it is *probable* that the gun was linked to McKenzie's drug trafficking activity, considering that it was recovered from the same compartment as approximately $68,000 in cash and from a vehicle transporting narcotics. McKenzie has not met his burden to overturn the sentencing enhancement.

* * * * *

We have considered McKenzie's other arguments raised in his *pro se* brief and find no error in the district court's decisions on those issues.

## CONCLUSION

We **AFFIRM** the district court's judgment of McKenzie's conviction.

# APPENDIX B

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

---

**UNITED STATES OF AMERICA,**

**vs.** **1:14-CR-169 (MAD)**

**ONIEL MCKENZIE, *also known as* Darrin Clark, *also known as* Shower,**

**Defendant.**

---

**APPEARANCES:**

**OFFICE OF THE UNITED STATES ATTORNEY**
James T. Foley U.S. Courthouse
445 Broadway, Room 218
Albany, New York 12207
Attorneys for the United States

**OF COUNSEL:**

**DANIEL HANLON, AUSA**
**SOLOMON B. SHINEROCK, AUSA**

**GARY GREENWALD AND PARTNERS, P.C.**
99 Brookside Avenue
Chester, New York 10918
Attorneys for Defendant

**GARY GREENWALD, ESQ.**

**Mae A. D'Agostino, U.S. District Judge:**

## MEMORANDUM-DECISION AND ORDER

## I. INTRODUCTION

Defendant is charged in a one (1) count indictment with knowingly and intentionally possessing with the intent to distribute one or more controlled substances, in violation of Title 21, United States Code, Section 841(a)(1). The violation allegedly involved five kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance in violation of Title 21, United States Code, Section 841(b)(1)(A), and 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, a Schedule I

controlled substance, in violation of Title 21, United States Code, Section 841(b)(1)(B). *See* Dkt. No. 12.

Currently pending before the Court is Defendant's motion seeking the following relief:

1. For an Order suppressing from use at trial, any and all evidence recovered from the searches of unit numbers 296 and 85 at Mabey's self-storage facility; search of 2006 Jeep Grand Cherokee New York Registration CDP4868 with a VIN #1J4HR48N06C146951; and search of residence located at 6707 Oakhill Circle, North Greenbush, New York, as said searches were conducted in violation of the Defendant's rights pursuant to the United States Constitution and Federal Rules of Evidence; or in the alternative a hearing to determine the same; and

2. For an Order requiring a *Franks* Hearing and/or for suppression of the evidence; and

3. For an Order determining that the "Good Faith Exception" does not permit the admissibility of the evidence and/or suppression of the evidence; or in the alternative a hearing to determine the same; and

4. For an Order, pursuant to Rule 16 of the Federal Rules of Criminal Procedure, requiring the Government to produce and permit the defendant and his counsel to discover and inspect each of the items requested herein; and

5. For an Order directing the Government [to] provide[ ] a Bill of Particulars; and

6. For an Order, pursuant to Rule 404(b) of the Federal Rules of Evidence, requiring the Government to give notice of its intention to use evidence of other crimes, wrongs, or bad acts of the defendant and of the general nature of any such evidence it intends to introduce at trial; and

7. Pursuant to Rules 12(b)(4) and 16 of the Federal Rules of Criminal Procedure . . ., and in accordance with the doctrine of *Raviaro v. United States*, 353 U.S. 53 (1957), disclosing the names, dates of birth, criminal records, etc., of any confidential sources o[r] informants from who the Government presently intends to elicit testimony at trial; and

8. Pursuant to *United States v. Saa*, 859 F.2d 1067 (2d Cir. 1998), directing the Government to make the confidential informants available to the defense so that they [may] be interviewed prior to trial; and

9. For an Order, pursuant to the doctrine enunciated in *United States v. Giglio*, 405 U.S. 150 (1972) requiring full disclosure of any relationship and/or agreements as and between the Government and any witness, co-defendant or unindicted co-conspirator; and

10. For an Order, pursuant to the Due Process clause of the Fifth and Fourteenth Amendments to the Constitution, for the disclosure of exculpatory or favorable evidence requested herein; and

11. For an Order, pursuant to 18 U.S.C. § 3500, requiring the Government to disclose all statements and reports withing the meaning of the *Jencks Act*; and

12. For an Order, pursuant to the Fifth and Sixth Amendments to the United States Constitution and Rule 26.2 of the Federal Rules of Criminal Procedure, requiring all Government agents to retain their rough notes; and

13. For an Order, pursuant to Rule 16 of the Federal Rules of Criminal Procedure, requesting the Government to make available a list of documents it intends to introduce at trial; and

14. For an Order permitting leave to file additional motions; and

Together with such other and further relief as the Court [d]eems just and proper.[1]

## II. BACKGROUND

On October 4, 2013, Christopher T. Gilroy, an Investigator with the New York State Police, swore three separate and successive affidavits before the Honorable Thomas A. Breslin in support of search warrants relating to an investigation into a suspected drug trafficking organization operating in the Albany, New York area. *See* Dkt. No. 30-2 at ¶¶ 1, 5. On each of

[1] According to the Local Rules, "no party shall file or serve a memorandum of law which exceeds twenty-five (25) pages in length, unless the party obtains permission from the Court to do so prior to filing. All memoranda of law exceeding five (5) pages shall contain a table of contents and, wherever possible, parallel citations." N.Y.N.D. L.R. Cr. P. 12.1(a). Despite not seeking the Court's permission, Defendant's memorandum of law is fifty-five pages in length and does not contain a table of contents. Although the Court will consider all arguments raised, Defendant is hereby placed on notice that any additional filings that do not comply with the Local Rules of this Court will be summarily rejected.

the three occasions that Investigator Gilroy applied for these search warrants on October 4, 2013, Judge Breslin read the affidavit and other documents in support of the applications, requested Investigator Gilroy to swear that the facts presented are true, and, upon affirmative response, Investigator Gilroy signed the affidavit in his presence. *See id.* at ¶¶ 6-9.

**A. Unit 296**

Investigator Gilroy swore to the first affidavit on October 4, 2013 at 1:55p.m., seeking a warrant to search Unit 296 at Mabey's Self Storage Facility in East Greenbush, New York (the "Unit 296 Affidavit"). *See* Dkt. No. 30 at 2; Dkt. No. 28-2. The Unit 296 Affidavit recounted an investigation that stretched back to July 2013, when an informant began to provide information regarding a criminal organization that the Government contends was headed by Defendant and responsible for distributing multiple kilogram quantities of cocaine in the Albany, New York area. *See* Dkt. No. 28-2 at 5. The informant indicated that the criminal organization had narcotics shipped to UPS stores packaged in boxes and white five-gallon buckets, where they would be picked up by female members of the organization and taken to local storage units. *See id.*

The Government contends that the informant's information conveyed in the Unit 296 Affidavit was reliable. Dkt. No. 30 at 3. In the Unit 296 Affidavit, Investigator Gilroy claims that the informant had been recruited by a former "business associate" turned enemy of Defendant, for the purpose of robbing Defendant's distribution organization. *See* Dkt. No. 28-2 at 6. As such, Investigator Gilroy claims that the informant was familiar with the organization's methods. *See id.* The informant provided a number of facts that were corroborated by official records and the personal investigation of Investigator Gilroy and other law enforcement officers,

including, the following: (1) corroborated reports regarding the makes and models of the cars driven by Defendant's alleged associates Deondra Forney, Latrina Riggins, and Dewayne Williams; (2) a corroborated report regarding the location of Williams' apartment; (3) a corroborated report regarding Riggins' use of the storage units; (4) a corroborated report regarding the organization's use of white construction buckets for packaging; and (5) a corroborated report regarding the use of UPS stores to receive packages before bringing them to storage areas. *See id.* at 6-8.

In addition to the information provided by the informant, the Unit 296 Affidavit also set forth information gathered in the course of surveillance and investigation conducted by Investigator Gilroy and other law enforcement officers. This information included, among other things, that Riggins had rented, used, and accessed multiple storage units. *See* Dkt. No. 28-2 at ¶¶ 10, 23, 30, 38, 40. Investigators further observed Riggins retrieve boxes from a UPS Store and transfer them to Unit 296 at Mabey's Self Storage Facility. *See id.* at ¶¶ 36-38. A trained police canine later gave a positive alert for the presence of a narcotic and/or marijuana in Unit 296. *See id.* at ¶¶ 36-39.

The Unit 296 Affidavit also stated that, on a separate occasion, investigators observed Riggins departing Mabey's Self Storage Facility and proceeding to a nearby parking lot, where she transferred a box from her vehicle to an unidentified male, who put it in his vehicle and exited the parking lot. *See id.* at ¶¶ 23-26. Investigators also learned that Riggins had access to a second nearby unit, Unit 85 at Mabey's Self Storage Facility, along with several other individuals. Investigators also spoke with the site manager who indicated that he observed individuals backing the rear end of vehicles into the storage unit, as if trying to conceal what was being loaded/off loaded. *See id.* at ¶ 31.

The Unit 296 Affidavit also discussed security surveillance footage that Investigator Gilroy and Special Agent Cryan reviewed after speaking with the site manager at Mabey's Self Storage. *See id.* at ¶ 30. According to the Unit 296 Affidavit, the video footage captured Riggins entering the storage facility on September 25 at 5:20p.m. *See id.* The footage also shows Riggins utilizing the security gate key pad to access the facility and, according to Mabey's records, Riggins utilized the access code assigned to unit 85. *See id.* After entering the storage facility, Riggins did not access unit 85 and remained in the storage facility for approximately eight minutes. *See id.* Upon exiting the facility, Riggins again utilized the access code assigned to unit 85. *See id.*

The Unit 296 Affidavit also states that, on October 3, 2013, members of the Drug Enforcement Task Force conducted surveillance in the area of Riggins' place of employment. *See* Dkt. No. 28-2 at ¶ 35. At approximately 4:31p.m., Riggins entered her 2007 Acura MDX and traveled to the UPS Store located at 740 Hoosick Road, Troy, New York. *See id.* at ¶ 36. At approximately 5:08p.m., Special Agent Cryan observed Riggins retrieve eleven (11) sealed boxes from the store. *See id.* at ¶ 37. Riggins placed the boxes in her vehicle and then proceeded to the Mabey's Self Storage Facility. *See id.* At approximately 5:35p.m., Special Agent Cryan witnessed Riggins access storage unit 296. *See id.* at ¶ 38. Subsequently, Riggins secured unit 296 and left the area. *See id.*

At approximately 7:30p.m., the area of unit 296 was subject to examination by a police canine trained the in the detection of narcotics and/or marijuana. *See id.* at ¶ 39. The canine handler and canine examined several units, including unit 296. *See id.* Investigator Gilroy contends that the canine gave a positive alert on unit 296 for the presence of a narcotic and/or marijuana, but did not alert to any other unit. *See id.* The affidavit sets forth that on June 1, 2012,

the canine and handler successfully completed the Law Enforcement Canine Training Course, which was sponsored by the New York State Division of Criminal Justice Services. *See id.* The canine has been certified in narcotics and marijuana detection. *See id.*

On October 4, 2013, at approximately 9:30a.m., Special Agent Cryan interviewed the site manager at Mabey's and was informed that unit 296 was being rented by Darrin Clark of Long Beach, California. *See* Dkt. No. 28-2 at ¶ 40. Mabey's records indicated that unit 296 was rented on July 5, 2013 and that the facility had never been accessed using the specific pass code assigned to unit 296 since the account had been opened. *See id.* Additionally, the records indicated that Riggins utilized the pass code assigned to unit 85 to gain access to the storage facility on October 3, 2013 at approximately 5:35p.m.

**B. Unit 85 and the Jeep**

Investigator Gilroy submitted a second affidavit on October 4, 2013, at 3:52p.m., which sought (1) a warrant to search unit 85 at Mabey's Self Storage and (2) a warrant to search a 2006 Jeep Cherokee (the "Jeep") with a New York registration of GVP4868 and VIN #1J4HR48N06C146951 (the "Unit 85/Jeep Affidavit"). *See* Dkt. No. 28-4. The facts set forth in the Unit 296 Affidavit were incorporated into the Unit 85/Jeep Affidavit. *See id.* at ¶ 10.

The Unit 85/Jeep Affidavit further provides that, on October 4, 2013, at approximately 12:10p.m., law enforcement officials were conducting surveillance of unit 96 at Mabey's Self Storage. *See id.* at ¶ 11. During their surveillance, the officials observed a 2006 Jeep Grand Cherokee enter the grounds of the storage facility. *See id.* Special Agent Cryan observed a black male exit the Jeep and gain access to unit 296. *See id.* Subsequently, the unidentified male,

secured unit 296 and then drove away. *See id.* Before leaving the facility, the male subject paid the monthly storage bill and then left the area. *See id.*

Surveillance personnel then followed the Jeep to the area of Third Street and Judson Street in Albany, New York. *See id.* According to the affidavit, the male subject exited the vehicle, looked around, returned to the vehicle, and then drove off and parked the Jeep in front of 27 Thornton Street. *See id.* At this point, the male exited the vehicle and approached two males who were standing next to a Ford Explorer. *See id.* The hood of the Ford Explorer was open. *See id.* At this time, two uniformed officers approached the operator of the Jeep, who was identified as Darren Clark – the Defendant in the present matter. *See id.* According to the affidavit, while speaking with the officers, Defendant discarded his keys in the engine block area of the Ford Explorer. *See id.* After speaking with the officers, Defendant left the area in a gray Lexus. *See id.* Law enforcement officials maintained constant visual surveillance of the Jeep and eventually subjected the vehicle to an examination by a police canine trained in the detection of narcotics and marijuana. *See id.* The canine gave a positive alert for the presence of a narcotic or marijuana. *See id.* Additionally, law enforcement observed six cardboard boxes inside the Jeep, which, according to Investigator Gilroy, were similar to the boxes that Latrina Riggins placed in unit 296 on October 3, 2013. *See id.*

The Unit 85/Jeep Affidavit further stated that, at approximately 2:23p.m., law enforcement officials executed the Unit 296 Search Warrant. *See id.* at ¶ 12. Pursuant to the warrant, approximately 100 pounds of marijuana were seized, which were housed within white plastic construction buckets. *See id.*

Further, Investigator Gilroy stated that storage unit 85 is registered to Zanalee Allan, but it was being paid for by Latrina Riggins. *See id.* at ¶ 13. The affidavit also provides that records

from Mabey's Self Storage show that Riggins had used the passcode uniquely assigned to unit 85 to access the facility and possibly other units. *See id.* Investigator Gilroy also claimed that Mabey employees reported seeing white construction buckets inside of unit 85 that are similar to those recovered from unit 296 earlier that day. *See id.*

**C. The Oakhill Apartment**

A third affidavit was sworn by Investigator Gilroy on October 4, 2013, at 6:38p.m., and sought a warrant to search the residence located at 6707 Oakhill Circle, North Greenbush, New York (the "Oakhill Apartment Affidavit"). *See* Dkt. No. 30-1. The Oakhill Apartment Affidavit incorporated the facts set forth in the Unit 296 Affidavit and the Unit 85/Jeep Affidavit. *See id.* at ¶ 9.

The Oakhill Apartment Affidavit further stated that, in executing the warrant for the Jeep at approximately 4:00p.m. on October 4, 2013, investigators recovered approximately sixty pounds of marijuana in boxes retrieved earlier from unit 296 of Mabey's Self Storage Facility. *See id.* at ¶ 10. The affidavit further provides that the Jeep was registered to Chantell M. Chambers and was operated by Defendant. *See id.* Further, Investigator Gilroy indicated that, prior to abandoning the Jeep, Defendant was observed driving it by officers in the Oakhill apartment parking lot. *See id.* Finally, the affidavit stated that records indicate that Chantell Chambers and Defendant (Darrin Clark) reside in the apartment. *See id.*

## III. DISCUSSION

**A. Illegal search**

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Criminal defendants seeking to suppress evidence must make a showing that their own Fourth Amendment rights were violated by a challenged search or seizure. *See Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978).

For decades, the touchstone of a court's analysis of whether a Fourth Amendment "search" occurred was whether the government violated a defendant's reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see also United States v. Hamilton*, 538 F.3d 162, 167 (2d Cir. 2008). Recently, however, the Supreme Court has revived the "Fourth Amendment's property-rights baseline," *Florida v. Jardines*, 569 U.S. ——, ——, 133 S. Ct. 1409, 1417 (2013), and made clear that "Fourth Amendment rights do not rise or fall with the *Katz* formulation," *United States v. Jones*, 565 U.S. ——, ——, 132 S. Ct. 945, 950 (2012), because "[t]he *Katz* reasonable-expectations test 'has been added to, not substituted for,' the traditional property-based understanding of the Fourth Amendment." *Jardines*, 133 S. Ct. at 1417 (quoting *Jones*, 132 S. Ct. at 951-952); *see also United States v. Aguiar*, 737 F.3d 251, 259 (2d Cir. 2013); *United States v. Brooks*, No. 12 Cr. 166(RRM), 2012 WL 6562947, *5 (E.D.N.Y. Dec. 17, 2012).

Accordingly, the Court will consider whether Defendant has shown that an unlawful search occurred under either the Fourth Amendment's property-rights baseline or the *Katz* reasonable-expectation-of-privacy test. *See Jones*, 132 S. Ct. at 950-51 n.3; *Jardines*, 133 S. Ct. at 1417.

***1. Property-Rights Baseline***

In *Jardines*, the Supreme Court held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Jardines*, 133 S. Ct. at 1417-18. The majority opinion reached this conclusion by applying the Fourth Amendment's traditional property-rights approach, finding that a search occurred because officers made an unlicensed physical intrusion of the defendant's home by entering its curtilage. *See id.* at 1414. Thus, *Jardines* instructs that a dog sniff just outside of a home constitutes a search. The question then is whether it follows that under the approach of *Jardines* or other precedent, a comparable dog sniff outside of a commercial storage unit is also a search.

Under the traditional property-rights approach to the Fourth Amendment, a defendant must show "an unlicensed physical intrusion . . . took place in a constitutionally protected area" to show that a "search" occurred. *Id.* at 1415; *see also, e.g., United States v. Jackson*, 728 F.3d 367, 373 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1347 (2014) (holding that no search occurred under *Jardines* because the area searched was beyond the curtilage of the defendant's dwelling). However, because "[t]he Fourth Amendment 'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects," *Jardines*, 133 S. Ct. at 1414 (quoting *Oliver v. United States*, 466 U.S. 170, 176 (1984)), the only "constitutionally protected areas" where unlicensed physical intrusions are prohibited are "persons, houses, papers, and effects ." *Id.* That is, "[t]he Fourth Amendment protects against trespassory searches only with regard to those items ('persons, houses, papers, and effects') that it enumerates." *Jones*, 132 S. Ct. at 953 n.8. The limited ability of this "simple baseline" to sufficiently protect against invasions of privacy not involving physical intrusions is what led the Supreme Court in *Katz* to "add[ ] to the baseline" and ensure that "property rights 'are not the sole measure of Fourth

Amendment violations.'" *Jardines*, 133 S. Ct. at 1414 (quoting *Soldal v. Cook County*, 506 U.S. 56, 64 (1992)).

The Fourth Amendment protects as "houses" places such as garages, business offices, stores, and warehouses, and prohibits warrantless physical entries into such places. *See* 1 Wayne LaFave, Search & Seizure § 2.1(a) (5th ed.) (citing cases); *see also See v. City of Seattle*, 387 U.S. 541, 543 (1967) ("The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property"). And, as Justice Scalia recognized in *Jardines*, the Fourth Amendment also considers curtilage, "the area 'immediately surrounding and associated with the home,'" to be "part of the home itself for Fourth Amendment purposes." *Jardines*, 133 S. Ct. at 1414.

In *Parrilla*, a criminal defendant argued that police officers conducted an unlawful warrantless search when they allowed a narcotics dog to sniff the premises surrounding a business and detect the odor of narcotics emanating from contraband inside the building. *See United States v. Parrilla*, No. 13 Cr. 360, 2014 WL 2111680, *3 (S.D.N.Y. May 13, 2014). As the Southern District noted in *Parrilla*, "the area surrounding a business has never been considered part of the business itself, and the concept of curtilage is limited to the home." *Id.* at *4. The *Parrilla* court cited *Dow Chemical Co. v. United States*, where the Supreme Court found "'the intimate activities associated with family privacy and the home and its curtilage'" simply do not reach "'the outdoor areas or spaces between structures and buildings of a manufacturing plant [.]'" *Id.* at *5 (quoting 476 U.S. 227, 236, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986)). The district court further reasoned that, "[u]nlike interior areas where business may be conducted in private, the [business's exterior] is unenclosed, accessible to the public via a short driveway, open to public view, and used for

visitors and customers to come and go." *Id.* Based on this reasoning, the Southern District declined to extend a "business curtilage" protection in *Parrilla*.

In the present matter, to the extent that Defendant is asking the Court to extend the principles set forth in *Jardines* and *Thomas* to the facts in the present case, his request must be denied. The Fourth Amendment's traditional property-rights baseline is not an appropriate vehicle for such an endeavor, as it protects only those rights that are traditionally accepted and specifically enumerated. In *Jardines*, Justice Scalia remarked that "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Jardines*, 133 S. Ct. at 1417. There the Court had "no doubt" that officers entered a constitutionally protected area, because "[t]he front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *Id.* at 1415 (quoting *Oliver*, 466 U.S. at 182 n.12). Here, however, the officers did not enter a constitutionally protected area when they entered the unenclosed area of the self storage facility, that was open to all persons entitled to be on the grounds of the storage facility.

The caselaw is clear that the areas surrounding homes, not businesses or commercial property, are entitled to special constitutional protections. While areas surrounding one's home act as a buffer zone to the intimate and private activities of the home itself, areas surrounding businesses are not host to such intimate activities. Therefore, while a Fourth Amendment search "undoubtedly occur[s]" where "the Government obtains information by physically intruding on persons, houses, papers, or effects," *Jardines*, 133 S. Ct. at 1414 (quoting *Jones*, 132 S. Ct. at 950-51 n.3) (quotation marks omitted), the warrantless canine sniff here did not constitute a physical intrusion into one of these constitutionally protected areas; and, therefore, did not violate Defendant's rights under the Fourth Amendment's property-rights baseline.

***2. Reasonable Expectations of Privacy***

*Katz* expanded the scope of the Fourth Amendment's protection by recognizing that "the Fourth Amendment protects people, not places" and therefore forbids government investigations that violate a person's reasonable expectations of privacy. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring); *see also United States v. Hamilton*, 538 F.3d 162, 167 (2d Cir. 2008) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)). The inquiry under *Katz* "involves two distinct questions: first, whether the individual had a subjective expectation of privacy; and second, whether that expectation of privacy is one that society accepts as reasonable." *Hamilton*, 538 F.3d at 167 (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring); *United States v. Chuang*, 897 F.2d 646, 649 (2d Cir. 1990)). "A protected privacy interest has been found in a wide array of circumstances, ranging from ownership or regular occupancy of a home, . . . to status as an overnight guest in someone else's home, . . . or even in someone else's hotel room, . . . to a rental storage unit, . . . to one's business premises, . . . including the desk drawers and file cabinets contained therein, . . . as well as the contents of one's office computer[.]" *Thomas*, 538 F.3d at 167-68 (internal citations omitted).

"On the other end of the spectrum from its recent conclusion in *Jardines*, the Supreme Court — applying the *Katz* analysis — has held that dog sniffs of luggage and vehicles do not violate any reasonable expectations of privacy, because they are not very intrusive and disclose only the presence or absence of contraband, information that a person cannot legitimately expect will be kept private." *Parrilla*, 2014 WL 2111680, at *7 (citing *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Illinois v. Caballes*, 543 U.S.

405 (2005)). Despite this finding, the Second Circuit has rejected the notion that a canine sniff itself can never violate a person's reasonable expectations of privacy. *See United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985); *United States v. Hayes*, 551 F.3d 138, 144 (2d Cir. 2008).

In support of his position, Defendant cites to *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985). *See* Dkt. No. 28 at 13. In *Thomas*, the magistrate judge found that probable cause existed to issue a search warrant, in part, because of a "canine sniff" outside of the defendant's apartment that indicated the presence of narcotics inside. *See Thomas*, 757 F.2d at 1365-66. The Second Circuit noted that, while a canine sniff of a person's luggage is permissible in an airport, due to heightened privacy interests that an individual has in his dwelling, the canine sniff outside of the defendant's apartment constituted a search in violation of the Fourth Amendment. *See id.* at 1367. Specifically, the court held that, with regard to a the canine sniff at the door of the apartment, "the defendant had a legitimate expectation that the contents of his closed apartment would remain private." *Id.* The Court explained that, although a dog's

> sniff in an airport is not a search, [it is] quite another [thing] to say that a sniff can never be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy. While one generally has an expectation of privacy in the contents of personal luggage, this expectation is much diminished when the luggage is in the custody of an air carrier at a public airport.
>
> * * * *
>
> Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, . . . it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses.

*Id.* at 1366-67 (citations omitted); *see also United States v. Hayes*, 551 F.3d 138, 144 (2d Cir. 2008) (reaffirming *Thomas* and holding that, "[c]onsistent with the strong expectation of privacy

in the sanctity of one's home, . . . a canine sniff at the door of an apartment – even if the only function of the sniff is to reveal illegal narcotics inside that apartment – is nonetheless a 'search' subject to the constraints of the Fourth Amendment").

Applying similar reasoning, the Supreme Court held in *Kyllo v. United States* that using an enhanced sensory instrument – a thermal imaging device used to detect heat patterns – to discover details about the contents of a closed home was an unreasonable search that violated reasonable expectations of privacy. *See Kyllo v. United States*, 533 U.S. 27 (2001). And similarly, in a concurring opinion in *Jardines*, Justice Kagan, writing on behalf of herself and Justices Sotomayor and Ginsburg, stated the view that the Supreme Court could have easily held, as an application of *Kyllo*, that a canine sniff of a home violates reasonable expectations of privacy. *Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring) ("The police officers conducted a search because they used a 'device . . . not in general public use' (a trained drug-detection dog) to 'explore details of the home' (the presence of certain substances) that they would not otherwise have discovered without entering the premises").

Contrary to Defendant's arguments, the Court's holding in *Thomas* is clearly distinguishable from the present matter. As the court discussed in *Parrilla*, there are significant differences between residential and commercial properties for Fourth Amendment purposes. While it is well-established that the Fourth Amendment protects commercial premises as well as dwellings from unreasonable searches and seizures, *see Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) (holding that a business "plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings"), a reasonable "expectation of privacy in commercial premises . . . is different from and . . . less than a similar expectation in an individual's home." *New York v. Burger*, 482 U.S. 691, 700 (1987). Defendant fails to cite to any

authority that extended the *Thomas* court's rationale to a non-residential situation and this Court refuses to do so. Simply stated, Defendant did not have a reasonable expectation of privacy to the area outside of his storage units; an area generally open to the public. *See Parrilla*, 2014 WL 2111680, at *7 (finding that a canine sniff that reveals the scent of contraband escaping from within a commercial building does not violate the proprietor's reasonable expectations of privacy); *United States v. Hogan*, 122 F. Supp. 2d 358, 369 (E.D.N.Y. 2000); *United States v. Mikelic*, No. 3:10-cr-132, 2011 WL 4368565, *5 & n.13 (D. Conn. Sept. 19, 2011) (declining to extend *Thomas* to a canine sniff of a commercial storage unit and finding that it was not a "search" for Fourth Amendment purposes). The canine sniff was intended only to inform the officers of the presence or absence of illegal narcotics, information that a person cannot legitimately expect will be kept private. *See Parrilla*, 2014 WL 2111680, at *7 (citing *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Illinois v. Caballes*, 543 U.S. 405 (2005)).

Moreover, the reasonableness of any expectation of privacy Defendant had in the storage units is further diluted by the fact that others, including Riggins, had access to them. Defendant's argument that he could have slept in the storage unit fails to change the fundamental nature of the space as a non-residential commercial space, and Defendant fails to substantiate this assertion with any facts suggesting that the applicable zoning ordinances, rental agreements, and Maeby's policy would permit him to use the storage unit as a residence. Even assuming he could have slept there without Maeby's knowledge or permission, such actions would still fail to present a subjective expectation of privacy "that society is prepared to accept as objectively reasonable." *Caballes*, 543 U.S. at 408.

Finally, to the extent that Defendant is arguing that the canine sniff of the Jeep violated his Fourth Amendment rights, his claim is without merit, since the Jeep was parked on a public street. *See United States v. Fred*, 50 F.3d 548, 551 (8th Cir. 1995), *vacated on other grounds*, 517 U.S. 1152 (1996) (concluding that canine sniff of car parked on the street is so limited in its intrusion on protected privacy interests that it does not amount to a search for Fourth Amendment purposes); *United States v. Ludwig*, 10 F.3d 1523, 1526-27 (10th Cir. 1993) (upholding canine sniff of car in parking lot of motel where it was conducted without particular suspicion); *Merrett v. Moore*, 58 F.3d 1547, 1553 (11th Cir. 1995) (holding that a canine sniff of the exterior of a car waiting at a roadblock was permissible without reasonable suspicion); *United States v. Grogg*, 534 F.3d 807, 810-11 (7th Cir. 2008).

Based on the foregoing, the Court finds that the warrantless canine sniff of the storage units did not violate Plaintiff's Fourth Amendment rights.

**B. Validity of the Search Warrants**[2]

In his motion, Defendant contends that the search warrants were improperly issued because they were based on inadmissible hearsay and information was provided from an unnamed informant, whose credibility was not established. *See* Dkt. No. 28 at 15-16. Further, Defendant argues that the canine's qualifications were not presented in the affidavits and contends that this renders the facts based on the canine's searches improper grounds to support a finding of probable cause.

---

[2] In the present case, Defendant failed to submit his own affidavit or an affidavit from another with personal knowledge of the facts surrounding the search. The affidavit submitted by Defendant's attorney was not made on personal knowledge. As such, the Court denies Defendant's request for a suppression hearing. *See United States v. Kantipuly*, No. 06-CR-065E(F), 2006 WL 4046151, *7-*8 (W.D.N.Y. Oct. 16, 2006) (citations omitted).

"In determining whether probable cause for a search warrant exists, the issuing judicial officer is simply to make a practical common sense decision whether, given the 'totality of the circumstances' set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Barnes*, 399 F. Supp. 2d 169, 178 (W.D.N.Y. 2005) (citing *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)); *see also United States v. Ponce*, 947 F.2d 646, 650 (2d Cir. 1991). A "magistrate's finding of probable cause is itself a substantial factor tending to uphold the validity of this warrant." *United States v. Travisano*, 724 F.2d 341, 345 (2d Cir. 1983); *see also United States v. Ventresca*, 380 U.S. 102, 106 (1965) (holding that a magistrate's disinterested finding of probable cause based on reasonable inferences is given preference). "The process does not deal with hard certainties, but with probabilities." *Gates*, 462 U.S. at 230; *see also United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985) ("Probable cause to believe certain items will be found in a specific location . . . need not be based on direct, first-hand, or 'hard' evidence") (internal citation omitted).

It is well settled that an affidavit to a search warrant that relies on hearsay "'is not to be deemed insufficient on that score, so long as a substantial basis for crediting that hearsay is presented.'" *Illinois v. Gates*, 462 U.S. 213, 241-42 (1983) (quotation omitted). Government investigatory agents are entitled to a "presumption of credibility" when a court evaluates their hearsay information in an affidavit. *United States v. Morill*, 490 F. Supp. 477, 478 (S.D.N.Y. 1980) (finding probable cause in an affidavit based in part on hearsay information provided by federal and local law enforcement agents); *United States v. Ventresca*, 380 U.S. 102, 111 (1985) ("Observations of fellow officers of the [federal] Government engaged in a common investigation

are plainly a reliable basis for a warrant applied for by one of their number"); *Velardi v. Walsh*, 40 F.3d 569, 574 (2d Cir. 1994).

"'An evidentiary hearing on a motion to suppress ordinarily is required if "the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question,"'" *United States v. Pena*, 961 F.2d 333, 339 (2d Cir. 1992) (quotation and other citations omitted), "including an affidavit of someone alleging personal knowledge of the relevant facts," *United States v. Barrios*, 210 F.3d 355, 2000 WL 419940, *1 (2d Cir. 2000) (citing *United States v. Gillette*, 383 F.2d 843, 848 (2d Cir. 1967); *see also United States v. Ciriaco*, 121 Fed. Appx. 907, 908-09 (2d Cir. 2005); *United States v. Richardson*, 837 F. Supp. 570, 572 (S.D.N.Y. 1993) (holding that "[i]t is well established that without a supporting affidavit of someone with personal knowledge of the underlying facts, the court need not resolve factual disputes that may be raised by the moving papers"). Moreover, the Local Rules of Criminal Procedure set forth the process that a criminal defendant must follow when the Government disagrees about the need for an evidentiary hearing: "If the parties agree that a suppression hearing is necessary and the papers conform to the requirements of L.R. Cr. P. 12.1(a), the Court will set the matter for a hearing. If the government contests whether the Court should conduct a hearing, the defendant must accompany the motion with an affidavit, based upon personal knowledge, setting forth facts which, if proven true, would entitle the defendant to relief." N.Y.N.D. L.R. Cr. P. 12.1(e).

***1. The Unit 296 Search Warrant Application***

In his motion, Defendant contends that the evidence from this search must be dismissed for a variety of reasons. First, Defendant argues that the Government failed to identify their

informant in the search warrant application, which required the issuing court to apply a heightened level of scrutiny. *See* Dkt. No. 28 at 8. Since the informant had no established credibility, the information he provided could not satisfy the burden of probable cause necessary for the issuance of the warrant without "significant legally-obtained corroboration." *Id.* at 8-9. Further, Defendant contends that most of the information contained in the search warrant application discussed activities that were non-criminal in nature. *See id.* at 9-10. "In fact, none of the details of the [informant's] tales of drug-running and criminality were arguably corroborated to any degree until the police employed an illegal canine sniff search of storage unit number 296." *Id.* at 10.

Contrary to Defendant's assertions, the affidavit in support of the Unit 296 search warrant set forth a substantial basis for concluding that probable cause existed. The Unit 296 Affidavit recounted an investigation that began in July 2013 and continued through the date of the application, October 4, 2013. As discussed in detail above, the affidavit was based on Investigator Gilroy's personal knowledge acquired through his involvement in the investigation, as well as information obtained by investigators and agents of the New York State Police and DEA. Further, Investigator Gilroy provided information obtained through a confidential informant. *See, e.g.*, Dkt. No. 28-2 at ¶ 4. The affidavit provided that the informant was a former "business associate" turned enemy of Defendant, which is how he became familiar with his methods. Many of the facts provided by the informant were corroborated by official records and the personal investigation of Investigator Gilroy and other members of the task force. Some such facts include (1) corroborated reports regarding the makes and models of the cars driven by Defendant's alleged associates Deondra Forney, Latrina Riggins, and Dewayne Williams; (2) a corroborated report regarding the location of Williams' apartment; (3) a corroborated report

regarding Riggins' use of the storage units; (4) a corroborated report regarding the organization's use of white construction buckets for packaging; and (5) a corroborated report regarding the use of UPS stores to receive packages before bringing them to storage areas. *See id.* at 6-8.

Defendant complains of the hearsay nature of much of the information conveyed in the affidavit; however, it is well settled that a search warrant application that relies on hearsay (is not deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented." *Gates*, 462 U.S. at 241-42 (citations omitted). As discussed, the informant's information was corroborated and a reasonable basis was provided for the basis of his knowledge.

Further, Investigator Gilroy set forth an extensive account of the surveillance conducted by himself and other members of the task force. Through this surveillance, Investigator Gilroy observed that Riggins had rented, used, and accessed multiple storage units. *See* Dkt. No. 28-2 at ¶¶ 10, 23, 30, 38, 40. Moreover, investigators observed Riggins retrieve boxes from a UPS Store and transfer them to Unit 296 at Mabey's Self Storage Facility. *See id.* at ¶¶ 36-38. Thereafter, a trained police canine gave a positive alert for the presence of a narcotic and/or marijuana in Unit 296. *See id.* at ¶¶ 36-39.

The Unit 296 Affidavit further detailed that, on a separate occasion, investigators observed Riggins depart Mabey's Self Storage, proceed to a nearby parking lot, and transfer a box to an unidentified male, who put it in his vehicle and left the parking lot. *See id.* at ¶¶ 23-26. The investigators also learned that Riggins had access to Unit 85, along with several other individuals, and that she used the unique access code for Unit 85 to get into the storage facility before entering Unit 296. Further, individuals were observed backing the rear end of vehicles into the storage unit as if trying to conceal what was being loaded or off-loaded. *See id.* at ¶¶ 31-33.

Based on the foregoing, the Court finds that, given the totality of the circumstances set forth in the affidavit, there was a fair probability that contraband or evidence of a crime would be found in Unit 296. *See Barnes*, 399 F. Supp. 2d at 178 (citing *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). Accordingly, the Court denies Defendant's motion insofar as it seeks to suppress evidence obtained through the execution of the Unit 296 search warrant.

***2. The Unit 85/Jeep Affidavit***

As mentioned, all of the facts supporting probable cause set forth in the Unit 296 Affidavit were incorporated into the Unit 85/Jeep Affidavit. *See* Dkt. No. 28-4 at ¶ 10. Further, the Unit 85/Jeep Affidavit stated that, in executing the search warrant on Unit 296 at approximately 2:23p.m. on October 4, 2013, investigators seized approximately 100 pounds of marijuana, which were housed in white plastic construction buckets. *See id.* at ¶ 12.

Additionally, the Unit 85/Jeep Affidavit indicated that investigators observed a male, later identified as Defendant, access Unit 296 and then drive the Jeep to 27 Thornton Street, Albany, New York. *See id.* at ¶ 11. After discarding the keys into the engine area of a nearby vehicle whose hood was open, Defendant left the area and officers observed six cardboard boxes in plain view inside the Jeep, similar to the one Riggins placed into Unit 296. *See id.* Thereafter, a certified police canine gave a positive alert for the presence of a narcotic and/or marijuana in the Jeep. *See id.*

Based on the totality of the circumstances, the Court finds that the Unit 85/Jeep Affidavit clearly supported the state court's finding of probable cause to issue the warrant.

***3. The Oakhill Apartment***

The third affidavit sworn by Investigator Gilroy on October 4, 2013 at 6:38 p.m. sought a search warrant for the residence located at 6707 Oakhill Circle, North Greenbush, New York. *See* Dkt. No. 30-1. The facts supporting probable cause set forth in the Unit 295 and Unit 85/Jeep Affidavits, together with the related warrants, were incorporated into the Oakhill Apartment Affidavit. *See id.* at ¶ 9. The Oakhill Apartment Affidavit further provided that, in executing the warrant for the Jeep at approximately 4:00p.m. on October 4, 2013, investigators recovered approximately 60 pounds of marijuana in boxes that had been retrieved earlier from Unit 296 of Maeby's Self Storage. *See id.* at ¶ 10. Moreover, the affidavit states that the Jeep was registered to Chantell Chambers and Defendant had been observed operating it. *See id.* Prior to abandoning the vehicle, Defendant was observed driving the vehicle in the Oakhill apartment parking lot. *See id.* Further, both Defendant (Darrin Clark) and Chambers were listed as residents on the rental application for the residence at 6707 Oakhill Circle, and the Jeep was listed on the rental agreement as well. *See id.* Finally, Investigator Gilroy affirmed that, based on his experience, it was likely that drug traffickers would use multiple storage locations, including their homes, to keep additional marijuana and related records. *See id.* at ¶ 11.

Having found that the other search warrant applications were supported by probable cause, the Oakhill Apartment Affidavit, which detailed the executions of the other search warrants, was undoubtedly supported by probable cause.

***4. Qualifications of the canine***

Defendant also argues that the affidavits failed to provide the state court with the "background of either the canine or the canine handler. Such as, the appropriate certifications so

that the Court would be aware that the canine was properly trained and was an animal that could be used for the purposes at hand. There are certifications, which are normally attached to search warrants so that the Court can confirm that the canine in issue has [the] requisite background to do what is being asked." Dkt. No. 28 at 11.

Although a canine alert may establish probable cause to search, a defendant is entitled to contest the reliability of the canine sniff. *See Florida v. Harris*, 133 S. Ct. 1050, 1057–58 (2013) (finding a dog's alert can provide probable cause to search but holding that the defendant "must have an opportunity to challenge . . . evidence of a dog's reliability," whether by (1) "cross-examining the testifying officer," (2) "introducing his own fact or expert witnesses," (3) contesting "the adequacy of a certification or training program," or (4) inquiring whether "circumstances surrounding a particular alert may undermine the case for probable cause"). The *Harris* Court explained that, "[i]f a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search." *Id.* at 1057. When a defendant challenges "the reliability of the dog overall or of a particular alert," the court should "weigh the competing evidence" to determine whether the "facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Id.* at 1058.

In the present matter, in the Unit 296 Affidavit, Investigator Gilroy set forth the following facts concerning the canine search and its qualifications:

> In this instance, the canine handler and Canine examined several units including the one that is the subject of this affidavit. At this time, the Canine gave a positive alert on Unit # 296 for the presence of a narcotic and/or marijuana. The Canine did not alert at any other unit. On June 1, 2012, Canine and handler successfully completed the Law Enforcement Canine Training Course which

> was sponsored by the New York State Division of Criminal Justice Services. This Canine has been certified in narcotics and marijuana detection.

Dkt. No. 28-2 at ¶ 39.

In his reply, Defendant contends that the Government "seems to suggest if an officer in a search warrant states that a canine, who has been given proper training as well as the handler, was used in the course of a given search, the affiant's statement about the propriety of such action automatically succeeds because the affiant was told that they had received this training. The reality is the officer who is making that statement as an affiant has no knowledge that this is true, outside what the other officer told him." Dkt. No. 35 at ¶ 105. Defendant continues by arguing that it "seems it would be more appropriate to require the affiant on behalf of the canine and its handler to provide proof that they have the appropriate authority to make the searches in question. The fact that they were 'trained' and further the police officer said that they were trained, does not mean automatically that they were trained." *Id.* Further, Defendant again argues that it was improper to have the canine search other units before proceeding to the area in front of Unit 296. *See id.* at ¶ 108.

Contrary to Defendant's assertions, the Government provided the state court judge with sufficient information regarding the training of the canine and his handler. Courts in the Second Circuit have found affidavits containing similar facts regarding the training and certification of a canine and its handler to be sufficient. *See, e.g., United States v. Negron*, No. 04 CR. 929, 2005 WL 701237, *1-*2 (S.D.N.Y. Mar. 25, 2005); *United States v. Dillon*, 810 F. Supp. 57, 61-62 (W.D.N.Y. 1992) (holding that the canine sniff technique "'is now sufficiently well-established to make a formal recitation of a police dog's *curriculum vitae* unnecessary in the context of ordinary warrant applications . . .'" and finding that the magistrate could properly infer that the police

canines "were sufficiently certified so as to insure the reliability of the positive 'hits' on the six UPS parcels") (quotation omitted); *United States v. Watson*, 551 F. Supp. 1123, 1127 (D.D.C. 1982) (same). The information provided in the warrant affidavits regarding the canine and handler's training and certification was sufficient

In *United States v. Cedano–Arellano*, 332 F.3d 568 (9th Cir. 2003), the court held that when a defendant requests dog-history discovery to pursue a motion to suppress, Federal Rule of Criminal Procedure 16 compels the government to disclose the "handler's log," as well as "training records and score sheets, certification records, and training standards and manuals" pertaining to the dog. *Id.* at 570–71; *see also United States v. Thomas*, 726 F.3d 1086, 1096 (9th Cir. 2013). These materials were held to be "crucial to [the defendant's] ability to assess the dog's reliability, a very important issue in his defense, and to conduct an effective cross-examination of the dog's handler" at the suppression hearing. *Id.* at 571. These disclosures are "mandatory" when the government seeks to rely on a dog alert as the evidentiary basis for its search. *See United States v. Cortez–Rocha*, 394 F.3d 1115, 1118 n.1 (9th Cir. 2005).

Here, however, Defendant has made entirely conclusory allegations concerning the reliability, training, and certification of the canine and handler. Defendant has failed to submit any evidence that would call into question the reliability of the hits in this case.

Further, nothing in the record indicates that Defendant requested any evidence concerning the reliability, certifications, and training of the canine and its handler.[3] Without such evidence, Defendant's conclusory assertions are insufficient to support his motion to suppress.

Accordingly, the Court denies Defendant's motion to suppress on this ground.

---

[3] The Court notes that, according to the docket, discovery was due by the Government on October 23, 2015. *See* Dkt. No. 37.

***5. Validity Under New York State Law***

Defendant makes several arguments that the search warrants were issued in violation of New York State law and the New York Constitution. *See, e.g.*, Dkt. No. 28 at 21 (citing *People v. Devone*, 15 N.Y. 3d 106 (2010) for the proposition that "the level of suspicion necessary to engage in a warrantless canine sniff of a vehicle's exterior . . . [is] 'founded suspicion'"). Defendant's reliance on the requirements under New York law are entirely unavailing. The Second Circuit has determined that "the touchstone of a federal court's review of a state search warrant secured by local police officials and employed in a federal prosecution is the Fourth Amendment and its requirements, and no more. In *United States v. Pforzheimer*, 826 F.2d 200, 204 (2d Cir. 1987), this court explicitly held that 'federal law should apply to . . . federal criminal prosecution[s], even though the underlying investigation leading to prosecution was conducted solely by state officials.'" *United States v. Smith*, 9 F.3d 1007, 1014 (2d Cir. 1993).

Accordingly, the Court denies Defendant's motion to suppress on these grounds.

**C. *Franks v. Delaware*, 438 U.S. 154 (1978)**

The Fourth Amendment prohibits "unreasonable searches and seizures," and the Warrants Clause mandates that "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." U.S. Const. amend. IV. "There is . . . a presumption of validity with respect to the affidavit supporting [a] search warrant." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). "In certain circumstances, however, a defendant may challenge the truthfulness of factual statements made in the affidavit, and thereby undermine the validity of the warrant and the resulting search or seizure." *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003) (footnote and citations

omitted). "However, '[e]very statement in a warrant affidavit does not have to be true.'" *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000) (quotation omitted).

In *Franks v. Delaware*, the Supreme Court held that, although generally a defendant may not challenge the veracity of a sworn statement that the police used to procure a search warrant, the Fourth Amendment requires that the court hold a hearing to determine the veracity of such statements if the defendant requests such a hearing and makes a substantial preliminary showing that (1) the affiant made "a false statement knowingly and intentionally, or with reckless disregard for the truth," and that (2) "the allegedly false statement [was] necessary to the finding of probable cause[.]" *Franks*, 438 U.S. at 155-56.

> To determine if the false information was necessary to the issuing judge's probable cause determination, *i.e.*, material, "a court should disregard the allegedly false statements and determine whether the remaining portions of the affidavit would support probable cause to issue the warrant." . . . If the corrected affidavit supports probable cause, the inaccuracies were not material to the probable cause determination and suppression is inappropriate.

*Canfield*, 212 F.3d at 718 (internal quotation omitted). Thus, "[t]he ultimate inquiry is whether, after putting aside erroneous information and material omissions, 'there remains a residue of independent and lawful information sufficient to support probable cause.'" *Id.* (quotation omitted).

In the present matter, Defendant states in a conclusory fashion that Investigator Gilroy "made false statements knowingly and intentionally or with reckless disregard for the truth and the false statements where [sic] necessary to finding of probable cause." Dkt. No. 28 at ¶ 54. Defendant contends that Investigator Gilroy "left out critical facts relative to the Jeep that mislead the State Court." *Id.* at ¶ 55. In an affidavit submitted by Defendant, Paul David Breslin, who was present on October 4, 2013 at approximately 10:00a.m., when Defendant parked the Jeep in

front of 27 Thorton Avenue. *See* Dkt. No. 28-7. Mr. Breslin claims that he observed police officers approach Defendant and request identification. *See id.* at 1. At this point, Defendant left and the police officers stayed with the vehicle for approximately fifteen-to-twenty minutes, until additional officers arrived and stated that they smelled marijuana. *See id.* Mr. Breslin further claims that the doors and windows of the Jeep were closed and that he did not notice the smell of marijuana while near the vehicle. *See id.* At this point, Mr. Breslin claims that he heard the police officer state that the vehicle was unlocked and opened the doors to the Jeep at approximately 11:00a.m. *See id.* Mr. Breslin states that he was at the location where the Jeep was located from the time Defendant parked it, to the time that the police took it away. *See id.* Finally, Mr. Breslin contends that he is "certain the police searched the vehicle before the warrant arrived, because I watched them do so and know it was before the warrant because I heard when they stated they had the warrant which was much later then when they first opened the doors." *See id.* at 1-2. Defendant argues that this critical information, which was omitted from the search warrant application, "was the basis of their attempt to get a search warrant[.]" Dkt. No. 28 at ¶ 56.

As the Government correctly asserts, even if the facts asserted in Mr. Breslin's affidavit were proven true, neither it nor anything in Defendant's motion presents a misstatement or omission that would entitle Defendant to suppression or a *Franks* hearing. Nothing in the search warrant application makes mention of a search of the Jeep by police officers and, therefore, it necessarily follows that this information was not necessary for the finding of probable cause. Further, even assuming that Investigator Gilroy orally provided this information to the state court judge, the information would have been immaterial since the remaining information contained in the Unit 85/Jeep Affidavit clearly supported the finding of probable cause. Even if there was a

pre-warrant search, Defendant fails to allege or submit any evidence suggesting that Investigator Gilroy was informed of such information so as to claim that he deliberately or recklessly omitted it from his affidavit. *See United States v. Falso*, 544 F.3d 110, 125 (2d Cir. 2008).

Finally, Defendant contends that Investigator Gilroy's affidavits implied that he was working with more than one confidential informant when, in fact, there was but a single informant. *See* Dkt. No. 28 at ¶ 57. Defendant's conclusory allegation, which is made without citation to anything in the record before the Court, is entirely without merit. The Investigator Gilroy's affidavits repeatedly referred to "a confidential informant," not multiple informants. *See, e.g.*, Dkt. No. 28-2 at ¶¶ 4, 9 ("a DEA source of information (SOI)"); Dkt. No. 28-4 at ¶ 4 ("a confidential informant"); Dkt. No. 28-8 at ¶ 9 ("a confidential informant"). Defendant's conclusory allegation is entirely belied by the record before the Court.

Based on the foregoing, the Court denies Defendant's motion for a *Franks* hearing.

**D. Standing to Challenge the Alleged Pre-Warrant Search of the Jeep**

As discussed, through Mr. Breslin's affidavit, Defendant contends that police officers searched the Jeep prior to the search warrant being issued. In the alternative to the grounds for denying the motion discussed above, the Court finds that Defendant does not have standing to challenge the search of the Jeep. In the Unit 85/Jeep Affidavit, Investigator Gilroy indicates that Defendant "discarded his keys in the engine block area of the Ford Explorer" while speaking with two police officers. Dkt. No. 28-4 at ¶ 11. Without retrieving his keys, Defendant left the area in a gray Lexus. *See id.* Further, the Oakhill Apartment Affidavit indicates that the Jeep is registered to Chantell Chambers, not Defendant. *See* Dkt. No. 28-8 at ¶ 10. Although a person in lawful possession of a vehicle that he or she does not actually own generally can have standing to

bring a Fourth Amendment challenge, Defendant abandoned any such expectation of privacy when he left the keys to the unlocked vehicle in the area of the Ford Explorer parked nearby. *See United States v. Valdez Hocker*, 333 F.3d 1206, 1209 (10th Cir. 2003); *United States v. Sinclair*, No. 09-cr-70, 2011 WL 6012975, *2 (N.D. Cal. Dec. 1, 2011) (denying motion to suppress without prejudice where the defendant failed to make any showing that he had authority to exclude all others, except for the vehicle's registered owner, from using the vehicle and, therefore, he failed to demonstrate that he had a legitimate expectation of privacy in the vehicle) (citation omitted); *United States v. Blanco*, 844 F.2d 344 (6th Cir. 1988), *cert. denied* 486 U.S. 1046 (1988) (finding a lack of standing to object to a search of a car when the accused surrendered the car keys and control of the car to other individuals); *United States v. Savides*, 665 F. Supp. 2d 686, 689-90 (N.D. Ill. 1987) (holding that the defendant's statement disavowing ownership of the car, coupled with his act of kicking the keys under the vehicle, clearly precluding him from asserting a legitimate expectation of privacy in the vehicle).

Accordingly, the Court finds that, in the alternative, Defendant has not established that he had a legitimate expectation of privacy in the Jeep when the alleged pre-warrant search occurred. *See United States v. Benitez-Arreguin*, 973 F.2d 823, 828 (10th Cir. 1992) (holding that a "proponent of a motion to suppress who relies upon the lawful possession factor bears the burden of presenting at least some evidence that his or her possession was lawful").

**E. Inevitable Discovery**

Even assuming the police officers searched the Jeep prior to obtaining the warrant and that Defendant had standing to contest the search, the Court finds that the evidence seized is still not subject to suppression because of the inevitable discovery doctrine. Generally, tangible and

testimonial evidence directly or indirectly derived from unconstitutional police conduct must be suppressed because it is tainted or constitutes "fruit of the poisonous tree." *Murray v. United States*, 487 U.S. 533, 536-37 (1988); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). If police seize evidence pursuant to a valid search warrant obtained on the basis of information unconnected to an earlier Fourth Amendment violation, there is an independent source for the seizure, and the evidence is untainted and admissible. *See Murray*, 487 U.S. at 540-41. Even if the police obtain knowledge during a Fourth Amendment violation, suppression is unwarranted if they would have obtained the same knowledge when executing a valid and independent warrant. *See id.* at 541-42. There are two prerequisites to the *Murray* rule: "(1) the warrant must be supported by probable cause derived from sources independent of the illegal [conduct]; and (2) the decision to seek the warrant may not be prompted by information gleaned from the illegal conduct." *United States v. D.K. Johnson*, 994 F.2d 980, 987 (2d Cir. 1993); *see also United States v. Canfield*, 212 F.3d 713, 717-18 (2d Cir. 2000).

In the present matter, the evidence before the Court clearly demonstrates that, even assuming the Jeep was searched prior to the search warrant being issued, the Government was supported by probable cause from sources independent of the alleged illegal search. Further, the decision to seek the Unit 85/Jeep Search Warrant was not prompted by information gleaned from the illegal search.

Accordingly, the Court finds that, in the alternative, notwithstanding the alleged illegal warrantless search, the evidence is still admissible pursuant to the inevitable discovery doctrine.

**F. Motion for Discovery and Inspection**

***1. Notice of Evidence subject to Suppression***

Defendant asks the Court to order discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure. *See* Dkt. No. 28 at ¶¶ 82-84. In its response, the Government asserts that it has "complied with the letter and spirit of Rule 16 and the local discovery rules" and further indicates that it is mindful of its ongoing obligation to promptly produce additional discovery as it become available. *See* Dkt. No. 30 at 17. Further, the Government asserts that it has voluntarily made available to Defendant all items of physical evidence it intends to offer at trial available for Defendant's physical inspection. *See id.* at 17-18. In light of the Government's compliance and acknowledgment of its ongoing responsibilities, the Court denies this aspect of Defendant's motion without prejudice to renew.

***2. "Catch-all" Hearsay Testimony***

Defendant requests an order requiring the Government to provide him with advance notice of hearsay testimony the Government intends to offer pursuant to the "catch-all" hearsay exception of Rule 803(24) and 804(b)(5) of the Federal Rules of Evidence. Since the Government contends that it is unaware of any such potential testimony, the Court denies this aspect of Defendant's motion without prejudice. *See* Dkt. No. 30 at 18.

***3. Advance Notice of Co-Conspirator Statements***

Defendant seeks an order requiring the Government to provide advance notice of co-conspirator statements the Government intends to offer at trial pursuant to Rule 801(d)(2)(E). *See* Dkt. No. 28 at ¶ 90 (citations omitted). As the Government correctly asserts, however, the cases upon which Defendant relies are no longer good law. The statements which Defendant seeks are covered under the Jencks Act, and production is not required until after that witness has testified

on direct examination. *See United States v. Shyne*, 617 F.3d 103, 105-07 (2d Cir. 2010); *In re United States*, 834 F.2d 283, 286-87 (2d Cir. 1987). Accordingly, this aspect of Defendant's motion is denied without prejudice.

***4. Disclosure of Documents Pursuant to Federal Rule Criminal Procedure 16(a)(1)(C)***

Defendant seeks an order requiring the Government to disclose all written statements and items covered under Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure. *See* Dkt. No. 28 at ¶¶ 92-93. By its very terms, Rule 16(a)(1)(C) applies only to an "organizational defendant." Fed. R. Crim. P. 16(a)(1)(C). Accordingly, Defendant's request is denied.

***5. Grand Jury Testimony***

Defendant seeks an order requiring the Government to disclose the transcript of the individuals who testified before the grand jury in this matter. *See* Dkt. No. 28 at ¶¶ 98-101.

Disclosure of grand jury proceedings is permitted upon a showing that a "ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). "[A] presumption of regularity attaches to grand jury proceedings[.]" *United States v. Leung*, 40 F.3d 577, 581 (2d Cir. 1994). Accordingly, "a defendant seeking disclosure of grand jury minutes has the burden of showing a 'particularized need' that outweighs the default 'need for secrecy' in grand jury deliberations." *United States v. Forde*, 740 F. Supp. 2d 406, 413 (S.D.N.Y. 2010) (citing *United States v. Moten*, 582 F.2d 654, 662 (2d Cir. 1978)); *see also Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) ("The burden . . . is on the defense to show that a 'particularized need' exists for the minutes which outweighs the policy of secrecy"). "A party makes a showing of particularized need by proving 'that the material they

seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.'" *In re Grand Jury Subpoena*, 103 F.3d 234, 239 (2d Cir. 1996) (quoting *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979)).

It is well-settled that "[h]ope and speculation are wholly insufficient to overcome the rule of secrecy in grand jury proceedings that is embodied in Fed. R. Crim. P. 6(e)." *United States v. Donald*, No. 07-CR-6208, 2009 WL 270181, *6 (W.D.N.Y. Feb. 4, 2009); *see also Forde*, 740 F. Supp. 2d at 414; *United States v. Olin Corp.*, 465 F. Supp. 1120, 1134-35 (W.D.N.Y. 1979). "A review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct." *United States v. Torres*, 901 F.2d 205, 233 (2d Cir. 1990), *overruled on other grounds as recognized by United States v. Marcus*, 628 F.3d 36 (2d Cir. 2010). "This standard applies equally to a defendant's request for the court to conduct in camera inspection of grand jury transcripts." *United States v. Laster*, No. 06 Cr. 1064, 2007 WL 3070599, *1 (S.D.N.Y. Oct. 19, 2007) (citation omitted); *Forde*, 740 F. Supp. 2d at 413-14 (applying particularized need standard to the defendant's request for an in camera inspection of the grand jury minutes).

In the present matter, Defendant seeks the transcript of the testimony of the individuals who testified before the grand jury. *See* Dkt. No. 28 at ¶ 98. Defendant contends that grand jury testimony "should be disclosed anytime the Government demonstrates no need for secrecy . . . and the defense shows a semblance of need[.]" *Id.* at ¶ 100 (citations omitted). Further, Defendant argues that where, "as here, the Government's case may depend on oral, unrecorded statements of the alleged co-conspirators, then any of the Grand Jury testimony regarding the

substance of those statements is necessary to adequately prepare and disclosure should be required prior to trial." *Id.* at ¶ 101.

Having reviewed Defendant's arguments and the applicable law, the Court finds that Defendant's assertions fall far short of demonstrating that he has a particularized need of this material to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that his request is structured to cover only material so needed. Defendant's conclusory assertions fail to satisfy any of these three requirements. In its response, the Government acknowledges that the production of witness statements, including grand jury testimony, is subject to the Jencks Act and disclosure upon the witness' testimony at trial. *See* Dkt. No. 30 at 19. Further, the Government acknowledges its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), and contends that it has complied and will continue to comply with those obligations.

Based upon the Government's representations and the applicable law, the Court denies Defendant's motion for disclosure of grand jury testimony. The Court would only remind the Government that "its *Brady* obligations trump the Jencks Act, that such obligations include the obligation to produce impeachment materials consistent with *Giglio*, and that such material must be produced 'in time for its effective use at trial.'" *United States v. Jacobs*, 650 F. Supp. 2d 160, 168 (D. Conn. 2009) (quoting *United States v. Coppa*, 267 F.3d 132, 135, 142 (2d Cir. 2001)).

**G. Bill of Particulars**

In his motion, Defendant demands a bill of particulars. *See* Dkt. No. 28 at ¶¶ 102-105. Specifically, Defendant argues that, "[g]iven the breadth of this indictment, and the severity of punishment Mr. McKenzie faces, it is necessary for the Government to provide a bill of

particulars as to Mr. McKenzie's involvement." *Id.* at ¶ 104. Defendant contends that without a bill of particulars he will be unable to adequately prepare for trial in this matter. *See id.*

A court should grant a motion for a bill of particulars only where necessary to inform the accused of the charge against him with sufficient precision to enable him to prepare her defense and avoid surprise and to enable him to plead his acquittal or conviction in bar of any further prosecution for the same offense. *See United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (citations omitted); *see also United States v. Macchia*, 35 F.3d 662, 670 n.1 (2d Cir. 1994) (quotation and other citations omitted). The purpose of a bill of particulars is to apprise the defendant of the essential facts of the crime with which he is charged; it is not an investigative vehicle for the defense. *See United States v. Johnson*, 21 F. Supp. 2d 329, 339 (S.D.N.Y. 1998) (citation omitted). "The test is not whether the particulars sought would be useful to the defense. Rather, a more appropriate inquiry is whether the information in question is necessary to the defense." *United States v. Guerrerio*, 670 F. Supp. 1215, 1224 (S.D.N.Y. 1987) (citation omitted). If the government has provided the defendant with the information he seeks from another source, *i.e.* through discovery, no bill of particulars is required. *See United States v. Laughlin*, 768 F. Supp. 957, 967 (N.D.N.Y. 1991) (citing *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987)).

The defendant bears the burden of showing that the information requested is necessary and that he will be prejudiced without it so as to justify granting a bill of particulars. *See United States v. Barnes*, 158 F.3d 662, 666 (2d Cir. 1998). A mere statement that the defendant will be prejudiced without the bill is insufficient. *See id.*

In the present matter, other than a conclusory statement regarding the breadth of the indictment and the fact that he needs a bill of particulars to adequately prepare for his defense,

Defendant has failed to put forth any specific arguments as to why the Court should grant his motion. Based on the evidence before the Court, it is clear that the indictment, together with the discovery that has been provided, sufficiently apprises Defendant of the crime with which he is charged. The information provided makes clear that Defendant has sufficient information to avoid surprise at trial and to enable him to plead double jeopardy if he is ever charged in the future with the same crime.

Accordingly, Defendant's motion for a bill of particulars is denied.

**H. Rule 404(b) of the Federal Rules of Evidence**

Defendant seeks an order requiring the Government to give notice of its intention to use evidence of other crimes or bad acts pursuant to Rule 404(b). *See* Dkt. No. 28 at ¶¶ 106-109. The Government states that, at this stage of the case, "it is not clear whether the Government will offer 404(b) evidence, and it may not be clear until the time of trial when the defendant raises issues that might be countered by such evidence." Dkt. No. 30 at 22. The Government further indicates that it "is aware of its obligations under this Rule and will 'provide reasonable notice in advance of trial . . ." of its intention to introduce 404(b) evidence, to the extent it has not already done so." *Id.*

Based on the Government's representations and its acknowledgment of its obligations under Rule 404(b), the Court denies Defendant's motion without prejudice to renew.

**I. Compelling Disclosure of Informant Identities and Permitting Interview by Defense**

Defendant requests an order compelling the Government to disclose the identities of any confidential informants and all related material pursuant to *Roviaro v. United States*, 353 U.S. 53

(1957). *See* Dkt. No. 28 at ¶¶ 110-115. Further, Defendant asks that, in the event that the Government does not call any confidential informant in its case in chief, he be permitted to speak with any such informant for the purpose of determining if they are willing to be interviewed by defense counsel and possibly called during Defendant's case. *See id.* at ¶¶ 116-120. Defendant acknowledges that, if the Government calls all informants to testify during trial, the motion will be withdrawn as moot. *See id.* at ¶ 120. In response to Defendant's motion, the Government asserts that it "fully intends to disclose this type of impeachment information consistent with its pre-existing obligations under *Brady*, *Giglio*, and the Jencks Act." Dkt. No. 30 at 23. Further, the Government contends that it "planned to give this information, particularly *Giglio*, to defense counsel fourteen days prior to the state of trial pursuant to Local Rule 14.1(d)." *Id.* at 23-24. The Government argues that this fourteen-day time frame will balance the Government's concern with protecting the informants' safety and Defendant's need to prepare for trial and an effective cross-examination. *See id.* at 24.

In *Roviaro v. United States*, 353 U.S. 53 (1957) the Supreme Court held that, "[w]here the disclosure of an informant's identity, or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the [informant's] privilege must give way." *Roviaro*, 353 U.S. at 60-61. The Court explained that

> [n]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individuals right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

*Id.* at 62.

The defendant is generally able to establish a right to disclosure where it is "shown that the informant is a key witness or participant in the crime charged, someone whose testimony would be significant in determining guilt or innocence." *United States v. Russotti*, 746 F.2d 945, 950 (2d Cir. 1984); *see also United States v. Roberts*, 388 F.2d 646, 648-49 (2d Cir. 1968). However, simply showing that the confidential informant was a participant in and witness to the crime charged it not enough. *See United States v. Jiminez*, 789 F.2d 167, 170 (2d Cir. 1986). The Second Circuit has stated that "[t]he defendant bears the burden of establishing the need for disclosure, . . . and this requires some demonstration that in the absence of such disclosure the defendant will be denied a fair trial." *United States v. Lilla*, 699 F.2d 99, 105 (2d Cir. 1983) (internal citations omitted).

In the present matter, the Court finds that, in light of limited information provided concerning the role of any confidential informants in the alleged underlying crimes and resulting investigation and the bare assertions regarding their materiality to Defendant presenting a defense, Defendant's motion should be denied without prejudice. Further, the Court finds that this result is even more appropriate in light of the Government's acknowledgment of its obligations under *Brady*, *Giglio*, and the Jencks Act. The Court agrees that disclosure of this information fourteen days prior to trial pursuant to Local Rule 14.1(d) balances the Government's concern with ensuring the informant's safety and Defendant's need to prepare for trial and an effective cross examination.

Based on the foregoing, the Court denies Defendant's motion without prejudice to renew.

**J. *Brady* and *Giglio* Material**

Defendant requests that the Court enter an order directing the Government to provide him with all evidence favorable to him, including evidence that could be used for purposes of impeachment, as *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) require. *See* Dkt. No. 28 at ¶¶ 121-137. The Government asserts that it is aware of its obligations and has acknowledged its continuing obligation. Further, the Government has agreed to produce any *Giglio* material fourteen days prior to trial, which the Court agrees is sufficient time to make effective use of such evidence and, therefore, satisfies the requirements of due process. Based on these representations, the Court denies Defendant's motion without prejudice to renew if it becomes necessary for Defendant to do so.

**K. Motion for Early Jencks Material**

Defendant requests an order directing the Government to disclose all "statements and reports within the meaning of the *Jencks Act,* 18 U.S.C. § 3500, not less than three weeks prior to the commencement of the trial in this case." Dkt. No. 28 at ¶ 138. Defendant contends that early disclosure is necessary to avoid extensive delays at trial because this case "involves extensive wiretaps and multiple defendants[,]" and multiple "federal law enforcement officers participated in an extensive investigation generating hundreds of reports and documents." *Id.* at ¶ 139. In the event the Court denies this request, Defendant requests that the Government comply with the dictates of the Jencks Act by tendering all such material to defense counsel outside the presence of the jury. *See id.* at ¶ 146.

In response, the Government argues that Defendant's motion should be denied because he has failed to set forth facts sufficient to warrant early disclosure of Jencks material. *See* Dkt. No. 30 at 26. The Government contends that Defendant mistakenly claims that the case involves

"'extensive wiretaps and multiple defendants'" and that it was an "'extensive investigation generating hundreds of reports and documents.'" *Id.* Rather, the Government argues that there were no wiretap order in this case, and the investigation did not generate hundreds of reports and documents. *See id.* The Government asks to be permitted to produce this material in its customary manner – at the time trial commences – which exceeds the applicable requirements and minimizes potential for witness intimidation and harm. *See id.*

Under the Jencks Act, 18 U.S.C. § 3500(a), "no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." The Second Circuit has consistently held that a district court's "power to order pretrial disclosure is constrained by the Jencks Act," and that the district court may not order advance disclosure inconsistent with the Jencks Act itself. *See Coppa*, 267 F.3d at 145-46 (reversing district court's decision ordering early disclosure of Jencks Act material); *see also United States v. Sebastian*, 497 F.2d 1267, 1268–69 (2d Cir. 1974); *United States v. Percevault*, 490 F.2d 126, 129 (2d Cir. 1974) (finding that "the district court did not have statutory authority to compel disclosure [of Jencks Act material] prior to trial over the government's objection").

In light of the authority cited, the Government's acknowledgment of its continuing *Brady* and *Giglio* obligations, and the Government's intention to follow its customary practice to produce any Jencks material at the time trial commences, the Court denies Defendant's motion for early disclosure of Jencks material.

**L. Preservation of Agents' Rough Notes**

Defendant asks the Court for an order directing "all Government law enforcement officers and agents, and the Government attorneys, who were involved in the investigation charged in the above-listed case, to retain and preserve all rough notes and writing that a producible, under Fed. R. Crim. P. 26(F)(1)(2), and *Brady v. Maryland*, 373 U.S. 83 (1963) or which may be relevant to impeachment for purposes under [Rule 806 of the Federal Rules of Evidence]." Dkt. No. 28 at ¶ 148. The Government responded that it "is aware of its obligation under the Jencks Act and considers rough notes of testifying agents as subject to disclosure to the defendant." Dkt. No. 30 at 26.

In light of the Government's acknowledgment of its obligations, the Court denies Defendant's motion without prejudice.

**M. Motion to Require Designation of Documents to be Introduced at Trial**

Defendant asks the Court to order the Government to designate the documents that it intends to introduce at trial. *See* Dkt. No. 28 at ¶¶ 153-158. Defendant contends that the Court should order this relief for the following reasons: (1) it would permit Defendant to "continue the discovery process in a more deliberate and orderly manner;" (2) Defendant would be prepared to rebut or explain those documents introduced at trial; (3) trial would "proceed without lengthy recesses that would be necessary when the defense needed to locate any writing, or the remainder of writings, that ought to be contemporaneously introduced with the government's documents;" and (4) the requested relief would condense Defendant's case "because it would be possible to concentrate on the designated documents." *Id.* at ¶ 154.

Having reviewed Defendant's motion, the Court finds that his request for the Government to provide a designation of documents to be introduced at trial should be denied at this time. The

Government has already provided Defendant through discovery the documents it intends to introduce at trial. This is not a complex fraud or other document intensive case and the discovery, while comprehensive, is not overly voluminous. Further, the Government is required to file its exhibit list two weeks prior to the start of trial. The exhibit list will designate the documents the Government intends to introduce at trial and will afford Defendant sufficient time to prepare his defense.

Accordingly, the Court denies this aspect of Defendant's motion.

## IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

**ORDERS** that Defendant's motions (Dkt. No. 28) are **DENIED** in their entirety as set forth herein; and the Court further

**ORDERS** that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

**IT IS SO ORDERED.**

Dated: November 4, 2015
Albany, New York

Mae A. D'Agostino
U.S. District Judge

# APPENDIX C

# UNITED STATES COURT OF APPEALS
## FOR THE
# SECOND CIRCUIT

---

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of December, two thousand twenty-one.

---

United States of America,

Appellee,

v.

Oniel McKenzie, AKA Darrin Clark, AKA Shower,

Defendant - Appellant.

---

**ORDER**

Docket No: 18-1018

Appellant, Oniel McKenzie, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk