
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN IBARRA-OZUNA, PETITIONER,
vs.
UNITED STATES, RESPONDENT.

**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

May 5, 2022

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

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MARTIN IBARRA-OZUNA, PETITIONER,
vs.
UNITED STATES, RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. When officers who have probable cause for an arrest or vehicle stop request another officer to take only a particular, limited action, does the “collective knowledge doctrine,” recognized by this Court in *Whiteley v. Warden*, 401 U.S. 560 (1971), and *United States v. Hensley*, 469 U.S. 221 (1985), permit the “requested officer” to take only the limited action requested, or does it permit the “requested officer” to take any action the requesting officers’ probable cause would have justified?

B. Can the collective knowledge doctrine be used to justify an arrest or vehicle stop for which there is probable cause when the actual request made is overly broad and unfocused?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Martin Ibarra-Ozuna petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is included in the appendix as Appendix 1. The transcript of the hearing with the district court ruling is attached as Appendix 2.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 23, 2022, *see* App. A001. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

1. Stop and Arrest.

On December 18, 2017, Arizona Department of Public Safety Detective George Luna was informed that a vehicle “possibly loaded with narcotics” would be traveling from San Luis, Arizona on Arizona Highway 195. App. A053. Detective Luna was asked “to develop [his] own probable cause for the

traffic stop, and then address it as a regular traffic stop.” App. A053-54. The vehicle was described as a gray Mazda. *See* App. A080-81, A102.

Detective Luna observed a gray Mazda later that day while he was pulled over to help another motorist. *See* App. A046-47. The Mazda moved from the right lane into the left lane as it passed and then moved back into the right lane after passing. App. A047, A054-55. Detective Luna claimed the front left bumper was “kind of a little bit sagging.” App. A046.

Detective Luna drove after the Mazda, caught up to it, and paced its speed for several miles. App. A047-48. The Mazda’s speed fluctuated, but it did exceed the speed limit at times, and Detective Luna pulled it over. App. A048-49. The stop took place approximately 19 miles from San Luis, near the larger city of Yuma, Arizona. *See* App. A176.

The driver of the Mazda was Petitioner, and he had his wife and small child with him. *See* App. A050. Detective Luna asked Petitioner for his driver’s license, registration, and proof of insurance. App. A051. He also asked if Petitioner had been involved in a collision, because of the front bumper “sagging” that he claimed he saw. App. A061. Petitioner’s wife answered and said they had just purchased the car from an elderly woman. App. A061. Detective Luna asked where they were going, and Petitioner replied they were going to Tempe, Arizona, to pick up his brother. App. A062. Regarding insurance, Petitioner said he did not have insurance yet, and his wife said the vehicle had been in Mexico. App. A063. Petitioner said he planned on getting insurance before leaving Yuma, App. A065, and he later explained he had insurance on another vehicle and would be substituting the Mazda for that vehicle, *see* App. A069.

Detective Luna did not address traffic violations at that point, but asked Petitioner to step out of the car. App. A066. He separated Petitioner from Petitioner's wife by directing Petitioner back to the patrol car, where there was another officer who had just arrived. App. A066. Detective Luna then told Petitioner that he was going to talk to Petitioner's wife, and had Petitioner wait with the other officer. App. A066-67. Detective Luna then walked back to the Mazda and spoke with the wife. *See* App. A067.

After speaking with the wife, Detective Luna returned to Petitioner. *See* App. A067. He continued to put off addressing traffic violations, asking how long the car had been in Mexico and where Petitioner was going to pick up his brother. *See* App. A067. Petitioner clarified that it was his wife's brother, not his brother, and he had trouble recalling exactly how long the car had been in Mexico. *See* App. A067-68. It was only after this discussion that Detective Luna addressed traffic violations; he explained why he had stopped Petitioner and told Petitioner he would just issue a warning and Petitioner should get the insurance taken care of. *See* App. A068-69.

Even then, Detective Luna did not simply issue the warning and let Petitioner leave. He did not issue the warning until "the end, when we were done with the whole investigation." App. A094. What he did after telling Petitioner he was just going to issue a warning was ask if he could search the car. *See* App. A072-73. Petitioner replied that he preferred not to allow a search because he was in a hurry to get to where he was going and asked, "Why don't you just get a K9?" App. A073.

Detective Luna then summoned a K9 officer, App. A073, and the K9 officer conducted a search with his dog. *See* App. A117-20. The dog did not

alert when it circled around the outside of the vehicle and did not alert when it was placed inside the trunk. *See* App. A119, A123. The officer then placed the dog inside the vehicle and believed the dog did alert at that point. *See* App. A119-20.

Detective Luna then summoned another officer, from the task force that had requested the stop. That officer had listened to wiretap recordings and participated in surveillance that suggested Petitioner would be transporting drugs in the Mazda that day. *See* App. A136-46. When this officer arrived, the officers searched the entire vehicle. *See* App. A075-76, A150-51. They found methamphetamine in a speaker box in the trunk, in a bag under the spare tire, and in the right rear quarter panel of the car. *See* App. A076-80, A150-57.

2. Suppression Hearing.

Petitioner was charged with conspiracy to possess methamphetamine and heroin with intent to distribute, money laundering conspiracy, and five substantive possession with intent to distribute counts. *See* App. A178. The substantive counts were possession with intent to distribute the methamphetamine found in the December 18, 2017 search of the car and possession with intent to distribute methamphetamine and heroin which had been discovered in alleged coconspirators' vehicles on other dates. *See* App. 178. Petitioner was tied to these other drugs through the wiretap investigation being conducted by the task force that had requested the stop on December 18, 2017. *See* App. 183-85. A superseding indictment removed the money

laundering count, broke up the drug conspiracy count into three separate conspiracies, and added two more possession with intent to distribute methamphetamine counts. App. A179.

Petitioner's attorney filed motions to suppress evidence, and the district court held an evidentiary hearing. *See* App. A032-172. Detective Luna, the K9 officer, the task force officer who had come to the scene, and another task force officer testified. The task force officers testified about the wiretap recordings and surveillance they believed created probable cause there would be drugs in the Mazda. *See* App. A136-46, A165. The K9 officer testified the dog did not alert when it circled around the car or when it was placed in the trunk, but did alert when it was placed inside the car. *See* App. A119-20, A123. The officer claimed the dog "jammed his nose in between the seats and started breathing real hard sounding like a vacuum, basically." App. A120.

Detective Luna testified about the stop. He claimed it was not just the speeding that justified the stop. He claimed Petitioner's move into the left lane before passing was an unsafe lane change. *See* App. A046-47, A054-55, A059. He also claimed the unsafe lane change and the bumper he claimed was "sagging" gave him reason to think the driver might be intoxicated. *See* App. A054, A058.

Detective Luna further claimed the stop was independent of the task force officers' request "to develop [his] own probable cause for [a] traffic stop," *supra* pp. 3-4. First, he claimed he would not have stopped the car if he had not witnessed the traffic violations he described. *See* App. A082. Second, he made the converse claim that he would have stopped the car based on the traffic violations even without the task force officers' request. *See* App. A054,

A104.

In addition to testifying about the reasons for the stop, Detective Luna testified about his interaction with Petitioner and Petitioner's wife. He claimed they were both nervous, *see* A062-63, A068, though he acknowledged on cross examination that it is not uncommon for motorists to get nervous when they are pulled over, *see* App. A094. He also claimed they made inconsistent statements, *see* App. A063, A067-68, and their "story" "just kind of didn't make sense," App. A064. Finally, he claimed it did not make sense that they planned to buy insurance in Yuma because one can buy insurance in San Luis. *See* App. A064-65.

In argument, defense counsel challenged the credibility of both Detective Luna and the K9 officer. He pointed to a photograph of the front of the car showing there was no sagging bumper. *See* App. A021. He pointed to a photograph of the inside of the car that showed there was a child's car seat where the dog had supposedly put its nose. *See* App. A022.

The district court agreed Detective Luna was not credible. *See* App. A018 ("even though I don't find him credible"). It did believe the testimony about speeding. *See* App. A021. But it did not believe the testimony about an unsafe lane change. *See* App. A021. It labeled the testimony about "[t]he bumper and intoxication issue" "just incredible." App. A021. And it found Detective Luna's claims of independence not credible. First, the court found not credible Detective Luna's claim he would not have stopped the car if he had not seen the traffic violations. *See* App. A013-14. Second, the court found not credible Detective Luna's converse claim that he would have stopped the car for the traffic violations even if he had not been asked to make

a stop. *See* App. A016. The court stated more generally, in finding Detective Luna “credible on the speed,” that “I didn’t believe Detective Luna was credible on the other issues.” App. A020.

The court avoided making a finding on defense counsel’s challenge to the credibility of the K9 officer’s testimony. The court relied instead on a “collective knowledge doctrine” argument by the government, *see* App. A015, A029-31, under which officers requested to take action by other officers may rely on the other officers’ probable cause, *see infra* pp. 10-11. The court ruled that “regardless of whether or not there was a consent and whether or not there was – the dog alerted at the right area of the car, the law has established that once the police have that collective knowledge, that creates the probable cause.” App. A023. It reasoned:

Under the collective knowledge doctrine, they had probable cause to go into that trunk and to stop that vehicle.

And I found the defendant’s – the stop of the defendant’s vehicle was justified by collective knowledge – by the collective knowledge doctrine, and collectively, there was probable cause to believe the defendant’s vehicle was involved in drug trafficking.

So the stop and search of his vehicle didn’t violate the Fourth Amendment. And there was wiretap information that that vehicle would be traveling on that road about that time of the day and that in the trunk of the vehicle would be speakers that contained methamphetamine.

That was all known before he even got stopped. So there was probable cause for the stop and probable cause for the search.

App. A022-23.

3. Conviction and Appeal.

The government proceeded to trial on some, but not all, of the counts in

the superseding indictment. *See* App. A182. The jury found Petitioner guilty of the two conspiracy counts that were tried and guilty of the possession with intent to distribute methamphetamine on December 18, 2017, but not guilty of three other possession with intent to distribute counts that were tried. *See* App. A186.

Petitioner appealed after being sentenced. He raised both a sentencing guidelines claim and a challenge to the denial of his suppression motion. His challenge to the suppression motion ruling was three-pronged. First, Petitioner argued that the collective knowledge doctrine did not justify the stop and search because (a) the officers who requested the stop did not have probable cause for the broad request they made, which was to stop any gray Mazda, but had probable cause for only a specific gray Mazda, and (b) the collective knowledge doctrine allows the officer who is requested to take action to take only the action he is requested to take, which in this instance was to “develop [his] own probable cause.” *See* App. A191-95. Second, Petitioner argued that without the collective knowledge doctrine, the stop was improperly prolonged beyond what was necessary to addressing traffic violations, in violation of *Rodriguez v. United States*, 575 U.S. 348 (2015). *See* App. A195-200. Third, Petitioner argued there was a need for findings regarding the dog sniff, which the district court had expressly declined to make, *see supra* p. 8, even if the stop was not improperly prolonged. *See* App. A200-02.

The court of appeals affirmed the denial of the suppression motion. *See* App. A001-04. Like the district court, it relied on the collective knowledge doctrine and did not reach the other issues. It wrote:

The district court did not err in holding that Detective Luna had probable cause to stop and search Ibarra-Ozuna's vehicle based on the collective knowledge of law enforcement. The collective knowledge doctrine allows courts to impute the collective knowledge of investigating officers to the officer who conducts the stop, search, or arrest. *United States v. Villasenor*, 608 F.3d 467, 475 (9th Cir. 2010). There is ample evidence in the record of the suppression hearing that the investigating officers had developed probable cause to stop and search Ibarra-Ozuna's vehicle and investigate the vehicle. *See United States v. Ramirez*, 473 F.3d 1026, 1032-33 (9th Cir. 2007); *United States v. Mayo*, 394 F.3d 1271, 1273, 1275 n.7 (9th Cir. 2005).

App. A002-03.¹

V.

REASONS FOR GRANTING THE PETITION

What some courts, including the court of appeals below, label the “collective knowledge doctrine,” *see supra*, and other courts label the “fellow officer rule,” *see* 2 Wayne R. LaFave, *Search and Seizure* § 3.5(b), at 333 (6th ed. 2020), allows an officer who does not personally have probable cause to make an arrest or stop based on another officer’s probable cause when the other officer requests him to do so. This Court recognized the principle in, first, *Whiteley v. Warden*, 401 U.S. 560 (1971), where the Court held an arrest invalid only because the officer requesting the arrest did not have probable cause, *see id.* at 568, and, second, *United States v. Hensley*, 469 U.S. 221 (1985), where the Court held a stop was valid because the officer requesting

¹ The court of appeals did agree with Petitioner’s sentencing guidelines challenge and remanded for resentencing. *See* App. A003-04.

the stop did have probable cause, *see id.* at 231-32. As the Court explained in *Hensley*:

[W]hen evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, its admissibility turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest. It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance.

Id. at 231 (emphasis in original).

This petition presents two questions not resolved by *Whiteley* and *Hensley*. First, where the requesting officers request only a particular, limited action, may the “requested officer” take only that limited action, or may he take any action the requesting officer’s probable cause or reasonable suspicion would have justified? Second, can the collective knowledge doctrine be used to justify an arrest or vehicle stop for which there is probable cause or reasonable suspicion when the actual request made is impermissibly broad and unfocused?

The petition should be granted because (a) lower courts are split on the first of these questions; (b) the question is important because pretext stops like the one here have become ubiquitous since this Court’s decision in *Whren v. United States*, 517 U.S. 806 (1996); and (c) the decision below, allowing action beyond the limited action requested, is wrong. Granting the petition will also allow the Court to address the second question at the same time, because that question is squarely presented by the facts of this case.

A. THE PETITION SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE LOWER COURTS ON THE IMPORTANT QUESTION OF WHETHER THE COLLECTIVE KNOWLEDGE DOCTRINE ALLOWS AN OFFICER TO TAKE ONLY THE ACTION HE IS REQUESTED TO TAKE OR ALLOWS THE OFFICER TO TAKE ANY ACTION THE REQUESTING OFFICERS' PROBABLE CAUSE OR REASONABLE SUSPICION WOULD HAVE JUSTIFIED.

1. There Is a Split in the Lower Courts on the Question of Whether the Collective Knowledge Doctrine Allows an Officer to Take Only the Action He Is Requested to Take.

That the collective knowledge doctrine cannot justify action based on another officer's probable cause when there has been no directive or request at all seems self-evident. Professor LaFave recognized this in his treatise on search and seizure, explaining, "The *Whiteley* type of case, in which there has been a directive or request from another officer or agency, must be distinguished from the situation in which there has been no such directive or request but the arresting or searching officer attempts to justify his action on the ground that other officers were in fact in possession of the underlying facts justifying his action." 2 LaFave, *supra* p. 10, § 3.5(c), at 345 (footnotes omitted). Various state and lower courts have thus stated, "While the collective knowledge of the police can give rise to a valid arrest, this is so only if the arresting officer acts in response to a broadcast or other directive which is based on the collective information." *Haywood v. United States*, 584 A.2d

552, 556 (D.C. 1990). *See also People v. Ford*, 198 Cal. Rptr. 80, 86 (Cal. App. 1984) (“It is well established that where an officer makes an arrest without a directive or request from another officer or agency, he may not justify the arrest on the existence of probable cause in the hands of the other officer or agency.”). As expressed in one of the opinions of the court of appeals below, the doctrine applies “where an officer (or team of officers), with direct personal knowledge of *all* the facts necessary to give rise to reasonable suspicion or probable cause, directs or requests that another officer, not previously involved in the investigation, conduct a stop, search, or arrest.” *United States v. Ramirez*, 473 F.3d at 1033 (emphasis in original).

Left unaddressed by these general statements is the circumstance present here – where an officer with probable cause requests *some* action, but not the most intrusive action for which he has probable cause. In this circumstance, there is a split in the courts below.

One side of the split is represented by the Colorado Supreme Court. That court considered – in *People v. Arias*, 159 P.3d 134 (Colo. 2007) – a factual scenario almost exactly like that in Petitioner’s case here. As described in the opinion:

Believing the driver was involved in drug activity, the Drug Task Force agent in charge contacted the Denver police dispatch at approximately 5:00 p.m. to request that a uniformed patrol officer conduct a traffic stop and seek permission to search the truck. However, the agent in charge did not inform dispatch about the earlier observations nor did he tell Denver Police that he believed these observations established a basis to stop the truck. Instead, he specifically requested that the patrol officer develop an independent basis for a traffic stop so that the driver would not discover the nature and extent of the surveillance.

Id. at 136. The court then held the fellow officer rule did not justify the stop in that case.

[T]he Drug Task Force agent in charge did not direct [the patrol officer] to stop [the defendant] based on existing information. Instead, the agent informed dispatch that the Denver patrol officer should find an independent basis for stopping the truck because he wished to keep the Task Force activity secret. As a result, [the patrol officer] was instructed to develop his own justification for the traffic stop. Because law enforcement officers chose not to rely on the existing information known to the Task Force agents at the time of the traffic stop, the People cannot later claim that, through the fellow officer rule, information is imputed to [the parole officer]. Because the traffic stop was not based on existing reasonable suspicion of fellow officers, the trial court was correct in finding that the fellow officer rule does not apply.

Id. at 140.

Other courts have taken a different view, however. The Florida Supreme Court, in a case in which Florida officers had simply told Mississippi officers they were looking for the defendant, held, “The fact that [the Florida] authorities did not specifically request the [Mississippi] authorities to make an arrest or take any action is not significant.” *Voorhees v. State*, 699 So. 2d 602, 609 (Fla. 1997). *See also Carroll v. State*, 497 So. 2d 253, 260 (Fla. App. 1985) (“refus[ing] to impose a hyper-technical requirement that certain ‘magic words’ must be used before the fellow officer rule is applicable”), *cited with approval in Voorhees*, 699 So. 2d at 609.

The Utah Supreme Court has agreed, rejecting a defense argument that “the exact timing of the Sheriff’s specific instruction to arrest and the Deputy’s actual arrest – which [the defendant] asserts occurred before the Sheriff’s specific instruction to arrest – makes his arrest unconstitutional.” *State v. Talbot*, 246 P.3d 112, 119 (Utah 2010). Similarly, the Virginia Court of

Appeals has rejected a defense argument that “the collective knowledge doctrine ‘does not authorize an officer to do anything over and above the action that is specified by the directing officer.’” *Long v. Commonwealth*, 853 S.E.2d 65, 73 (Va. App. 2021).

In sum, different courts disagree about whether the action the “requested officer” may take is limited by the request the requesting officers did make or the request the requesting officer could have made. Different courts will reach different results on the same facts until the split is resolved.

2. The Question Is Important Because the Use of Pretext Stops Has Become Ubiquitous After This Court’s Decision in *Whren*.

The question is also very important after this Court’s decision in *Whren*. *Whren* held that an officer’s subjective motivation for making a stop is irrelevant so long as there is objectively probable cause for the stop. *See id.*, 517 U.S. at 813. This allows stops based on traffic violations regardless of whether the traffic violation was the true purpose of the stop and regardless of whether a reasonable officer would have made the stop based on the traffic violation. *See id.* at 813-14.

This has made the practice of pretextual stops that are nominally for minor traffic violations, but in reality for other purposes, ubiquitous. This is evidenced in the media, *see, e.g.*, *Cities Try to Turn the Tide on Police Traffic Stops*, N.Y. Times, April 15, 2022 (hereinafter “*Cities Try to Turn the Tide*”), available at <https://www.nytimes.com/2022/04/15/us/police-traffic-stops.html>; *New Limits on ‘Pretextual Stops’ by LAPD Officers Approved, Riling Police*

Union, L.A. Times, March 1, 2022 (hereinafter “*Limits on Pretextual Stops Approved*”), available at <https://www.latimes.com/california/story/2022-03-01/new-limits-on-pretextual-stops-by-lapd-to-take-effect-this-summer-after-training>, as well as opinions by members of this Court expressing concern about the effects of *Whren*, see, e.g., *District of Columbia v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in judgment in part); *Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring); *Maryland v. Wilson*, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting). The practice has become so common that many local jurisdictions – though far from all and probably not even a majority – are placing their own legislative or regulatory limits on the practice. See *Cities Try to Turn the Tide*, *supra* p. 15; *Limits on Pretextual Stops Approved*, *supra* p. 15.

The practice also includes stops like those in the present case and the Colorado *Arias* case discussed *supra* pp. 13-14, where officers with probable cause based on an investigation that they wish to keep secret request an uninvolved officer to create his own probable cause for an arrest or search. Such stops have become an exceedingly common part of the “war on drugs.” Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 Mich. L. Rev. 1843, 1844-45 (2004). They have become so common that they have acquired their own label – “wall stop.” *United States v. Evans*, 786 F.3d 779, 781 n.2 (9th Cir. 2015).

This makes the question presented not only the subject of a split in the lower courts, but an important question. This is an additional reason to address and resolve the split.

3. The Opinions of the Court Below and Other Courts Holding the Collective Knowledge Doctrine Does Not Limit the Officer to the Action He Is Requested to Take Are Wrong.

Finally, the opinion of the lower court here is wrong – for at least two reasons. First, there is the reason given by the Colorado Supreme Court in *Arias* – that limiting the “requested officer’s” action to the action which is requested prevents potential abuse of the rule. As the Colorado Supreme Court explained:

Potential abuse of the fellow officer rule is averted by requiring that the officer be instructed or directed to make the stop based on existing reasonable suspicion. For instance, an officer may not illegally stop a vehicle in hopes of finding that there is a warrant out on the driver. Instead, the fellow officer rule requires that the officer must act on a communication from another officer and the communication must arise from already existing probable cause or reasonable suspicion.

Id., 159 P.3d at 140.

Second, the opinion of the lower court here is inconsistent with the rationale of the collective knowledge doctrine. That rationale, as articulated in this Court’s *Whiteley* case, is that “police officers called upon to aid other officers in executing arrest warrants [the aid requested in *Whiteley*] are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.” *Id.*, 401 U.S. at 568. Such officers are not entitled to assume there is justification for something more than what they are requested to do.

As applied to the present case, this permitted the detective who made the stop to assume that the requesting officers had *reasonable suspicion* to justify

a *stop*. He could not extrapolate from that to make the additional assumption that the other officers had *probable cause* for a *search*. That is especially true in light of the fact that he was asked to “develop [his] own probable cause,” *supra* p. 3 (quoting App. A053-54). For all the detective making the stop knew, the other officers did *not* have the probable cause needed for a search, but had only the reasonable suspicion needed for a stop, and hoped an officer making a stop would “develop [his] own probable cause.”

B. A SECOND REASON TO GRANT THE PETITION IS THAT IT WILL ALLOW THIS COURT TO ADDRESS THE QUESTION OF WHETHER THE COLLECTIVE KNOWLEDGE DOCTRINE CAN JUSTIFY ACTION WHEN THE REQUEST IS OVERLY BROAD AND UNFOCUSED.

Granting the petition will also allow the Court to address a second issue raised about the collective knowledge doctrine. The collective knowledge doctrine requires not only that action be requested by officers with the required probable cause or reasonable suspicion, but that the action those officers request be supported by the probable cause or reasonable suspicion they have. As Professor LaFave has explained, “*Whiteley* should not be used to validate an arrest, notwithstanding probable cause at the source to arrest the person actually arrested, when the arresting officer was acting in response to an impermissibly broad and unfocused directive or request. (Footnote omitted.)”² LaFave, *supra* p. 10, § 3.5(b), at 340-41.

Two cases cited by Professor LaFave illustrate the problem. One is

United States v. Webster, 750 F.2d 307 (5th Cir. 1984), where the requesting officers had probable cause to arrest a particular individual they had tied to an offense, but directed the “requested officer” to bring in whomever he discovered in investigating a citizen complaint in the area where the particular individual had last been seen. *See id.* at 312-13, 319. The court of appeals held that the requesting officers’ probable cause did not support the arrest because it was probable cause for just the particular individual, not whomever the requested officer discovered in his investigation. *See id.* at 323-24.

The other illustrative case is *People v. Jones*, 746 N.E.2d 1053 (N.Y. 2001). The requesting officers’ probable cause in that case was for the arrest of a particular individual they had observed purchasing drugs from an undercover officer. *See id.* at 1058. The officers radioed other officers to make an arrest of a man with a given description, but the defendant sought to argue the description was overly general. *See id.* The New York Court of Appeals held an overly general description was a valid objection to an arrest based on the collective knowledge doctrine if its overly general nature could be established at a hearing. *See id.*

The facts of Petitioner’s case are very like the facts in these cases. What the requesting officers had probable cause for here was the particular gray Mazda Petitioner drove. But the directive they gave to the other officer was simply “a gray Mazda.” App. A102. This would include any of the presumably dozens or hundreds of gray Mazdas in the Yuma metropolitan area.²

² 211,931 people were estimated to live in the Yuma Metropolitan Statistical Area in 2020, *see Census Reporter: Yuma, AZ Metro Area*,

This directive swept too broadly just as the directives in *Webster* and *Jones* swept too broadly. Just as the multitude of people in the area in *Webster* and the multiple people fitting the overly general description in *Jones* were subject to an unjustified intrusion upon their Fourth Amendment rights, the innocent drivers of all of the dozens or hundreds of other gray Mazdas in the Yuma metropolitan area were subject to invasion of their Fourth Amendment rights. Considering this additional question in Petitioner's case will allow the Court to make clear that the collective knowledge doctrine requires a focused directive limited by the particular probable cause the requesting officers have.

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: May 5, 2022

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

<https://censusreporter.org/profiles/31000US49740-yuma-az-metro-area/> (last visited April 26, 2022), and the cars owned by those 211,931 people presumably included additional gray Mazdas. It is appropriate to consider the entire metropolitan area because Petitioner was stopped approximately 19 miles from San Luis and near Yuma, as noted *supra* p. 3.

A P P E N D I X 1

FILED

NOT FOR PUBLICATION

FEB 23 2022

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARTIN IBARRA-OZUNA,

Defendant-Appellant.

No. 20-10412

D.C. No.
2:18-cr-00076-DLR-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Submitted February 9, 2022**
Phoenix, Arizona

Before: MURGUIA, Chief Judge, GRABER, Circuit Judge, and FITZWATER,***
District Judge.

Defendant Martin Ibarra-Ozuna (“Ibarra-Ozuna”) challenges the denial of his

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

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

*** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

motions to suppress and his sentence. We review *de novo* the district court's ruling on the motions to suppress, and we review for clear error the district court's findings of fact. *United States v. Evans*, 786 F.3d 779, 784 (9th Cir. 2015). We review the district court's construction of the United States Sentencing Guidelines *de novo* and review for clear error its supporting factual findings for the role adjustment. *United States v. Holden*, 908 F.3d 395, 401 (9th Cir. 2018). We affirm his convictions, vacate his sentence, and remand for resentencing.

1. The district court did not err in holding that Detective Luna had probable cause to stop and search Ibarra-Ozuna's vehicle based on the collective knowledge of law enforcement. The collective knowledge doctrine allows courts to impute the collective knowledge of investigating officers to the officer who conducts the stop, search, or arrest. *United States v. Villasenor*, 608 F.3d 467, 475 (9th Cir. 2010). There is ample evidence in the record of the suppression hearing that the investigating officers had developed probable cause to stop and search Ibarra-Ozuna's vehicle and that they had communicated a request to Detective Luna to stop and investigate the vehicle. See *United States v. Ramirez*, 473 F.3d 1026, 1032–33 (9th Cir. 2007);

United States v. Mayo, 394 F.3d 1271, 1273, 1275 n.7 (9th Cir. 2005).¹

2. When explaining that Ibarra-Ozuna did not qualify for the safety valve adjustment because he was a “manager” and “supervisor,” the district court made three clearly erroneous factual findings.

First, the parties (and we) agree that the district court’s finding that Ibarra-Ozuna planned a coconspirator’s trip from southern Arizona lacks any support in the record. This finding is clearly erroneous.

Second, the district court clearly erred in finding that Ibarra-Ozuna ever “directed” Flabio Gaxiola to meet him at any location. At most, the calls between Gaxiola and Ibarra-Ozuna reflect that Ibarra-Ozuna told Gaxiola where he was or when he would meet Gaxiola at the mall, and the parties were coordinating the exact meeting locations.

Third, the district court clearly erred in finding that Ibarra-Ozuna planned logistics for others. While there is evidence that Ibarra-Ozuna discussed the location of other parties, the record demonstrates that Ibarra-Ozuna’s discussions of logistics related only to the details and planning of *his own* trips, meetings, or drug deliveries.

¹ An investigating officer’s probable cause based on the information learned in his investigation is imputed to the arresting officer without the need to communicate all of the information known to the investigating officer. *Ramirez*, 473 F.3d at 1037.

Because the district court based the “manager” or “supervisor” role adjustment on several factual findings that are clearly erroneous, we vacate Ibarra-Ozuna’s sentence and remand for resentencing. *See, e.g., United States v. Harris*, 999 F.3d 1233, 1238 (9th Cir. 2021).

AFFIRMED in part, VACATED in part, and REMANDED for resentencing.

APPENDIX 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BEFORE: THE HONORABLE DOUGLAS L. RAYES, JUDGE

REPORTER'S EXCERPTED TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING (Continued) - Day 3
(Pages 142 through 164 - does not contain sealed proceedings)

Official Court Reporter:
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Sandra Day O'Connor U.S. Courthouse, Suite 312
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

A P P E A R A N C E S

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I N D E X

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Closing Arguments	
By Ms. Schesnol	152
By Mr. Rogers	155

PROCEEDINGS

(The defendant was assisted by the Official Court Interpreter.)

(Proceedings commenced at 8:34 a.m.)

THE COURT: Mr. Rogers, is your client going to testify?

MR. ROGERS: Your Honor, I believe he wants to address the Court before we go forward.

THE COURT: Okay. I'm not sure --

MS. SCHESNOL: I'm sorry, Your Honor --

THE COURT: Is this a statement he's making, or what is this?

MR. ROGERS: This is with regard to my representation.

THE COURT: Okay.

THE DEFENDANT: Good morning. Your Honor, a few days ago I sent you a letter where I was letting you know that I didn't want Mr. Tim Rogers to represent me.

THE COURT: I haven't seen that letter yet. Was this after the last hearing?

THE DEFENDANT: Yes, and it was at that time I had a copy with me, but I lost it here. I don't know what happened to it. So on Tuesday I sent it by mail.

THE COURT: Well, we're checking now to see if it's in the file.

It hasn't gotten to our file yet. So maybe we ought

1 to have a conversation outside the presence of counsel so we
2 have a chance to find out what's going on.

3 MS. SCHESNOL: We will step outside, Your Honor.

4 THE COURT: We're going to do an ex parte confidential
5 closed hearing just so I can find out what the issues are with
6 regard to the relationship with counsel and the defendant.

7 So I'd ask the courtroom to be cleared, and then we'll
8 let you know in a few minutes.

9 MS. SCHESNOL: Thank you. We'll be right outside.

10 THE COURT: Okay. Thank you.

11 (Ms. Schesnol and the case agent left the courtroom.)

12 (Sealed proceedings held on the record contained in a
13 separate sealed transcript.)

14 (Ms. Schesnol and the case agent returned to the
15 courtroom.)

16 THE COURT: Okay. I have denied the request for new
17 counsel. During the conversation, though, we did have a
18 discussion about a legal issue in the case, and it involved
19 *United States versus Gonzalez?* Is that it?

20 MR. ROGERS: *Rodriguez.*

21 THE COURT: *Rodriguez.* And I told the defendant that
22 I would re-review that case. So I just wanted everybody to
23 understand what I'm looking at. And that's a case, I think --
24 I believe it was already cited by the government in their
25 response anyway.

1 MS. SCHESNOL: That's correct, Your Honor.

2 THE COURT: All right. We're ready to proceed.

3 Mr. Rogers, is your client going to testify?

4 Mr. Ibarra -- is Mr. Ibarra going to testify?

5 (Conference off the record between the defendant and
6 Mr. Rogers.)

7 MR. ROGERS: Your Honor, I'm inquiring of my client
8 whether or not he wants to testify, and it doesn't appear that
9 he does. But Your Honor may want to ask him directly.

10 THE COURT: All right. Mr. Ibarra, you have the right
11 to testify at this hearing, if you wish. When we were here
12 last time, you told me you wanted to. Have you changed your
13 mind?

14 THE DEFENDANT: Well, yes, because whatever I say or
15 do really doesn't matter, so I'll let this guy make the
16 decisions.

17 THE COURT: Well, the decision whether to testify is
18 yours. If you wish to testify, you may.

19 THE DEFENDANT: No.

20 THE COURT: No, you do not want to testify? Is that
21 what I'm hearing?

22 THE DEFENDANT: It is. I'm not going to do it.

23 THE COURT: Okay. Mr. Rogers, do you have any other
24 evidence to present?

25 MR. ROGERS: No, Your Honor.

1 THE COURT: All right. Does the government have any
2 other evidence?

3 MS. SCHESNOL: No, Your Honor.

4 THE COURT: Okay. Do counsel want to make arguments?

5 MS. SCHESNOL: Yes, Your Honor. I think where we left
6 off on Monday was Mr. Rogers was making his --

7 THE COURT: Well, let me just ask --

8 MS. SCHESNOL: Yes.

9 THE COURT: I've got some questions for the
10 government.

11 MS. SCHESNOL: Would you like me to step to the
12 lectern?

13 THE COURT: Yeah. Would you, please?

14 What if I find -- what if I don't find that Detective
15 Luna was credible? Is there still probable cause for the stop
16 and search based entirely on the information known to law
17 enforcement as a result of the wiretapping, disregarding
18 anything that Detective Luna said?

19 MS. SCHESNOL: Yes, Your Honor. It is the
20 government's position that based on what was said on the
21 wiretap alone is enough. But we did also have testimony about
22 surveillance, and Mr. Ibarra's seen working in the trunk of the
23 Mazda the night before. That lined up with those wiretap
24 calls. It is the government's position that there is probable
25 cause based on that alone.

1 THE COURT: Probable cause to stop defendant's
2 vehicle?

3 MS. SCHESNOL: Yes. To stop and search the vehicle.

4 THE COURT: Because I don't know why you put on that
5 evidence of Detective Luna, for him -- he was told to go out
6 and almost manufacture probable cause, was kind of the way it
7 came to me. And I didn't find him -- I did not find him
8 credible.

9 I had some questions about that, his testimony. He
10 was told to develop probable cause. I don't even know what
11 that means. But it sounds like he's -- it doesn't sound good.

12 Detective Luna then, at page 18, said he stopped the
13 defendant for an unsafe lane change, for speed, and
14 fluctuations in speed. Later he testified he stopped him
15 because of traffic violations, so I guess that those are the
16 things.

17 The other testimony -- then he talked about bumper
18 damage and fluctuations in speed were involved, and suggestions
19 that he suspected defendant was intoxicated, which is not
20 credible. That the Mazda had been under surveillance, they
21 would have known about that bumper before he even got on that
22 road. So for him to act like this is a -- possibly a new
23 damaged bumper and that it's the basis for him to stop and
24 thinking he might be intoxicated just doesn't hold water.

25 So, but I want to understand. What was the unsafe

1 lane change? When I asked Detective Luna, he said he didn't
2 interfere with any other traffic. So what statute is he
3 operating under? Can you give me the statute?

4 MS. SCHESNOL: May I have a moment, Your Honor?

5 While I'm looking --

6 THE COURT: Let me ask you this: Was a citation
7 issued?

8 MS. SCHESNOL: A warning was issued, and the Court --

9 THE COURT: That was for the insurance.

10 MS. SCHESNOL: No. No, Your Honor. If I may correct
11 the record, Exhibit No. 26, which is in evidence, it was a
12 warning. It was issued for both speed as well as lane usage.
13 It was not for insurance.

14 THE COURT: What lane change violation -- what statute
15 was that under?

16 MS. SCHESNOL: According to this warning, it is
17 Arizona Revised Statute 28-729.1.

18 THE COURT: And what does that statute say constitutes
19 unsafe lane change?

20 MS. SCHESNOL: I'm sorry, Your Honor. I would have to
21 look that up. I do not have that statute in front of me.

22 But if I may address an issue, Detective Luna did
23 testify unequivocally that even keeping an eye out for that
24 Mazda, if he did not see any traffic violations, he would not
25 have stopped that vehicle.

1 THE COURT: I didn't find that credible.

2 MS. SCHESNOL: He also --

3 THE COURT: I didn't find that credible.

4 MS. SCHESNOL: Okay. He also said that even if he had
5 not known about the Mazda potentially having drugs in it, based
6 on what he saw alone, he would have stopped the Mazda.

7 THE COURT: I told you I did not find that credible.

8 He -- when I asked him whether he interfered with traffic, he
9 fumbled, couldn't give me any answer. When I -- and that
10 unsafe lane change, a quick lane change does not necessarily --
11 it's not defined in the statute as an unsafe lane change. If
12 you read the statute, it doesn't -- there's nothing in there
13 about a quick lane change.

14 MS. SCHESNOL: I believe there -- he did testify there
15 is something about signaling a hundred feet or a hundred yards
16 ahead.

17 But even without the unsafe lane change --

18 THE COURT: That's not in the statute either.

19 MS. SCHESNOL: Okay. Even without that, the defendant
20 was going 73 in a 65 mile-per-hour zone for at least two miles.

21 THE COURT: What's the statute he's relying on for
22 that one?

23 MS. SCHESNOL: According to the warning that was
24 given, Arizona Revised Statute 28-701 and 702. The defendant
25 was speeding. He was going eight miles over. I've seen

1 traffic stops for one mile over.

2 THE COURT: Okay. All right. You've seen traffic
3 stops that weren't pretext stops for one mile over on the
4 highway?

5 MS. SCHESNOL: Yes, I have.

6 THE COURT: Okay.

7 MS. SCHESNOL: And also, just to be clear, the
8 government respectfully takes issue with the term "pretext
9 stop."

10 Again, there is this legal theory of collective
11 knowledge, and it's common for -- we heard testimony that it is
12 common for different law enforcement agencies to collaborate
13 with one another when they are investigating cases.

14 THE COURT: Okay. Well, is there anything else you
15 want to add?

16 MS. SCHESNOL: Very briefly, Your Honor, if I may.

17 The law does provide that a violation of a traffic law
18 is grounds to stop a vehicle. A traffic stop should be
19 based -- may be based on reasonable suspicion. Probable cause
20 is not necessary.

21 Even if the Court does not find Detective Luna
22 credible, we do still have the theory of collective knowledge.
23 And because of the wiretap, because of the surveillance, that
24 vehicle could have been stopped based on that probable cause
25 alone.

1 The law is clear that because of the inherent mobility
2 of vehicles and the fact that there is a lesser expectation of
3 privacy in vehicles, that a car may be searched with probable
4 cause even without a warrant, and there need not be exigent
5 circumstances.

6 THE COURT: I agree with all that. I don't understand
7 why you brought Detective Luna in to come up with this other
8 theory, because -- I don't know why you did that. I don't
9 understand that. Because it looked to me like it was -- he did
10 what he was told to do. He went out and created probable
11 cause.

12 And I don't believe he would have stopped this vehicle
13 had this not happened, although with the speed, I think there
14 is at least a justification for the stop legally. But I don't
15 understand why we did all this when you have this other law
16 that supports your position.

17 MS. SCHESNOL: Well, the government respectfully
18 disagrees. The government does not believe that Detective Luna
19 perjured himself here. The government believes Detective Luna
20 when he said he would have stopped that car regardless of being
21 told about it in advance or not and that he wouldn't have
22 stopped the car if there were no traffic violations.

23 So the government -- it is the government's theory
24 that in addition to collective knowledge --

25 THE COURT: Well, you're not answering my question.

1 My question is, I don't understand why you did the stop theory
2 along with the other collective knowledge theory if all you
3 needed was collective knowledge in the first place.

4 MS. SCHESNOL: Because, Your Honor, it's very common
5 that the government would present any and all theories, and the
6 government does believe that this was a clean, clear traffic
7 stop. We do not believe that Detective Luna perjured himself,
8 and we were presenting the Court and making a record of all the
9 various reasons why this was a good stop and search of the
10 vehicle and why the evidence should not be suppressed. That's
11 why. We wanted to make a good record and present the Court
12 with all the evidence.

13 THE COURT: Well, there was, I don't believe, evidence
14 of an unsafe lane change or evidence to support his claim that
15 he was investigating an intoxicated driver, possibly. The
16 speed, I don't think that there's any way you can disagree with
17 the speed. If he was going above the posted speed limit, then
18 that's a violation of 701. Or 702.

19 So I think that's -- that's how I see the evidence.
20 Anything else you want to add?

21 MS. SCHESNOL: No, Your Honor. Just that we are
22 asking the Court does not suppress the stop or the search or
23 the fruits of that in this case.

24 THE COURT: Okay.

25 MS. SCHESNOL: Thank you.

1 THE COURT: Mr. Rogers?

2 MR. ROGERS: Your Honor, I think Your Honor has hit
3 the issue right on the -- hit the nail right on the head. This
4 all comes down to the credibility of Detective Luna.

5 THE COURT: Well, I don't know that it does. I mean,
6 I think that even though I don't find him credible, at least
7 for two of the three reasons he gave for the stop, there's a --
8 you have a bigger problem, regardless of what Detective Luna
9 says and regardless of what your client might have said about
10 the stop and his consent to the search. It's the collective
11 knowledge issue.

12 MR. ROGERS: Well, Your Honor, if that's -- if that's
13 the case, then they -- then they could have gotten a warrant if
14 they had probable cause, and if they chose not to get a
15 warrant, then they could have -- they could have just seized
16 the vehicle or searched the vehicle on their own. They didn't
17 have to go through this whole charade of stopping the vehicle.

18 So if that's the fact, if that's the case, then that's
19 what they should have done, not come up with a pretext to stop
20 the vehicle.

21 THE COURT: You know, what you say sounds perfectly
22 logical and makes a lot of sense, but unfortunately for your
23 client, that's already been addressed by the Supreme Court in
24 *Maryland versus Dyson*. Are you familiar with that case?

25 MR. ROGERS: No, Your Honor.

1 THE COURT: Let me just go back.

2 You know, the Fourth Amendment typically requires the
3 police to obtain a warrant before conducting a search.
4 However, there's an established exception to this requirement
5 when dealing with searches of vehicles. This is known as the
6 automobile exception. That came out in *Carroll* back in -- way
7 back in 1925.

8 In *Maryland versus Dyson*, a St. Mary's County
9 sheriff's deputy received a tip from a reliable informant that
10 the respondent had gone to New York to buy drugs and would be
11 returning to Maryland in a rented red Toyota later that day
12 with a quantity of cocaine.

13 The deputies received the tip at 11:00 a.m. in the
14 morning of July 2nd that the respondent would be returning to
15 St. Mary's County in a rented vehicle at 1:00 a.m. on July 3rd.
16 The deputies stopped and searched the vehicle and found cocaine
17 in a duffel bag.

18 The Maryland Court of Special Appeals reversed and
19 held that in order for the automobile exception to the warrant
20 requirement to apply, there must not only be probable cause to
21 believe that evidence of a crime is contained in the automobile
22 but also a separate finding of exigency.

23 The U.S. Supreme Court reversed that decision and said
24 that the finding of abundant probable cause alone satisfied the
25 automobile exception to the Fourth Amendment's warrant

1 requirement.

2 So I think the issue you've raised has already been
3 addressed and decided in that case. Am I reading that case
4 wrong?

5 Are you familiar with that case?

6 MS. SCHESNOL: I don't have an intimate familiarity
7 with that case, but based on what I heard the Court say, I
8 think you're reading it correctly.

9 THE COURT: Okay. Well, it's at 527 U.S. 465. And as
10 I read that case, even though there was testimony that there
11 was probable cause that existed 24 hours before this stop, I
12 think this case holds that the automobile exigency -- exception
13 allows this to occur based on that knowledge without a warrant.

14 If I'm reading that wrong, I'd like counsel to let me
15 know that, but I think that's what this case says. In other
16 words, the automobile exception applies even if there was time
17 to get a warrant ahead of time. And that's why I was puzzled
18 by the extent they went to with regard to this stop.

19 I do find that there was also probable cause for the
20 stop based on the speed alone. Although I didn't believe
21 Detective Luna was credible on the other issues, he was
22 credible on the speed. So that alone was sufficient for the
23 stop.

24 MR. ROGERS: Well, Your Honor, just to -- I understand
25 the issue with regard to the probable cause prior to the

1 vehicle stop. I would like time to look at that case myself.

2 But just to close off the argument with regard to
3 Detective Luna and the speed, it's our argument, Your Honor,
4 that if he wasn't credible on anything else, if he made up the
5 story about a hanging bumper -- you can clearly see from
6 Defense Exhibit 104 that the bumper is not hanging in any
7 way -- that that reflects on his credibility with regard to
8 speed as well.

9 THE COURT: Well, I agree with you on that. But also,
10 what we have is those two -- he tried to allege three kind of
11 areas where he was interested in stopping the defendant. The
12 unsafe lane change, he couldn't give me any testimony as to why
13 that was unsafe. The bumper and the intoxication issue was
14 just incredible.

15 But it's hard to say an officer doesn't have evidence
16 of speed when he tracks the vehicle and paces it for three
17 miles -- for three miles or three minutes, can't remember
18 which. I guess they're about the same -- and there's no
19 evidence to the contrary.

20 So I'm going to find that there was evidence that
21 supported his decision to stop based on the speed.

22 So I'm finding the stop was lawful based on the two
23 theories. One is the collective knowledge/automobile
24 exception. They had collective knowledge of probable cause.
25 The automobile exception excluded the need for a warrant. And

1 also on the fact that there was a speeding violation.

2 Okay. Is there anything else you want to talk about
3 with regard to this stop now?

4 MR. ROGERS: Well, just -- with regard to the stop,
5 no, Your Honor. But with regard to the search --

6 THE COURT: Okay.

7 MR. ROGERS: -- I just wanted to pointed out testimony
8 from the DPS agent that he said that his K9, Dex [sic] -- there
9 was a point in the testimony where he said the K9, Dex, stuck
10 his nose in between the seats and alerted twice within the
11 passenger -- within the backseat of the vehicle.

12 In his report, he only mentioned that Dex had alerted
13 once, and he didn't mention anything about the backseat. He
14 mentioned just the passenger area.

15 But what I think is most important, Your Honor, about
16 his testimony is that from the photographs, from Defense
17 Exhibit 102, you can see that there's clearly a child's car
18 seat in the backseat. And the testimony that was elicited from
19 several witnesses said that nothing had been removed from the
20 compartment of the vehicle, and so that car seat would have
21 been right where supposedly Dex stuck his nose to sniff.

22 THE COURT: See, that's why I'm wondering why the
23 government created this issue, because that's not an issue to
24 be created. Under the collective knowledge doctrine, they had
25 probable cause to go into that trunk and to stop that vehicle.

1 And I found the defendant's -- the stop of the
2 defendant's vehicle was justified by collective knowledge -- by
3 the collective knowledge doctrine, and collectively, there was
4 probable cause to believe the defendant's vehicle was involved
5 in drug trafficking.

6 So the stop and search of his vehicle didn't violate
7 the Fourth Amendment. And there was wiretap information that
8 that vehicle would be traveling on that road about that time of
9 the day and that in the trunk of the vehicle would be speakers
10 that contained methamphetamine.

11 That was all known before he even got stopped. So
12 there was probable cause for the stop and probable cause for
13 the search.

14 So regardless of whether or not there was a consent
15 and whether or not there was -- the dog alerted at the right
16 area of the car, the law has established that once the police
17 have that collective knowledge, that creates the probable
18 cause.

19 Am I missing something?

20 MR. ROGERS: No, Your Honor. If that's -- if that's
21 what -- the case that Your Honor has cited, if that's what that
22 Supreme Court case stands for, then you're absolutely correct.

23 THE COURT: Well, I'm looking at *United States versus*
24 *Villasenor* at 608 F.3d 467. That's where I'm citing some of
25 that language. And also the *Ramirez* case at 473 F.3d at 1037.

1 So is there anything else you want to argue?

2 MR. ROGERS: No, Your Honor.

3 THE COURT: Does the government have anything else to
4 add?

5 MS. SCHESNOL: Not with regard to this issue, Your
6 Honor.

7 THE COURT: Okay. So the motions to suppress are
8 denied based on the reasoning I just discussed and the cases I
9 cited.

10 All right. Are we all set to go Tuesday then?

11 MS. SCHESNOL: I believe we are. If I can raise an
12 issue I'd like some clarification of -- and I apologize I
13 didn't bring this up with Mr. Rogers in advance.

14 We will have a linguist testifying regarding her
15 opinion about the defendant's voice on the wire. And to form
16 that opinion, in addition to the wires that she listened to,
17 she listened to his post-arrest interview as well as jail
18 calls.

19 And I just wanted to know whether or not we can
20 mention that she listened to jail calls or if that would
21 somehow be deemed too inflammatory in front of the jury.

22 THE COURT: Mr. Rogers?

23 MR. ROGERS: Your Honor, I would object to that. If
24 the government wants to characterize them as phone calls, I
25 think that's sufficient. I don't think they need to know that

1 they're from the jail.

2 THE COURT: I think you can talk about phone calls and
3 the number of phone calls. I don't think it's relevant whether
4 they were in the jail or wherever they were.

5 MS. SCHESNOL: As long as it's clear to the jury that
6 the person who placed this phone call was known -- because with
7 jail calls, what happens is a person has to put in a specific
8 PIN number to get access to make the call. So it was almost --
9 while she recognized his voice, it's known that it was that
10 person placing the call as well. So she listened to that,
11 almost like a known -- his known voice to match it up with wire
12 calls.

13 THE COURT: Oh, so you want to establish that -- how
14 she knew that it was his voice?

15 MS. SCHESNOL: How she knew it was him placing the
16 call, and then knowing it's his voice by listening to all these
17 things in conjunction.

18 THE COURT: Okay. Mr. Rogers, I assume you're not
19 going to object to her stating that she had knowledge that this
20 was his call without having to say, "I knew it because he was
21 in the jail."

22 MR. ROGERS: I thought we had already stipulated to
23 that in one of the stipulations, but if not, I would be
24 comfortable with that. To avoid the jury hearing that they
25 were jail calls --

1 THE COURT: Yeah.

2 MR. ROGERS: -- I would be comfortable agreeing with
3 that foundation.

4 THE COURT: I think you guys can work something out on
5 that. If there's a problem, let me know, but I think it's
6 right -- there's no reason -- it's not relevant that these
7 calls were made from the jail, but it is relevant to show how
8 she -- what is relevant is to know how she -- to know that she
9 was -- knew she was listening to Mr. Ibarra. So if that can be
10 agreed to without talking about a jail call, that would be
11 preferable.

12 MS. SCHESNOL: Perfect. Thank you.

13 THE COURT: All right. Anything else?

14 MS. SCHESNOL: No, Your Honor.

15 MR. ROGERS: No, Your Honor.

16 THE COURT: Okay. Then we'll stand in recess.

17 (Proceedings concluded at 9:16 a.m.)

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1 C E R T I F I C A T E
23 I, JENNIFER A. PANCRATZ, do hereby certify that I am
4 duly appointed and qualified to act as Official Court Reporter
5 for the United States District Court for the District of
6 Arizona.7 I FURTHER CERTIFY that the foregoing pages constitute
8 a full, true, and accurate transcript of all of that portion of
9 the proceedings contained herein, had in the above-entitled
10 cause on the date specified therein, and that said transcript
11 was prepared under my direction and control.12 DATED at Phoenix, Arizona, this 20th day of
13 September, 2019.14
15
16 s/Jennifer A. Pancratz
17 Jennifer A. Pancratz, RMR, CRR, FCRR, CRC
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24
25

APPENDIX 3

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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF ARIZONA

13 United States of America,

14 Plaintiff,

15 vs.

17 Martin Ibarra-Ozuna¹, et. al.,

18 Defendants.

19 CR-18-00076-001-PHX-DLR

20 **UNITED STATES' CONSOLIDATED
21 RESPONSE TO DEFENDANT
22 IBARRA'S MOTIONS TO SUPPRESS**

23 The United States, by and through undersigned counsel, respectfully responds in
24 opposition to Defendant Ibarra-Ozuna's Motions to Suppress Evidence. Defendant Ibarra-
25 Ozuna ("Defendant Ibarra" or "Ibarra") filed two Motions to Suppress. One Motion is sub-
26 captioned, "No Reasonable Suspicion to Stop" (Doc. 175); the other Motion is sub-
27 captioned, "Statements and Evidence" (Doc. 173). Because the facts, evidence, and law
28 are to both of these motions are inextricably intertwined, the Government respectfully

¹ In Defendant's Motions his name is spelled "Osuna." According to Arizona Department of Transportation Motor Vehicle Division, his name is spelled "Ozuna," which is how it is spelled in the indictment.

1 told defendant that he was being arrested for violating state law, which was wrong, but
 2 there may have been probable cause for another offense, which Ninth Circuit should have
 3 considered); *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011) (“[A]n objectively reasonable
 4 arrest and detention of a material witness pursuant to a validly obtained warrant cannot be
 5 challenged as unconstitutional on the basis of allegations that the arresting authority had
 6 an improper motive.” Court unanimously reversed a Ninth Circuit decision that denied
 7 absolute and qualified immunity to former Attorney General John Ashcroft on a claim that
 8 he adopted and implemented a policy of using material witness warrants to detain terrorist
 9 suspects whom the government wished to investigate but did not have probable cause to
 10 arrest).

11 Probable Cause:

12 “A police officer has probable cause to conduct a search when the facts available to
 13 him would warrant a person of reasonable caution in the belief that contraband or evidence
 14 of a crime is present. . . . Finely tuned standards such as proof beyond a reasonable doubt or
 15 by a preponderance of the evidence . . . have no place in the probable-cause decision. . . .
 16 All we have required is the kind of ‘fair probability’ on which reasonable and prudent
 17 people, not legal technicians, act.” *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013) (internal
 18 alterations omitted).

19 Collective Knowledge:

20 It is well-settled that probable cause or reasonable suspicion may be based on the
 21 collective knowledge of all law enforcement officers involved in investigation, *United*
22 States v. Hoyos, 892 F.2d 1387, 1392 (9th Cir. 1989), *overruled on other grounds*, *United*
23 States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001), “even if the information known to others is
 24 not communicated to the detaining officer prior to a Terry stop.” *United States v. Butler*,
 25 74 F.3d 916, 921 (9th Cir. 1996) (holding that “collective knowledge of police officers
 26 involved in an investigation, even if some of the information known to other officers is not
 27 communicated to the arresting officer” can establish probable cause) (as quoted in *United*
28 States v. Terry-Crespo, 356 F.3d 1170, 1177 (9th Cir. 2004). See also *United States v.*

1 *Jensen*, 425 F.3d 698, 704 (9th Cir. 2005) (“The accepted practice of modern law
 2 enforcement is that an officer often makes arrests at the direction of another law
 3 enforcement officer even though the arresting officer himself lacks actual, personal
 4 knowledge of the facts supporting probable cause. . . . In such situations, a probable cause
 5 determination is based on the collective knowledge of the law enforcement personnel.”),
 6 citing *Butler*, 74 F.3d at 921; *United States v. Hensley*, 469 U.S. 221 (1985) (police officers
 7 entitled to rely on radio bulletins based on reasonable suspicion of other officers); *United*
 8 *States v. Mayo*, 394 F.3d 1271, 1275 n.7 (9th Cir. 2005) (same). But see *United States v.*
 9 *Russell*, 436 F.3d 1086, 1091 (9th Cir. 2006) (collective knowledge doctrine that extends
 10 the knowledge of police dispatchers to responding officers did not apply in this case, where
 11 no single operator was aware of the attributable information so as to have been connected
 12 in officers’ collective minds) (citing *United States v. Fernandez-Castillo*, 324 F.3d 1114,
 13 1118 (9th Cir. 2003). See also *United States v. Villasenor*, 608 F.3d 467 (9th Cir. 2010)
 14 (there was no evidence that Customs and Border Protection (“CBP”) agents and
 15 Immigration and Customs Enforcement (“ICE”) agent who stopped defendant’s vehicle for
 16 drug search were working together in an investigation, or that CBP agents directed or
 17 requested that ICE agent conduct a stop, search or arrest, as required for collective
 18 knowledge doctrine to apply to impute CBP agents’ knowledge of failed drug sniff on
 19 defendant’s vehicle to ICE agent).

20 The collective knowledge doctrine further provides that, where one officer knows
 21 facts constituting cause and communicates an appropriate order or request, *another* officer
 22 may conduct a warrantless stop without having been told the facts underlying the cause.
 23 See *United States v. Madrid*, 583 Fed. Appx. 610, 611 (9th Cir. 2014) (unpublished);
 24 *United States v. Ramirez*, 484 Fed. Appx. 146, *1 (9th Cir. 2012) (unpublished); *United*
 25 *States v. Ramirez*, 473 F.3d 1026, 1035-1037 (9th Cir. 2007) citing *United States v. Ibarra-*
 26 *Sanchez*, 199 F.3d 753, 759 (5th Cir. 1999) (officers had reasonable suspicion to stop a van
 27 because DEA agent’s knowledge was imputed to them under the collective knowledge
 28 doctrine); *United States v. Covarrubias*, 2007 WL 30275, *1, 11 (D. Oreg. Jan. 4, 2007)

1 (unpublished) (DEA already had probable cause to stop and search defendant's vehicle
 2 when they called for a "wall off stop" and DEA's knowledge can be imputed even if
 3 information known to the investigating officers is not communicated to detaining officer).

4 Dog Sniff:

5 A reliable dog's "alert" on the vehicle provides probable cause to search. *Illinois v.*
 6 *Caballes*, 125 S.Ct. 834 (2005) (After an Illinois state trooper stopped defendant for
 7 speeding and radioed in, a second trooper, overhearing the transmission, drove to the scene
 8 with his narcotics-detection dog and walked the dog around defendant's car while the first
 9 trooper wrote him a warning ticket. When the dog alerted at vehicle's trunk, the officers
 10 searched the trunk, found marijuana, and arrested defendant); *Florida v. Harris*, 133 S. Ct.
 11 1050 (2013) (drug dog's alert provided probable cause to search the defendant's vehicle;
 12 Court also discussed factors indicating reliability of dog alert; "The question -- similar to
 13 every inquiry into probable cause -- is whether all the facts surrounding a dog's alert,
 14 viewed through the lens of common sense, would make a reasonably prudent person think
 15 that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when
 16 it meets that test." Court also described process and purpose of probable cause hearing.).
 17 See also *United States v. Scott*, 705 F.3d 410 (9th Cir. 2012) (probable cause supported
 18 search of vehicle based on several factors, and dog's lack of alert to presence of drugs did
 19 not undermine probable cause).

20 **A. TRAFFIC STOP**

21 A violation of a traffic law provides a state officer sufficient grounds to stop a
 22 vehicle. *Whren v. United States*, 517 U.S. 806 (1996) (turning car without signaling, at
 23 "unreasonable" rate of speed, justified state officer's stop of vehicle); see also *Arkansas*
 24 *v. Sullivan*, 121 S.Ct. 1876, 1878 (2001) (officer may arrest for fine- only traffic
 25 violations and "a traffic-violation arrest . . . [will] not be rendered invalid by the fact that
 26 it was a 'mere pretext to search'"); *United States v. Pulliam*, 405 F.3d 782 (9th Cir. 2005)
 27 ("The malfunctioning taillight provided lawful grounds for the stop, regardless of the
 28 officers' motivations.") (citing *Whren*).

APPENDIX4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)
Plaintiff,) No. CR-18-00076-01-PHX-DLR
vs.)
Phoenix, Arizona
September 13, 2019
Martin Ibarra-Ozuna,)
3:01 p.m.
Defendant.)

BEFORE: THE HONORABLE DOUGLAS L. RAYES, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING
(Pages 1 - 77, inclusive)

Official Court Reporter:
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

UNITED STATES DISTRICT COURT

A P P E A R A N C E S

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I N D E X

WITNESSES FOR THE
GOVERNMENT:

DIRECT CROSS REDIRECT RECROSS

CROSS

REDIRECT

RE CROSS

George Luna

By Ms. Schesnol

14

71

By Mr. Rogers

51

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>REC'D</u>
1	Photograph	20
29	Photograph	22
26	Traffic Warning Citation	40
2	Photograph	47
3	Photograph	48
4	Photograph	48
101	December 18, 2017: Photograph related to traffic stop of Martin Ibarra-Ozuna and Melissa Ortega (BS #161)	69
102	December 18, 2017: Photograph related to traffic stop of Martin Ibarra-Ozuna and Melissa Ortega (BS #161)	69
103	December 18, 2017: Photograph related to traffic stop of Martin Ibarra-Ozuna and Melissa Ortega (BS #161)	69
104	December 18, 2017: Photograph related to traffic stop of Martin Ibarra-Ozuna and Melissa Ortega (BS #161)	69

PROCEEDINGS

(The defendant was assisted by the Official Court Interpreter.)

(Proceedings commenced at 3:01 p.m.)

THE COURTROOM DEPUTY: Criminal Case No. 18-0076,
United States versus Martin Ibarra-Ozuna, on for evidentiary
hearing.

Counsel, please announce for the record.

MS. SCHESNOL: Good afternoon, Your Honor. Jacqueline Schesnol and Don Pashayan representing the United States.

With us at counsel table is Eugene Sardinas, who is being designated, with the Court's permission, as our case agent for this hearing only. He will not be the case agent at trial. We have discussed this with defense counsel, who does not have an objection.

THE COURT: Okay. Thank you.

MR. ROGERS: And Tim Rogers here, Your Honor, on behalf of Mr. Martin Ibarra-Ozuna, who is present, in custody, and being assisted by the court interpreter today.

THE COURT: All right. Good afternoon. We're here on a couple of motions to dismiss. We have an evidentiary hearing -- motions to suppress.

But first we have a non-present defendant, Ortega. What are we going to do with that -- Gomez, I'm sorry. What are we going to do with Gomez?

1 MS. SCHESNOL: Your Honor, Fabiola Gomez, we believe,
2 has fled to Mexico. It is not the government's policy to try
3 defendants in absentia.

4 THE COURT: I understand that. But what are we going
5 to do with the charges? We have these charges hanging out
6 there, and we have a trial coming up.

7 MS. SCHESNOL: Yes, Your Honor. So the charge in
8 which Mr. Ibarra was charged in conjunction with Ms. Gomez is
9 one of the charges that we dismissed on Wednesday. There are
10 pending charges against Ms. Gomez. Basically, we are just
11 going to have to wait to see if she ever comes back to the
12 United States.

13 THE COURT: And so we're just trying to understand,
14 what does this trial have to do with -- are we going to vacate
15 the trial with regard to that defendant? Is that what you want
16 me to do?

17 MS. SCHESNOL: Yes, Your Honor.

18 THE COURT: Okay. Any objection?

19 MR. ROGERS: No, Your Honor.

20 THE COURT: I'm not sure you have any say in it,
21 but --

22 MR. ROGERS: I don't believe I do.

23 THE COURT: -- I always want to give the defense a
24 chance in case there's something I'm missing.

25 So we're going to vacate the trial as to that

1 defendant and proceed only as to this defendant, and then we'll
2 move forward now with regard to the motion to suppress.

3 Now, there's two motions to suppress, Mr. Rogers. Let
4 me make sure I understand them correctly. The first one, you
5 want to suppress the statements based as the fruit of the
6 poisonous tree under the Wong Sun doctrine because you allege
7 that the stop was unlawful?

8 MR. ROGERS: That is correct, Your Honor.

9 THE COURT: And the second motion, you want to
10 suppress the seizure of the defendant, the search of the
11 vehicle, and search of the apartment because of the unlawful
12 stop?

13 MR. ROGERS: Correct. Well, basically to narrow it
14 down today, what I'm going to be focusing on is the reasons for
15 the traffic stop and then the search of the vehicle; in
16 particular, what was found in the trunk.

17 THE COURT: Okay. And so you're challenging -- I
18 think the government's position is going to be that this was a
19 consent search. Is that what your position is?

20 MS. SCHESNOL: Yes, Your Honor.

21 THE COURT: Consent for the K9 to come, and then once
22 the K9 came, I think their position is probable cause was
23 developed.

24 MS. SCHESNOL: That's correct, Your Honor.

25 THE COURT: So you're challenging the question of

1 whether or not there was truly consent? Is that what the issue
2 is?

3 MR. ROGERS: No, Your Honor. There -- we don't
4 dispute that there was consent for the dog sniff. However, we
5 don't -- the argument is that the probable cause did not extend
6 to a closed container within the trunk when there were a means
7 to be able to take the vehicle and procure a search warrant.

8 THE COURT: Okay. So you're not saying there wasn't
9 probable cause. You're saying they -- even if they had
10 probable cause, they should have gotten a search warrant?

11 MR. ROGERS: Assuming that the stop was valid, yes.

12 THE COURT: Okay. So we got two issues, then: One,
13 was the stop valid; and, two, should there have been a search
14 warrant obtained even after the dog sniff occurred.

15 MR. ROGERS: Correct.

16 THE COURT: Okay.

17 All right. Is that what you understood the issues to
18 be?

19 MS. SCHESNOL: Your Honor, if I could just ask for
20 further clarification because one of the motions to suppress
21 does discuss the interview, conversation, confession --

22 THE COURT: Yeah, there's a question -- there's an
23 allegation in one of the motions about the voluntariness of the
24 statement. Are you proceeding with the voluntariness issue as
25 well?

1 MR. ROGERS: No, Your Honor. After having filed that
2 motion, I -- I hadn't been given disclosure. I had -- the
3 government had given me disclosure of the recorded
4 interrogation of my client, but I wasn't able to open it. It
5 was on a Blu-ray. By the time I was able to get it in a media
6 that was -- I was able to review, that was after the motion had
7 been filed.

8 Once I reviewed that interview, I don't believe
9 there's any grounds to go forward on an argument that there was
10 any coercion or any voluntariness issues.

11 THE COURT: Are you withdrawing the motion to suppress
12 the statement based on voluntariness?

13 MR. ROGERS: Based on voluntariness, yes. Not based
14 on, as Your Honor's already said --

15 THE INTERPRETER: Your Honor -- Your Honor, if I may.
16 The interpreter has been made aware by the defendant that his
17 headphones are not working properly.

18 THE COURT: Okay. Let's get this cleared up, yeah.

19 (Brief pause in proceedings.)

20 THE INTERPRETER: What the defendant has mentioned is
21 that apparently the transmission gets interrupted, so I'm not
22 sure if it's the battery or the system, Your Honor.

23 THE COURT: Can he hear you -- did he indicate he can
24 hear you now?

25 THE INTERPRETER: Yes, Your Honor.

1 THE COURT: Is it better?

2 THE INTERPRETER: It seems that's the case. Thank
3 you.

4 THE COURT: Okay. Go ahead, Mr. Rogers. I think you
5 were speaking.

6 MR. ROGERS: Yes, Your Honor.

7 So with regard to the voluntariness issue, after
8 having reviewed the video and audio of the interrogation, I
9 don't believe there is grounds for that. However, we would
10 still make the argument that, as Your Honor has pointed out,
11 fruit of the poisonous tree.

12 THE COURT: Okay. Yeah.

13 Let me just suggest that you guys talk sometimes
14 before we come to these hearings. I think the government
15 brought a witness ready to testify on that issue, and it might
16 have saved some manpower if we knew that ahead of time.

17 But so now we understand. The issues that we're going
18 to be litigating here today factually are, number one, the
19 lawfulness of the stop; and, number two, the lawfulness of the
20 search of the trunk without a search warrant.

21 MR. ROGERS: The search of the trunk; in particular,
22 the container inside the trunk.

23 THE COURT: Is there any other issue that is still in
24 play?

25 MR. ROGERS: I don't believe so, Your Honor.

1 THE COURT: So you're withdrawing any other part of
2 your motion to suppress, if there were other parts of it, other
3 than those two issues?

4 MR. ROGERS: That's correct.

5 THE COURT: All right.

6 MS. SCHESNOL: Just for further clarification, for my
7 understanding as well as for the record, in one or both of
8 these motions, there was also mention of whether or not there
9 was valid consent to search the defendant's residence. So I'd
10 like clarification as to whether or not we're going into that.

11 THE COURT: Okay. Is that -- I think he's withdrawing
12 everything else other than those two issues.

13 Is the residence still in play too?

14 MR. ROGERS: No, Your Honor. I don't recall from my
15 motion. I apologize if -- I don't recall having addressed that
16 issue in the motion, but if I did, then that's not -- once
17 having viewed the interrogation and -- which is what led to the
18 search of the -- or where consent was given to search the home,
19 that's no longer an issue.

20 THE COURT: So where we're focusing now is the
21 lawfulness of the stop and the fruit of the tree of that stop,
22 being the statement he gave after he was stopped.

23 MR. ROGERS: Correct.

24 THE COURT: And then the lawfulness of the search of
25 the trunk and the container within the trunk without a search

1 warrant.

2 MR. ROGERS: Correct.

3 THE COURT: And those are the only issues?

4 MR. ROGERS: I believe so, Your Honor, yes.

5 THE COURT: All other issues that may have been raised
6 in your motions to suppress are withdrawn; is that true?

7 MR. ROGERS: Yes.

8 THE COURT: Okay. All right.

9 MS. SCHESNOL: One final issue. I apologize to beat a
10 dead horse, but I really do want a clear record, especially
11 should this matter be appealed in the future.

12 I don't believe the motions to suppress addressed the
13 search of the defendant's telephone. But I am prepared to
14 address that today, if need be, only because if this comes up
15 on the morning of trial, I'd rather address it now than when we
16 are waiting to impanel a jury.

17 So I just want to make sure that is not going to be an
18 issue.

19 THE COURT: I think Mr. Rogers has been very clear
20 about this.

21 But, Mr. Rogers, is the phone in play at all as far as
22 a motion to suppress?

23 MR. ROGERS: No, Your Honor. And again, that was --
24 that -- those aspects of the case came out after the
25 interrogation -- or during the interrogation.

1 THE COURT: So what I understand you to say is after
2 you received all of the government's discovery and reviewed it,
3 you found that there is no legal or factual basis for you to
4 make a good faith argument to suppress any of those other
5 issues.

6 MR. ROGERS: That is --

7 THE COURT: Including the phone.

8 MR. ROGERS: That is correct.

9 THE COURT: True? Okay.

10 The only good faith arguments you believe you can make
11 based on the state of the evidence as you've read it from the
12 government's discovery are the two issues you're raising here
13 today.

14 MR. ROGERS: That is correct.

15 THE COURT: And those are the lawfulness of the stop
16 which led to the interrogation and the statement made by your
17 client, and secondly, the lawfulness of the search of the trunk
18 without a search warrant, the trunk and the container in the
19 trunk.

20 MR. ROGERS: That is correct. I would just add that
21 it was also the search of the trunk and the container found in
22 the trunk that led to the arrest and subsequent interrogation,
23 not just the stop of the vehicle.

24 THE COURT: Okay. So your argument is that if I find
25 that the search of the trunk and the container within the trunk

1 was unlawful, then again we get back to the Wong Sun argument
2 for the statement he gave?

3 MR. ROGERS: Correct.

4 THE COURT: All right. I think we understand where
5 we're going then.

6 Is the government ready to proceed?

7 MS. SCHESNOL: Yes, Your Honor.

8 THE COURT: Do you have a witness to call?

9 MS. SCHESNOL: Yes, we do.

10 The government calls George Luna. And we will fetch
11 him now.

12 THE COURT: Going to fetch him?

13 MS. SCHESNOL: The government has intentionally kept
14 the witnesses out of the courtroom so they didn't overhear what
15 was being said prior to their testimony.

16 THE COURT: Okay. Well, thank you.

17 MS. SCHESNOL: May I approach the lectern?

18 THE COURT: You may.

19 Mr. Luna, would you come up here, please. The clerk
20 standing right in front of me is going to swear you in.

21 GEORGE LUNA,

22 called as a witness herein by the Government, having been first
23 duly sworn or affirmed, was examined and testified as follows:

24 THE COURT: You may proceed.

25 MS. SCHESNOL: Thank you, Your Honor.

1 DIRECT EXAMINATION

2 BY MS. SCHESNOL:

3 Q. Please state your name.

4 A. George Luna.

5 Q. How are you employed?

6 A. I work for the Department of Public Safety, and I've worked
7 for 16 years.

8 Q. Is that also known as DPS?

9 A. Yes, ma'am.

10 Q. Can you briefly describe the training that you've -- that
11 you went through to become a DPS officer.12 A. I attended approximately four months of academy at ALEA and
13 then two months with advanced training at DPS.

14 Q. And what is your current assignment with DPS?

15 A. I am currently assigned as a detective to the state gang
16 task force, which is known as GIITEM.

17 Q. Did you say GIITEM?

18 A. GIITEM.

19 Q. Can you briefly describe some of your duties and
20 responsibilities as a detective with DPS.21 A. We are tasked with investigating gang crimes, narcotics.
22 We patrol, we interact with informants, execute search
23 warrants, as well as testify in court and all the follow-up
24 after that.

25 Q. Were you working as a detective with DPS on December 18th,

1 2017?

2 A. Yes, ma'am.

3 Q. And at approximately 3:10 p.m., where were you?

4 A. I was patrolling on 195 northbound at about Milepost 14.

5 Q. And what specifically were you doing at that time out on
6 State Route 195?

7 A. I observed a motorist that was stranded or appeared broken
8 down on the right side of the roadway. I pulled over to assist
9 or to check on them. That's one of our -- when we're out
10 patrolling our areas or when we all go out and do details is to
11 check on motorists that are broken down.

12 Q. And during that time period that you were checking on this
13 broken-down motorist, did anything catch your attention?

14 A. When I pull up behind a vehicle and I exit, I always look
15 back towards traffic just because of the history of accidents
16 or being hit. Monitor traffic as it moves over for, you know,
17 the state statute of Move Over Law.

18 So when I got out, I saw a vehicle traveling towards
19 me in the right lane, which is the number two lane.

20 Q. And what about -- what, if anything, about that vehicle
21 caught your attention?

22 A. So as I saw it get closer, I noticed that it wasn't
23 changing lanes so I maintained my visual on the vehicle. I
24 noticed the front left bumper was kind of a little bit sagging
25 down. It continued towards me, so I kept watching it. And

1 then as it got closer, it made a sudden, like, a signal and
2 lane change, so an abrupt lane change, over to the number one.
3 I watched it go by, and then it moved back into the number two,
4 which is the right lane. And then at that point I went up to
5 contact the driver of the vehicle.

6 Q. And when you -- just for clarification, when you say "the
7 driver of the vehicle," are you talking about the driver of the
8 vehicle you just described with these lane changes or the
9 driver of the vehicle you had stopped to help on the side of
10 the road?

11 A. The one I stopped to help on the side of the road. The
12 motorist, yes, the broken-down motorist.

13 Q. And how long were you with that motorist on the side of the
14 road?

15 A. It was seconds. I mean, maybe 20, 30 seconds. Just walked
16 up to the passenger window, asked her if she was okay. She
17 said she was not broken down. At that point, just walked back
18 to my patrol car and got back onto the roadway in an attempt to
19 catch up to the gray Mazda that had gone by.

20 Q. Were you, in fact -- so you -- this car that you saw that
21 you've described making these lane changes, now you referenced
22 it as a gray Mazda. Is that --

23 A. Right. That's what it was, yes.

24 Q. -- car one and the same?

25 THE COURT: Whoa, whoa, whoa, whoa, whoa. Wait till

1 she finishes before you start your answer, because the court
2 reporter can't do you both at the same time.

3 THE WITNESS: Okay. Yes, sir.

4 BY MS. SCHESNOL:

5 Q. So the gray Mazda, was that the same car you noticed make
6 these lane changes you've described?

7 A. Yes, ma'am.

8 Q. What, if anything, did you observe once you caught up to
9 this Mazda?

10 A. I pulled in behind the Mazda and maintained a little bit of
11 a distance and paced the vehicle as far as speed. I paced it
12 at about 73 miles an hour.

13 Q. And what was the posted speed limit?

14 A. 65 miles an hour.

15 Q. For how long did you pace the vehicle?

16 A. I believe three miles.

17 Q. Did you notice anything else about the speed in that
18 three-mile time period in which you were pacing it?

19 A. Yeah. During that time it slowed down to about 62, and
20 then it accelerated back up, picked up its speed again, to
21 about 70 miles an hour.

22 Q. And again, what was the posted speed limit? I'm sorry.

23 A. 65.

24 Q. So as a result of the variety of things that you've
25 described that you observed regarding the Mazda, what, if

1 anything, did you do?

2 A. At that point I initiated a traffic stop. I continued
3 behind it and initiated a traffic stop. I turned on my lights
4 and my sirens, which I always do, to make sure that the driver
5 saw my vehicle.

6 Q. And what was the purpose of this traffic stop? I mean,
7 what -- in your mind, what, if any, violations had the Mazda
8 committed?

9 A. For the unsafe lane change, the speed --

10 (Court reporter clarification.)

11 THE WITNESS: For the unsafe lane change, that was the
12 reason for the stop, and the speed, the fluctuation in speed,
13 excess speed above the posted speed limit, and then the slowing
14 down.

15 BY MS. SCHESNOL:

16 Q. Do you remember at what milepost you made the stop?

17 A. I believe at Milepost 19.

18 Q. The vehicle that you were in, can you describe it?

19 A. It's a black Chevy Tahoe. It's police rated, unmarked, but
20 it has the police lights and siren.

21 Q. This Milepost 19 on State Route 195, is that within the
22 District of Arizona?

23 A. Yes, ma'am.

24 Q. Did you contact the occupants of --

25 A. Yes.

1 Q. -- the vehicle?

2 A. Yes, ma'am.

3 Q. And how many people were in the vehicle? Can you describe
4 their gender, et cetera?

5 A. I approached on the driver's side. I contacted a Hispanic
6 male driver and a female passenger. And there was a small
7 child in the back.

8 Q. And any of the individuals who were occupants of that Mazda
9 on December 18th, 2017, do you see any of them in the courtroom
10 today?

11 A. Yes, ma'am. The driver is seated at that table there.

12 Q. Okay. And when you say "at that table" --

13 A. At --

14 Q. -- can you be specific as to what that individual is
15 wearing?

16 A. A gray jumpsuit -- or gray, I'm sorry. Orange jumpsuit.

17 MS. SCHESNOL: Your Honor, may the record reflect the
18 identification of the defendant?

19 THE COURT: It may so reflect.

20 MS. SCHESNOL: Thank you, Your Honor.

21 BY MS. SCHESNOL:

22 Q. When you mentioned that you -- I believe you said that you
23 approached the driver's side vehicle; is that correct?

24 A. Yes, ma'am.

25 Q. And what, if any, interaction did you have with the driver

1 of the vehicle at that -- when you very first approached?

2 A. I contacted him. I explained to him the reason I had
3 stopped him. Asked him for his license, registration, and
4 insurance. And then I also actually asked him if he had been
5 involved in a collision or anything, because of the front left
6 bumper was kind of sagging a little bit. That was pretty much
7 it.

8 MS. SCHESNOL: If I may ask the court clerk to be so
9 kind as to show the witness Exhibit No. 1, as well as Exhibit
10 No. 29.

11 BY MS. SCHESNOL:

12 Q. So directing your attention to what's been marked for
13 identification as Exhibit No. 1, do you recognize what Exhibit
14 No. 1 is?

15 A. Yes. That's the vehicle that I stopped that day.

16 Q. Is that a fair and accurate depiction of how the car looked
17 on that day?

18 A. Yes, ma'am.

19 MS. SCHESNOL: Your Honor, the government moves for
20 the admission of Exhibit No. 1.

21 THE COURT: Any objection?

22 MR. ROGERS: No objection, Your Honor.

23 THE COURT: Exhibit No. 1 is admitted into evidence.

24 (Exhibit No. 1 admitted into evidence.)

25 MS. SCHESNOL: Your Honor, may I publish the exhibit

1 to the Court?

2 THE COURT: You may.

3 MS. SCHESNOL: Thank you.

4 (Discussion off the record.)

5 THE COURT: I have a hard copy here.

6 MS. SCHESNOL: Oh, excellent.

7 BY MS. SCHESNOL:

8 Q. So Exhibit No. 1 is the Mazda that you stopped on
9 December 18th; is that correct?

10 A. Yes, ma'am.

11 Q. Now directing your attention to what's been marked for
12 identification as Exhibit No. 29.

13 Do you know what Exhibit 29 is?

14 A. It was the driver front side of the Toyota -- of the Mazda.

15 Q. And is that the Mazda that you stopped on December 18th,
16 2017?

17 A. Yes, ma'am.

18 Q. And does Exhibit 29 fairly and accurately depict how the
19 car looked on that day?

20 A. Yes.

21 Q. And does this picture depict the damage to the front bumper
22 that you have described for the Court?

23 A. Yes.

24 MS. SCHESNOL: Your Honor, I understand your projector
25 isn't working, but do I have permission for you to now look at

1 Exhibit -- or the government moves for the admission of Exhibit
2 No. 29.

3 THE COURT: Any objection?

4 MR. ROGERS: No objection, Your Honor.

5 THE COURT: Exhibit 29 is admitted.

6 (Exhibit No. 29 admitted into evidence.)

7 MS. SCHESNOL: So are we reset yet, Michele?

8 THE COURTROOM DEPUTY: It's got 73 seconds left.

9 MS. SCHESNOL: Okay. Well, then I'll talk about
10 something else while we count down that clock.

11 BY MS. SCHESNOL:

12 Q. Before you stopped the Mazda on December 18th, 2017, did
13 you know to -- that this Mazda might be in the same area that
14 you would be patrolling on that day?

15 A. Yes, ma'am.

16 Q. And how is it that you -- what is it that you knew about
17 that Mazda?

18 A. And also, another officer or detective provided information
19 that the vehicle may be traveling down that location, possibly
20 loaded with narcotics.

21 Q. And based on that information, was it your intention to
22 stop that Mazda no matter what you saw that day?

23 A. No, ma'am.

24 Q. So why did you stop the Mazda that day?

25 A. The detective did provide -- say -- mention that we -- to

1 develop our own probable cause for the traffic stop, and then
2 address it as a regular traffic stop as far as that part.

3 Q. Based on what you've described for us, what you saw in
4 terms of the unsafe lane change, the speed, the bumper, did you
5 have any impression about what might be going on with that car?

6 A. Are you talking about prior to the violations?

7 Q. No, when you saw those various violations.

8 Did you come to formulate an opinion as to what might
9 be going on?

10 A. No. But I wanted to gather more information on what was
11 going on. I mean, at times in -- I've been doing this for 16
12 years. The unsafe lane change, the speed, what I noticed of
13 the front bumper, it's -- you know, I started thinking about
14 maybe it was involved in a collision, maybe intoxicated driver,
15 you know, and that's what initially I responded to.

16 Q. So if you had not had previous information to keep an eye
17 out for this Mazda, would you have stopped it based on what you
18 have just described?

19 A. Yes, ma'am, I would have.

20 THE COURT: Why?

21 THE WITNESS: Because of the traffic violations.

22 THE COURT: You said an unsafe lane change. What --
23 where was the unsafe lane change?

24 THE WITNESS: So when I was stopped behind the
25 broken-down motorist.

1 THE COURT: Yeah.

2 THE WITNESS: When I exit my patrol car, when I stop a
3 vehicle, I always get out. I look at traffic coming towards
4 me, make sure that they move over to the left lane.

5 When he came up, the vehicle continued towards me,
6 stayed in the right lane. He got pretty close to me before it
7 made the abrupt lane change. There was other traffic around.
8 So he made the abrupt lane change into the number one,
9 continued, then back into the number two.

10 At that point, then I walked up to the --

11 THE COURT: What was unsafe about that?

12 THE WITNESS: There was other traffic around it. So
13 he did not -- when you're going to make a lane change, by state
14 law --

15 THE COURT: Okay. Is that in your report?

16 THE WITNESS: The abrupt?

17 THE COURT: Yeah, the unsafe lane change.

18 THE WITNESS: Yes.

19 THE COURT: What you've just described.

20 THE WITNESS: Yes.

21 THE COURT: Okay.

22 All right. Go ahead.

23 BY MS. SCHESNOL:

24 Q. In addition to the unsafe lane change, you described the --
25 that the driver was speeding; is that correct?

1 A. Once I caught up to it, I was able to get a pace on the
2 vehicle, yes.

3 Q. And in addition to his speeding, you mentioned that his
4 speed actually fluctuated within the three miles that you were
5 behind him; is that correct?

6 A. Yes, ma'am.

7 Q. And is that considered a traffic violation?

8 A. Yes, ma'am.

9 Q. You also mentioned the fact that there was damage --

10 THE COURT: Whoa, whoa.

11 Fluctuation of speed is a traffic violation?

12 THE WITNESS: He was traveling at 73 miles per hour in
13 a 65 mile-an-hour zone, so the speed itself.

14 THE COURT: Okay. So it's not the fluctuation --

15 THE WITNESS: No, it's the actual speed of the
16 vehicle.

17 THE COURT: It's the 73 in the 65?

18 THE WITNESS: Right, sir.

19 THE COURT: And what time of day was that?

20 THE WITNESS: It was about 3:15.

21 THE COURT: Heavy traffic?

22 THE WITNESS: It was moderate traffic. There were
23 other vehicles around.

24 THE COURT: All right.

1 BY MS. SCHESNOL:

2 Q. And you also mentioned the damage to the bumper; is that
3 correct?

4 A. Yes, ma'am.

5 Q. So to recap, it sounds like there were two traffic
6 violations --

7 A. Yes, ma'am.

8 Q. -- and the damage to the bumper.

9 A. Correct.

10 Q. And based on that, you -- I believe you said you wanted to
11 further investigate because you thought the driver could be
12 impaired or the car may have been in a collision; is that
13 correct?

14 A. Well, the initial stop, yes, was for the traffic
15 violations. And like I said, from past experience, you know,
16 just looking to --

17 THE INTERPRETER: Your Honor -- Your Honor, if the
18 witness could speak a little louder so I could hear him.

19 THE COURT: Speak louder and slower.

20 THE INTERPRETER: Closer to the microphone, please.

21 THE COURT: Slower, too, please.

22 BY MS. SCHESNOL:

23 Q. So as you were saying, please speak slowly and loudly.

24 You were saying what you were looking into based on
25 everything you had observed.

1 A. Well, all the factors, just the traffic violations itself
2 and then the damage to the front and it was -- the reason for
3 the stop or the traffic violations. But in past experience,
4 sometimes people have been intoxicated. That's why the
5 fluctuation of the speed or the unsafe lane change. And so
6 that's what led me to stop the vehicle, the two violations, and
7 just to further investigate.

8 MS. SCHESNOL: So I believe our overhead camera is up
9 and working. I believe Exhibit 29 has been admitted into
10 evidence.

11 THE COURT: Mine is still not working.

12 MS. SCHESNOL: Does the Court have a hard copy of
13 Exhibit 29?

14 THE COURT: I have a hard copy.

15 MS. SCHESNOL: So may I publish it so I can discuss it
16 with the witness?

17 THE COURT: Yes.

18 BY MS. SCHESNOL:

19 Q. All right. So I'm sorry the Court can't see more
20 specifically what I have zoomed in on, but I've zoomed in on,
21 when looking at this photograph, if it were horizontal so the
22 Court can see the car in its entirety, what would be the lower
23 left-hand corner of the piece of paper.

24 Is it in that area that this damage to the bumper that
25 you've described appears on this photo?

1 A. Yes, ma'am.

2 Q. Did you make any inquiries to the passenger -- to the
3 driver or passenger about this damage to the vehicle?

4 A. Yes, ma'am. I asked the driver if the vehicle had been
5 involved in a collision recently or anything that caused the
6 damage.

7 THE COURT: I've just got a couple questions.

8 When you saw the vehicle approaching as you were
9 pulling off to assist the driver on the side of the road, did
10 you see the vehicle -- did you look at it directly or were you
11 looking at it in your rearview mirror?

12 THE WITNESS: No. I got out of my patrol car.

13 THE COURT: And you're standing when it passed by?

14 THE WITNESS: It changed lanes and then it went by,
15 yes. And then I turned and walked up to the motorist, yes,
16 sir.

17 THE COURT: So how far away from you was it when you
18 first saw it?

19 THE WITNESS: I can't give you an exact distance. I
20 don't know. Maybe a few hundred feet, maybe 300 feet. I mean,
21 I could see it coming because you could see the traffic coming.
22 I can't give you an exact measurement.

23 THE COURT: And how far from your vehicle was it when
24 it made its lane change?

25 THE WITNESS: 50 feet.

1 THE COURT: And did it interfere with any other
2 traffic when it made that change?

3 THE WITNESS: There was other traffic around, but I
4 did not see anybody to the point where they had to go off the
5 road or anything like that.

6 THE COURT: Okay. And so you saw it from a distance
7 of about -- did you say 300 feet?

8 THE WITNESS: 200 to 300 feet. I can't be exact.

9 THE COURT: 200 feet to 50 feet?

10 THE WITNESS: Uh-huh.

11 THE COURT: Is that yes?

12 THE WITNESS: All the way to 50 feet, yes.

13 THE COURT: And where was it when you saw -- when you
14 observed that the bumper was damaged?

15 THE WITNESS: As he's coming, as he's getting closer,
16 you could see the damage hanging -- or the bumper hanging to
17 the left on the lower part. You could see it as it came.

18 THE COURT: So what you saw was the bumper wasn't
19 level. There was -- one side was dipping down?

20 THE WITNESS: Right.

21 THE COURT: Okay.

22 MS. SCHESNOL: Thank you, Your Honor.

23 BY MS. SCHESNOL:

24 Q. And just for clarification, if you can sort of paint the
25 scene for us, so you're out of your car looking back at traffic

1 that's approaching you; is that accurate?

2 A. Uh-huh. As soon as I exit my --

3 Q. Is that a "yes" for our court reporter?

4 A. Yes, ma'am. Yes.

5 Q. And so even though once that car passed you, its passenger
6 side was passing you, but before it got to you, could you see
7 the car from a head-on point of view?

8 A. Yep. It was coming. So I get out, I look this way, here
9 comes the traffic, you know, all the traffic that's coming, so
10 I could see it coming.

11 Q. And that's when you noticed the bumper was not level?

12 A. Yes. You could see the front, right.

13 Q. Once you pulled over the Mazda, you were about to talk
14 about questioning the occupants about the damage to the
15 vehicle. Can you please tell us what, if anything, you asked
16 and what, if anything, the occupants told you about the damage.

17 A. I just asked if the -- they had been involved in a
18 collision or maybe some damage, something that caused the
19 bumper to be -- to be hanging, or if they knew about it. And
20 he began to -- the driver began to answer, and the female cut
21 him off and answered for him.

22 Q. And what did the female say?

23 A. She stated that they had just purchased the vehicle from an
24 elderly woman.

25 Q. And did the driver say anything about the damage to the

1 vehicle?

2 A. No. He didn't get a chance to really say anything.

3 Q. Did you make any inquiries to the driver and/or the
4 passenger about what they were doing, where they were headed,
5 anything like that in the course of your investigation?

6 A. Yes, I did ask where they were headed. They were going to
7 Tempe, I believe, to pick up his brother, he said.

8 Q. And so just to be clear, when you say "he," are you talking
9 about --

10 A. Yes, ma'am.

11 Q. -- about the driver?

12 A. Yes, ma'am.

13 Q. And that's the defendant that you previously identified in
14 court?

15 A. Yes, ma'am.

16 Q. And what specifically did he tell you?

17 A. They were on their way to Tempe to pick up his brother.

18 Q. His brother?

19 A. Uh-huh.

20 Q. When you were speaking with the driver initially, what, if
21 anything, did you notice about his physical demeanor?

22 A. I noticed that he appeared nervous to me. I could see his
23 face kind of trembling. He evaded making too much eye contact,
24 was looking forward when he was answering me. Just appeared
25 nervous, just --

1 Q. In addition to -- you mentioned some trembling. Do you
2 remember specifically what part of his body was trembling?

3 A. I remember his lower jaw, his lip kind of, you know, little
4 trembling. I tried to put him at ease a little bit by
5 continuing to talk to them.

6 Q. And did that seem to alleviate his nervousness?

7 A. No. He was just the same.

8 Q. And what, if anything, was the female passenger doing
9 during this time?

10 A. She was answering or telling me what the vehicle -- that
11 they had purchased it, that they bought it that way, that it
12 had been in -- when they gave me the paperwork, I asked for the
13 insurance. He told me that he didn't have insurance, and then
14 she said, "The vehicle's been in Mexico." And then she
15 stopped.

16 Q. With regard to the vehicle being in Mexico, was the female
17 passenger able to give you any details about -- about the
18 vehicle being in Mexico?

19 A. No. I asked if it was to get the front end maybe repaired
20 or maybe that's what was going on, and she didn't have an
21 answer. And then said, "I didn't say it was in Mexico." And
22 then I told, "Well, you just said it was in Mexico."

23 That was pretty much -- she kind of changed the
24 subject. It turned into another conversation.

25 Q. Did you make an inquiry about where in Mexico, how long in

1 Mexico, anything like that?

2 A. Yeah. I asked again, you know, where in Mexico was it
3 getting done, and there was no answer.

4 Q. What about the length of time the car was in Mexico?

5 A. Initially they were both trying to kind of give me a
6 timeline, two or three days, and then it was a week, and they
7 were unsure.

8 Q. And based on your training and experience, what, if
9 anything, did you draw from that?

10 A. Just at that point they appeared nervous. Their story or
11 what they were telling me just kind of didn't make sense. So
12 then I asked the driver to step out with me so I could talk to
13 him some more.

14 Q. You had mentioned asking for proof of insurance; is that
15 correct?

16 A. Yes, ma'am.

17 Q. Can you tell us what, if anything, your investigation about
18 the insurance revealed?

19 A. They stated that they did not have insurance as of yet, but
20 they were planning to get it on the way out of Yuma.

21 Q. Can I stop you for a minute?

22 A. Yes, ma'am.

23 Q. You're saying "they." So were they both saying this?

24 A. They were both kind of speaking over each other so they
25 were kind of both answering. She would answer for him at

1 times, and then he was kind of more quiet, but she would
2 answer. But he mentioned that he was going to get it prior to
3 leaving Yuma.

4 Q. Okay. Again, "he" being the defendant?

5 A. The driver, yes.

6 Q. The driver?

7 A. Yes.

8 Q. That he was going to get insurance prior to leaving Yuma?

9 A. Correct.

10 Q. What, if any, assessments did you make about that
11 statement?

12 A. Well, it didn't make sense to me knowing that they were
13 coming, based on their identification, from San Luis, Arizona.
14 There's locations there where you can purchase insurance. So
15 it didn't make sense to me why they would wait. You know, they
16 got a child in the car. No insurance is citations. 980, I
17 believe, the fine for no insurance, so I was trying to figure
18 out why they would do that.

19 Q. I'm sorry. What did you say about a fine?

20 A. The fine is about 980 for the citation, for the ticket.

21 Q. \$980?

22 A. \$980. So I was trying to figure out, why would you take
23 that risk of -- when you could get it there in San Luis,
24 Arizona.

25 Q. So based on your experience of working in that part of the

1 state, there are places to purchase insurance in San Luis?

2 A. Yes.

3 Q. And regarding the comment that the driver said he was going
4 to get insurance before leaving Yuma, what, if any, assessment
5 did you make about that specific comment?

6 A. Oh, it just didn't make sense why he would wait to get
7 wherever he -- Foothills or wherever he was going, which is the
8 Foothills of Yuma, to get insurance.

9 Q. When you stopped the driver on the I-95 [sic] at
10 Milepost 19, is that a commercial part of town where one might
11 be able to get insurance?

12 A. No, ma'am.

13 Q. You mentioned that at some point you asked the driver to
14 step out of the car; is that correct?

15 A. Yes.

16 Q. And did you speak with him any further once he was not with
17 the female passenger?

18 A. I asked him to step out. I directed him back towards my
19 patrol car. At that point another officer had arrived and was
20 standing by my passenger door. And the reason I did that was
21 when we do investigations and we're trying to ascertain what's
22 going on, we like to separate individuals to try to figure out
23 what the story is or what's going on.

24 So I directed him back to the back and then just told
25 him that I was going to go back up and talk to her, and had him

1 just wait with the other officer.

2 Q. When the driver you've identified as the defendant was out
3 of the vehicle, was he handcuffed at that point?

4 A. No, ma'am.

5 Q. Did you question him further outside the presence of the
6 female passenger regarding the vehicle being in Mexico?

7 A. No, not yet. I had not.

8 Q. At some point in your interaction?

9 A. Yes.

10 Q. And when you did question him further about the car being
11 in Mexico, what was his reaction?

12 A. I had walked back up to the car and then spoke to her and
13 then came back, and as I'm walking back, I walked up to him and
14 I said, "So how long was the car in Mexico for?"

15 He had like a blank stare. Didn't know what to
16 answer. He initially started with two or three -- two to three
17 days, maybe a week, and then he just -- I don't know. And that
18 was it.

19 Q. Did you have further conversations with the driver about
20 where they were going that day?

21 A. Yes.

22 Q. And what, if anything, did he tell you?

23 A. I asked him again where he was -- or he was going to pick
24 up his brother, for -- what school he went to. He said it
25 actually wasn't his brother, it was her brother.

1 Q. So the driver's story changed with regard to who they were
2 going to see in the Phoenix or Tempe area; is that right?

3 A. Yes, ma'am.

4 Q. You mentioned that you had some interaction with the female
5 passenger once she was still in the car and the driver was out
6 of the car; is that correct?

7 A. Yes.

8 Q. And what, if anything, did you notice about her demeanor as
9 you were speaking with her at that point?

10 A. She appeared to start getting more nervous and looking back
11 to where he was at as she was talking to me.

12 Q. In addition to looking -- looking back, did she do anything
13 else that --

14 A. Yeah, just kind of rubbing her hands and looking back and,
15 you know, telling me what I was asking her.

16 Q. Based on your experience, did you draw any inference from
17 that physical behavior that you saw?

18 A. Yeah. She appeared more nervous, and it led me to kind of
19 want to know more of what was going on.

20 Q. Did you speak with the driver about these traffic
21 violations that you had observed?

22 A. Yes, ma'am.

23 Q. Can you tell us about that.

24 A. I just explained to him what I had stopped him for, again,
25 and explained to him that the citation for no insurance, what

1 it was, what the amount, what the fine was. At that point I
2 explained to him I would just be issuing him a warning, to get
3 it taken care of as soon as possible.

4 He responded with that as soon as we were done, he
5 would be removing -- that he actually had insurance and had a
6 vehicle on that insurance, and he would be removing that one
7 and putting that -- this one, the one he was driving, the
8 Mazda, on his insurance.

9 Q. And did you -- did you draw anything from that statement he
10 made?

11 A. Well, yes. When I talk to somebody, you know, when I see
12 that they're nervous, in an effort to maybe calm them down
13 regarding what's going on or -- I -- you know, I tell them,
14 "Hey, I'm going to be issuing you a warning here" in an effort
15 to kind of get him to relax a little bit. He was just --
16 continued the same. He -- it had no effect.

17 Q. And what is the difference between a warning and a ticket?

18 A. Well, a ticket is fines, which can result in quite a bit of
19 money, points on your license. Insurance goes up.

20 Q. And a warning?

21 A. And a warning is just, we spoke about the infractions.
22 Make sure he corrects them. And that's it. Documents our
23 contact.

24 Q. And you mentioned that, in your experience, most people, if
25 they are nervous to begin with, tend to be less nervous once

1 they find out they're getting a warning and not a ticket; did I
2 understand that correctly?

3 A. Correct, if they're nervous. Some people are not nervous,
4 but some people do display signs of nervousness, tend to kind
5 of bring it down, and then they start talking to you and
6 conversating and telling you that you made their day or -- you
7 know.

8 Q. You made their day by not giving them a ticket?

9 A. By not giving them a ticket, right. Right.

10 Q. But that did not occur with the driver, the defendant in
11 this instance?

12 A. No. He just -- demeanor stayed the same.

13 MS. SCHESNOL: If I could ask the clerk to show the
14 witness what has been marked for identification as Exhibit
15 No. 26.

16 THE COURTROOM DEPUTY: I believe the camera is working
17 now.

18 MS. SCHESNOL: Excellent. Thank you.

19 THE WITNESS: Thank you.

20 BY MS. SCHESNOL:

21 Q. Do you know what Exhibit No. 26 is?

22 A. Yes, ma'am. That's the warning I issued him.

23 Q. Is that a fair and accurate depiction of the warning that
24 you issued?

25 A. Yes, ma'am.

1 MS. SCHESNOL: Your Honor, the government moves for
2 the admission of Exhibit No. 26.

3 THE COURT: Any objection?

4 MR. ROGERS: No objection, Your Honor.

5 THE COURT: Exhibit 26 is admitted.

6 (Exhibit No. 26 admitted into evidence.)

7 MS. SCHESNOL: May I publish it to Your Honor?

8 THE COURT: You may.

9 BY MS. SCHESNOL:

10 Q. So this is a copy of the warning that you issued on the
11 date we've been discussing; is that correct?

12 A. That is correct.

13 Q. And who is this warning issued to? What is the name?

14 A. Martin Ozuna. Ibarra-Ozuna.

15 Q. As far as the time on this warning, what is the time that
16 the warning was issued?

17 A. 3:23.

18 Q. P.m.?

19 A. 1523. Yes, p.m.

20 Q. The date on this warning, what is the date of the warning?

21 A. 12/18, and I made a mistake and put 2016, but it's 2017.

22 Q. Thank you.

23 Also on this citation, you have noted an approximate
24 speed. Right here.

25 A. Correct.

1 Q. Can you please tell us what that approximate speed is?

2 A. 70-plus.

3 Q. Your testimony had been that the vehicle was traveling at
4 approximately, I believe, 72 miles per hour. Could you please
5 explain to us why the warning says 70?

6 A. It was actually 73 that I documented on the report. And
7 the 70, anytime we issue a warning, by our department policy,
8 you can only give a warning for 5 miles over. We have the
9 discretion as officers when we write a warning to do that, but
10 it has to only be 5 miles. Anything above that, it has to be a
11 citation. And that's why you document it as 70-plus.

12 Q. So would it be fair to say that you sort of did the driver
13 a favor by issuing him a warning and indicating the speed at
14 70?

15 A. Yes, ma'am.

16 THE COURT: Did you have a video camera in your
17 vehicle?

18 THE WITNESS: No, sir, I did not.

19 THE COURT: Why not?

20 THE WITNESS: I am not issued a video camera. Not all
21 vehicles are issued a video camera. Our gang unit does not
22 have any cameras.

23 BY MS. SCHESNOL:

24 Q. Was there ultimately a search of this vehicle?

25 A. I -- once I continued to speak with him, I asked him, yes,

1 if I could search the vehicle, consent to search the vehicle.

2 Q. So you asked -- and I am going to ask you just to speak a
3 little louder, if possible.

4 So you asked for consent to search the vehicle; is
5 that correct?

6 A. Yes, ma'am, I did.

7 Q. And what, if any, response did the defendant give you?

8 A. He -- I believe he stated he preferred not to. He was in a
9 hurry to get to where he was going. And he offered up, "Why
10 don't you just get a K9."

11 Q. Pardon me?

12 A. "Why don't you just get a dog, K9."

13 Q. And that was the defendant that initiated the reference to
14 getting a dog?

15 A. Yes, ma'am.

16 Q. So what did you do in response to that?

17 A. I requested a K9.

18 Q. Did a K9 show up on the scene?

19 A. Yes, ma'am.

20 Q. And what was the approximate time from your request to when
21 the K9 appeared?

22 A. I'm going to say three to five minutes, maybe. Maybe a
23 little bit longer. Three to five minutes.

24 Q. Three to five minutes.

25 Did the K9 and the K9 handler, in fact, conduct a dog

1 sniff of this Mazda?

2 A. Yes. I spoke to him first prior to him doing that and
3 explained to him --

4 Q. Sorry. Which "him" are we talking about?

5 A. Sorry, the Border Patrol agent that arrived with the K9
6 unit. And explained to him the reason for the stop, what was
7 going on, and then requested if he would conduct a K9 sniff of
8 the vehicle.

9 Q. During the K9 sniff of the vehicle, where were you?

10 A. I stood in front of my police Tahoe.

11 Q. And where was -- where were the driver, passenger, and
12 child who had previously been in the Mazda? Where were they?

13 A. The driver was standing still to the passenger side front
14 tire of my Tahoe. The female was just ahead of him, maybe by
15 the gravel there.

16 Q. Were either of them handcuffed?

17 A. No, ma'am.

18 Q. Was the child handcuffed?

19 A. No, ma'am.

20 Q. What was the result of this K9 sniff?

21 A. Once he completed his K9 sniff, I spoke with the agent and
22 he advised that it alerted -- the K9 alerted positively to the
23 presence of narcotics in that vehicle.

24 Q. And as a result of being given that piece of information,
25 what did you do in response?

1 A. I initially requested the assistance of Detective Keeling.

2 Q. And who is Detective Keeling?

3 A. He is a Department of Public Safety officer. He's assigned
4 as a TFO to the DEA.

5 Q. What's a TFO?

6 A. He's a task force officer.

7 Q. And with DEA, the --

8 A. DEA.

9 Q. -- Drug Enforcement?

10 A. Yep, Drug Enforcement Agency.

11 Q. And did Detective Keeling, in fact, show up?

12 A. Yes, ma'am.

13 Q. What happened once Detective Keeling showed up?

14 A. I explained to him what was going on and asked him to
15 assist me with the search of the vehicle.

16 Q. What, if anything, did you find when you and Detective
17 Keeling searched the vehicle?

18 A. We began the search. We searched the vehicle, the trunk
19 area. During the search of the trunk area, we observed a -- or
20 I observed a speaker box. I looked at the speaker box. It was
21 not attached to any cables or any wiring.

22 At that point, myself and Detective Keeling pulled the
23 speaker box forward. It was unusually heavy.

24 Q. I want to interrupt you right there.

25 You specifically mentioned that the speaker box didn't

1 have any cables, wasn't wired to anything. What about that is
2 of significance to you?

3 A. Well, I mean, you have a big speaker box with two good
4 speakers and, you know, it wasn't wired. I mean, it's just
5 another question.

6 THE COURT: I'm confused. You said in the trunk area.
7 Was this in the trunk or in the back of the inside of the
8 compartment of the vehicle?

9 THE WITNESS: In the trunk of the vehicle, the Mazda.

10 THE COURT: You opened the trunk?

11 THE WITNESS: Yes.

12 THE COURT: And in the trunk you found this speaker
13 wire?

14 THE WITNESS: Correct, sir. No, the speaker box.

15 THE COURT: Speaker box that didn't seem to be hooked
16 up?

17 THE WITNESS: Correct, it was not hooked up. Because
18 before we pulled it, we wanted to make sure we didn't
19 disconnect it.

20 THE COURT: All right. Go ahead.

21 BY MS. SCHESNOL:

22 Q. Then you were saying when you moved the speaker box towards
23 you, you were talking about the weight of the speaker box.

24 A. Yes, ma'am.

25 Q. Can you continue with what you were saying about that.

1 A. It was unusually heavy. At that point, we removed it out
2 of the trunk, observed that as we looked at the speakers, there
3 were some screws missing. Then I believe Detective Keeling
4 retrieved a tool to remove the speakers.

5 Q. And what, if anything, was significant to you about there
6 being screws missing?

7 A. It just appeared to be maybe tampered with.

8 Q. And in your 16 years in law enforcement, how is that
9 significant that a speaker might be tampered with?

10 A. Well, it just led me to further investigate. Maybe
11 possibly something was placed inside of it recently.

12 MS. SCHESNOL: If the clerk would be so kind as to
13 show the witness Exhibits 2, 3, and 4.

14 BY MS. SCHESNOL:

15 Q. You mentioned Detective Keeling used some kind of tool or
16 instrument; is that correct?

17 A. Yes, ma'am.

18 Q. And what did he do with that instrument?

19 A. He removed the remaining screws and then removed the
20 speaker, one speaker and then the next.

21 Q. And what, if anything, was inside the speaker box?

22 A. I immediately saw some packages wrapped in cellophane,
23 multiple packages inside the speaker box.

24 Q. Showing you what's been marked for identification as
25 Exhibit No. 2, do you recognize Exhibit No. 2?

1 A. Yes, ma'am.

2 Q. And what is Exhibit No. 2?

3 A. That's the speaker box with the two speakers removed and
4 then the package inside.

5 Q. Is that a fair and accurate depiction of what you saw on
6 December 18th, 2017?

7 A. Yes, ma'am.

8 MS. SCHESNOL: Your Honor, the government moves for
9 the admission of Exhibit No. 2.

10 THE COURT: Any objections?

11 MR. ROGERS: No objection, Your Honor.

12 THE COURT: Exhibit 2 is admitted into evidence.

13 (Exhibit No. 2 admitted into evidence.)

14 BY MS. SCHESNOL:

15 Q. So Exhibit No. 2 is the speaker box as you've described
16 with the speakers removed from it; is that correct?

17 A. Yes.

18 Q. And then what are these items that I am pointing to on the
19 overhead camera?

20 A. Those are the packages, cellophane-wrapped packages.

21 Q. If you would direct your attention to Exhibit No. 3, do you
22 know what Exhibit No. 3 is?

23 A. Yes. Those are the packages.

24 Q. Is that a fair and accurate depiction of what you saw on
25 December 18th, 2017?

1 A. Yes, ma'am.

2 MS. SCHESNOL: Your Honor, the government moves for
3 the admission of Exhibit No. 3.

4 THE COURT: Any objection?

5 MR. ROGERS: Your Honor, I believe it's cumulative.
6 Exhibit 3 depicts the same thing.

7 THE COURT: Overruled. Exhibit 3 is admitted into
8 evidence.

9 (Exhibit No. 3 admitted into evidence.)

10 BY MS. SCHESNOL:

11 Q. Is this a close-up picture of the packages that you've
12 described?

13 A. Yes, ma'am.

14 Q. And directing your attention to Exhibit No. 4, what is
15 Exhibit No. 4?

16 A. The same. It's the packages and the speaker box.

17 Q. And is that a fair and accurate depiction of what you saw
18 on December 18th, 2017?

19 A. Yes, ma'am.

20 MS. SCHESNOL: Your Honor, the government moves for
21 the admission of Exhibit No. 4.

22 THE COURT: Any objection?

23 MR. ROGERS: Same objection, Your Honor.

24 THE COURT: Exhibit No. 4 is admitted. Overruled.

25 (Exhibit No. 4 admitted into evidence.)

1 MS. SCHESNOL: Thank you, Your Honor.

2 BY MS. SCHESNOL:

3 Q. Based on your training and experience, did you have a
4 belief as to what the packages in the speaker box --

5 A. Yes, I initially --

6 Q. -- might be?

7 A. Sorry.

8 Yes, I initially believed it was crystal
9 methamphetamine, based on my training and experience.

10 Q. And as a result of that, what, if anything, did you do with
11 regard to the adults who had been in that Mazda?

12 A. At that point, I turned over to where they were standing,
13 and they were both handcuffed and arrested.

14 Q. Were they placed under arrest?

15 A. Yes.

16 Q. And did you do anything further with the investigation?

17 A. At that point, Detective Keeling took disposition of the
18 investigation.

19 MS. SCHESNOL: May I have a moment, Your Honor?

20 THE COURT: You may.

21 BY MS. SCHESNOL:

22 Q. Directing your attention back to the information that you
23 had received about a Mazda potentially traveling in the area
24 you were patrolling, to the best of your recollection, what
25 were you specifically told?

1 A. The detective told me that they were looking for a vehicle
2 that was traveling, leaving San Luis, Arizona, area. They
3 didn't know where, as far as east, west, once it reached where
4 it was going, but it was traveling 195. And to develop our own
5 PC as far as it was possibly loaded, and investigate further as
6 needed.

7 Q. Was -- were you told what type of vehicle it was?

8 A. Yes.

9 Q. And the type of vehicle that you were told, did that match
10 up with this Mazda that you've described and that you've
11 identified in these photographs?

12 A. Yes, ma'am.

13 Q. And when you say you were advised it might be loaded, can
14 you clarify what that might mean?

15 A. Sorry. That it might be in -- it might have narcotics
16 inside the vehicle, hidden in the vehicle.

17 Q. And do you recall specifically who provided you with this
18 information?

19 A. Detective Valenzuela.

20 Q. Valenzuela?

21 A. Yes.

22 Q. And who is Detective Valenzuela?

23 A. At that time, he was assigned to our gang task force, but
24 he had previously worked with the Drug Enforcement Agency.

25 MS. SCHESNOL: No further questions of this witness.

THE COURT: Okay. I've just got a couple.

What does it mean to develop PC?

THE WITNESS: To develop PC, to develop the probable cause to, first of all, make a traffic stop. And then as you continue with the traffic stop, as far as in a criminal investigation, is to develop enough probable cause to make the arrest, to develop enough evidence to make that arrest.

THE COURT: And what if you don't see any evidence of unlawful -- or any traffic violations? What do you do then?

THE WITNESS: I wouldn't have stopped it. I wouldn't have stopped the vehicle if I didn't have any traffic violations.

THE COURT: You just let it --

THE WITNESS: Just based on the information I was given.

THE COURT: You'd just let it go?

THE WITNESS: I would have. Yes, sir.

THE COURT: All right. Mr. Rogers?

CROSS-EXAMINATION

BY MR. ROGERS:

Q. Good afternoon, Detective Luna.

In this case, you wrote a departmental report, correct?

A. Yes, sir.

Q. And those departmental reports are important because people

1 rely on that information, correct?

2 A. That is correct, sir.

3 Q. So you try and be as accurate and complete as possible,
4 right?

5 A. That's correct, sir.

6 Q. So you testified just a moment ago that you -- before you
7 got out of your patrol car, that you looked back and observed
8 traffic; is that not right?

9 A. Not correct.

10 Q. That's not what you testified a moment ago?

11 A. No. When I exited my patrol vehicle.

12 Q. We can have the record read back. I wrote down that you
13 said "Before I got out of my patrol car, I looked back at
14 traffic." Is that not right?

15 A. No.

16 Q. That's not what you said?

17 A. When the judge asked me if I looked through my rearview
18 mirror of my patrol car or not, to the traffic, I said, "No. I
19 exited my patrol vehicle, stepped out, and I was looking at
20 traffic as it was coming towards me in the lanes of travel."
21 So I'm out, and I'm looking at the --

22 Q. And before the judge asked you that question, you had said,
23 "Before I got out of my patrol car, I looked back and observed
24 traffic."

25 Is that wrong?

1 A. You'd have to play it back for me.

2 Q. So you exited your patrol vehicle and then you noticed a
3 small gray vehicle, right?

4 A. I saw traffic coming. I saw the other vehicles around that
5 gray vehicle.

6 Q. That's not what I asked you, Detective.

7 I asked you, when you exited your patrol car, you
8 noticed a small gray vehicle, correct?

9 A. Yes.

10 Q. Okay. And then you also -- it was later identified as a
11 Mazda, right?

12 A. Correct.

13 Q. Yet you testified here that you already knew that it was a
14 Mazda, right?

15 A. Correct.

16 Q. So in your report when you said it was later identified,
17 that's not correct?

18 A. No, it's correct.

19 Q. Well, you just said it was -- you knew it was a Mazda.

20 A. The information I was provided was a Mazda, but when I
21 first saw the vehicle, I couldn't tell you, like, it's a Mazda.
22 I saw a gray vehicle coming.

23 Q. So you didn't know what that vehicle was when it approached
24 you?

25 A. When it was coming, no, sir.

1 Q. At what point did you identify that it was a Mazda?

2 A. Once I -- when I pulled up, you know, to it and -- I
3 believe when it went by, I kind of thought it was a Mazda, but
4 I wasn't sure until I got right up on the vehicle as I, you
5 know, went after it.

6 Q. So when you saw that vehicle approaching, when you were
7 standing there on the side of the road, you didn't see the
8 Mazda symbol on the front bumper?

9 A. I don't recall seeing that, no, sir.

10 Q. If you would have observed that Mazda symbol, you would
11 have known it was a Mazda, right?

12 A. Right. Correct.

13 Q. Now, you said that as it approached you, where you were
14 standing, it made a lane change, correct?

15 A. Yes.

16 Q. And what -- you said -- you described it as an unsafe lane
17 change. What was unsafe about it?

18 A. He made an abrupt -- so when you're traveling in a lane,
19 prior to making a lane change, you must signal the lane change,
20 travel a hundred feet, then make a safe lane change into the
21 lane that you're trying to move into. And, you know,
22 acknowledging traffic or verifying that there's no traffic.

23 So when he changed lanes, he said -- he pretty much
24 just went from two to one. Just switched.

25 Q. And you noticed that as soon as you got out of your patrol

1 vehicle, right?

2 A. Well, I exited my patrol vehicle. I'm looking at traffic
3 as it's coming, which we do to make sure that traffic moves
4 over to the fast lane or left lane or the number one lane. So
5 as he's coming, he's coming, he's coming, then the vehicle
6 moves over to the number -- to the left lane, yes.

7 Q. But that's not how you describe it in your report, is it?

8 A. How did I describe it? I don't have the report.

9 Q. If I show you your report, would that refresh your
10 recollection?

11 A. Sure.

12 MR. ROGERS: Your Honor, I've marked as Exhibit 105,
13 if we may -- if the clerk can --

14 THE COURT: It would help me a little bit if you asked
15 him or point out to him what specifically in his report is
16 different than what he just said.

17 BY MR. ROGERS:

18 Q. In your report, Officer, you say that you -- as you exited
19 the patrol vehicle, you noticed the small gray sedan traveling
20 towards you in the right lane, and then the vehicle suddenly
21 unsafely moved into the left lane.

22 A. I believe it says "along with other traffic." And then as
23 it approached, it made an abrupt lane change. I believe it
24 says that.

25 Q. Right. So as soon as you exited your patrol vehicle, you

1 see the vehicle. It suddenly makes that lane change?

2 A. It's coming towards me, and then it makes an abrupt lane
3 change as it's coming towards me. I believe that's what the
4 report says, and if you want to refresh my recollection, that
5 would be great.

6 Q. Well, I just read it to you.

7 A. You missed some stuff when you read that to me, so -- that
8 I remember as far as the other traffic around it.

9 THE COURT: You can show it to him if you want, but I
10 just was trying to understand what was the inconsistency we
11 were trying to follow.

12 MR. ROGERS: Was that made clear now, Your Honor?

13 THE COURT: Yeah.

14 MR. ROGERS: That's okay, Your Honor. I don't think
15 the "along with other traffic behind it" is that significant.

16 BY MR. ROGERS:

17 Q. But the fact is that as soon as you exit your patrol car,
18 you observed this gray Mazda, and then it makes a lane change?

19 A. I'd have to see the report to how you're wording it, but
20 the way I recall is it's coming along with other traffic, it's
21 continuing, I'm watching it, and it makes an abrupt lane change
22 as it got closer, into the left lane.

23 THE COURT: Okay. Just -- tell me everything about
24 that lane change that made it a violation.

25 THE WITNESS: Well, first of all, when you make a lane

1 change, you got to signal a hundred feet prior to making that
2 lane change.

3 THE COURT: So there was a lack of signal?

4 THE WITNESS: So when he made the lane change, he made
5 the lane change with one movement. He made the lane change
6 while turning on his signal, so he made the lane change. That
7 was his lane change.

8 So more like you're here, you're driving, you see
9 something, and you move over. Well, when there's other
10 traffic, you got to account for the other traffic and do it in
11 a safe manner.

12 THE COURT: Well, you told me it didn't interfere with
13 other traffic, so what I'm trying to understand is, what was it
14 about that lane change that was a violation? I'm still not
15 clear.

16 THE WITNESS: Well, I mean, I can't --

17 THE COURT: Is it unlawful to make a sudden lane
18 change?

19 THE WITNESS: Yes. Along with other traffic around
20 the vehicle, yes, sir, it is.

21 THE COURT: Well, but if it doesn't interfere with
22 other traffic, it's not an unsafe lane change.

23 THE WITNESS: But there's other traffic around the
24 vehicle, which his abrupt lane change could cause other
25 vehicles to react in a manner that's unsafe. That's why you

1 have to allow traffic to see that you're signaling a lane
2 change. And there's other traffic traveling with him, so I
3 can't tell you that I --

4 THE COURT: I guess I'm still not clear. Is that laid
5 out in the statute, the unsafe lane change statute? Is that
6 what it describes as unsafe lane change?

7 THE WITNESS: I believe so. I read it prior to coming
8 here, yes.

9 THE COURT: So the Arizona Revised Statutes on traffic
10 will define an unsafe lane change just as you've described or
11 include what you've described?

12 THE WITNESS: Close to it, yes. I believe so.

13 BY MR. ROGERS:

14 Q. So how close were these other vehicles to the Mazda?

15 A. I can't give you -- I don't remember. It's been two years.

16 Q. And Arizona law, you mentioned earlier in your testimony,
17 Arizona law does require that a vehicle move over when they see
18 an emergency vehicle or a law enforcement vehicle on the side
19 of the road, correct?

20 A. If it's safe to do so, yes, sir.

21 Q. So if it's not safe to do so, we're not required -- a
22 motorist is not required to move over?

23 A. I believe that's correct.

24 Q. Now, you testified that the -- you also observed, as you're
25 watching this Mazda, you observed that the bumper is sagging or

1 hanging. Those were the words that you used; is that right?

2 A. Yes, sir, correct. The left side, on the driver's side
3 there.

4 Q. And you observed that after the Mazda had moved to the left
5 lane?

6 A. As he's coming towards me.

7 Q. So at what point -- how -- what distance from you would you
8 say the vehicle was when you observed that hanging or sagging
9 bumper?

10 A. I can only estimate. I mean, it's been two years, so maybe
11 50 feet. Maybe 30 feet. But I could see that -- you could see
12 it from the front end, that it was sagging on the left bottom
13 part of the bumper. You could see it. I saw it.

14 Q. And you stated that you believed -- or in your report, you
15 stated that it appeared it had recently been involved in a
16 collision. What made you think that?

17 A. That's what I believed. I thought maybe it possibly was
18 involved in a collision and that's why the bumper was hanging
19 down. It's typical, you know, in my experience when vehicles
20 hit something or there's a collision, that might cause damage
21 to the bumper if they hit the front end or --

22 Q. And what did you mean by "recently"?

23 A. Well, like -- I don't know, maybe earlier in the day.
24 Maybe earlier in the week. I don't know.

25 Q. So what made you believe that it was recent?

1 A. Well, because I just saw it hanging down. The front bumper
2 was hanging down. I didn't know when it occurred. I just
3 meant recently, like it could have been that same day, it could
4 have been the day before.

5 Q. Or it could have been two years ago?

6 A. It could have been.

7 Q. You wouldn't know either way?

8 A. It was just my belief.

9 Q. Now, you said that you observed -- there was a vehicle on
10 the side of the road that you stopped originally to see if the
11 person was okay; is that right?

12 A. Yes.

13 Q. And that person told you that they weren't broken down?

14 A. They weren't broken down.

15 Q. And that didn't cause any suspicion, that a vehicle was on
16 the side of the road and they weren't broken down?

17 A. No. Sometimes people pull over to use the phone or to just
18 rest or to wake up.

19 Q. Did you see her on the phone?

20 A. I believe she might have been on the cell phone. I think
21 she had it in her hand.

22 Q. And you didn't put that in your report, did you?

23 A. No, I did not.

24 Q. It's also typical in that area that people might pull over
25 to pick up illegal aliens?

1 A. I have never experienced that, but it's possible.

2 Q. You've never been involved in a case where someone's parked
3 on the side of the road to pick up illegal aliens?

4 A. No, sir.

5 Q. And you said that the driver, Mr. Ibarra, didn't have auto
6 insurance, right?

7 A. That's what he stated, yes.

8 Q. Did you check that?

9 A. That he didn't have vehicle insurance, you said?

10 Q. Yes.

11 A. How would I check that, sir?

12 Q. You're not able to check whether a vehicle has insurance?

13 A. No, sir.

14 Q. Do you typically give warnings for people who don't have
15 insurance?

16 A. Sometimes, yes.

17 Q. Is that typical?

18 A. At times. It depends -- like he explained to me that he
19 was going to put it on as soon as we were done with the stop.
20 I would give him a warning, say, "Just make sure you get that
21 taken care of."

22 Q. You would consider that a pretty serious violation,
23 wouldn't you, driving without insurance?

24 A. Yeah.

25 Q. But you decided to give him a warning?

1 A. Yes, because he explained to me that he was going to be
2 putting it on his insurance at that point.

3 Q. At some point in the --

4 A. That he was going to call before we were done with the
5 stop, or when we were done with the stop, and he was going to
6 remove an old vehicle, and then add this vehicle to that
7 insurance.

8 Q. And you believed that?

9 A. I did.

10 Q. Now, in your interaction with him, was that in English or
11 in Spanish?

12 A. I believe it was all Spanish. Here and there some English,
13 because sometimes I speak English.

14 THE COURT: Can you slow down, please.

15 THE WITNESS: Sorry.

16 BY MR. ROGERS:

17 Q. So are you saying that your conversation with him was in
18 both English and Spanish?

19 A. You know, I don't recall. I think it was all Spanish, to
20 be honest with you.

21 Q. Okay. And you testified that they had some conflicting
22 statements between Mr. Ibarra and Ms. Ortega, right?

23 A. Correct.

24 Q. Were there any other law enforcement around when they made
25 those statements?

1 A. The -- when they were first -- when I first contacted them,
2 it was just me.

3 Q. It was just you?

4 A. Yes, sir.

5 Q. Now, I'm an attorney, and sometimes I still get nervous --
6 I get nervous when I'm pulled over by police. It's not
7 uncommon for motorists to get nervous, correct?

8 A. Correct.

9 Q. So at some point you issued Mr. Ibarra the warning, but at
10 that point he wasn't free to leave, was he?

11 A. I did not issue him the warning yet. I told him I'd be
12 issuing him a warning.

13 Q. But at some point you did issue him a warning?

14 A. At the end, when we were done with the whole investigation.

15 Q. So that was well after --

16 A. When I was doing -- when we were -- once we did the search
17 and all, I completed the -- yeah, the warning.

18 Q. So you issued the warning after he was arrested?

19 A. Yes.

20 MR. ROGERS: Excuse me one moment, Your Honor.

21 BY MR. ROGERS:

22 Q. So at what -- now, I want to ask you some questions about
23 the speaker box in the trunk.

24 What about the speak -- you're the one that originally
25 found the speaker box in the trunk?

1 A. Myself and Detective Keeling.

2 Q. At the same time?

3 A. Pretty much, yes. We were both searching, so...

4 Q. And you described that as suspicious, didn't you? The
5 speaker box? Do I have that wrong?

6 A. I don't recall using the word "suspicious," just that I saw
7 a speaker box and it wasn't --

8 Q. Did you consider it -- when you observed it, did you
9 consider it something suspicious?

10 A. No. I mean, I've seen speaker boxes in a trunk.

11 Q. And that speaker box, you wouldn't describe it as being
12 new, right?

13 A. No.

14 Q. There were some parts on it that were worn?

15 A. I'd have to look at the -- I -- I believe some screws were
16 missing and it had been -- it looked like it had been tampered
17 with a little bit.

18 Q. I'm showing you what's been marked as Government's
19 Exhibit 2.

20 Does that box look worn?

21 A. Yes. Yes, sir. Yes, sir.

22 Q. So it wouldn't be strange that it might be missing some
23 screws?

24 A. I'd have to look at it. I mean, it was -- yeah, it would
25 be, just because typically, I mean, a speaker has the screws

1 attached to the speaker. I mean, it's screwed in. And it had
2 a few screws and then some were missing, I believe.

3 Q. And typically it wouldn't -- if it's in an old condition
4 like this one was, it wouldn't be uncommon that it might be
5 missing a screw?

6 A. I don't know. I don't know what to answer to that.

7 Q. Well, in your experience.

8 A. I've never had a speaker box, so I -- you know, I don't
9 know what to tell you. I mean, what I've seen is usually the
10 speaker -- the speakers are screwed in so that, you know, they
11 work for the sound.

12 Q. And you testified that you didn't -- that you observed that
13 it wasn't wired in, right?

14 A. Yes. As we were preparing it, we were going to pull it
15 forward, I noticed it wasn't connected.

16 Q. And later, Mr. Ibarra had told you that he had just
17 borrowed it the night before, right?

18 A. Yes.

19 Q. So it wouldn't necessarily be un -- out of the ordinary
20 that it wouldn't have been wired to the car, right?

21 A. No.

22 Q. Now, the drugs, then, after you found the narcotics in the
23 speaker box, Mr. Ibarra was arrested, right?

24 A. Yes, sir.

25 Q. You arrested him?

1 A. I walked over and placed him in handcuffs, yes.

2 Q. And just to be clear, you didn't have a warrant to search
3 the vehicle, right?

4 A. No.

5 Q. And under the law, it's -- you can tow a vehicle for not
6 having valid insurance, right?

7 A. No.

8 Q. You can't tow a vehicle for not having insurance?

9 A. Not -- we do not tow vehicles for no insurance.

10 Q. Okay. That's your policy?

11 A. Right.

12 Q. But under the law, you could?

13 A. I'd have to refresh on that. I don't know.

14 Q. You don't know --

15 A. I'd have to refresh on that.

16 Q. -- whether you --

17 A. I've never towed a vehicle for no insurance, no, sir.

18 Q. And you've never heard of any other law enforcement towing
19 a vehicle for not having insurance?

20 MS. SCHESNOL: Objection. Asked and answered.

21 THE COURT: Sustained.

22 BY MR. ROGERS:

23 Q. So at what time did you arrest Mr. Ozuna --

24 Mr. Ibarra-Ozuna?

25 A. I'd have to look at the report. I don't know. I don't

1 remember. 3:26, maybe.

2 Q. Your report says approximately 1549 hours, Ozuna and Ortega
3 were both placed under arrest.

4 A. Yes, sir.

5 Q. So at 3:49?

6 A. What my report says, sir.

7 Q. Were you wearing a DPS uniform?

8 A. I was wearing my tactical uniform assigned to us in the
9 GIITEM squad, yes.

10 Q. And that's the khaki color typical DPS uniform?

11 A. No, sir. It's black BDUs with the black tactical shirt
12 that says "Police" on the sleeves, both sides, "Police," with a
13 tactical black vest that says "Police" on the chest and on the
14 back.

15 Q. And are you, in your position with DPS and with the GIITEM,
16 are you assigned a body cam?

17 A. No, sir.

18 Q. An on-body camera?

19 A. No, sir.

20 Q. So you don't use a body camera?

21 A. No, sir.

22 MR. ROGERS: Your Honor, I would like to ask the clerk
23 to provide the witness with Defense Exhibits 101 through 104.

24 BY MR. ROGERS:

25 Q. If you could take a look at those, Detective.

1 Do you recognize those four photos?

2 A. Yes, sir. That's the Mazda.

3 Q. Are those in the same series as the exhibits that counsel
4 for the government has already shown you?

5 A. I didn't see -- 101, I didn't see. I don't believe I saw
6 101.

7 Q. What I mean to say is, those were taken at the same time as
8 the photos that were already shown to you, right?

9 A. I didn't take the photos, sir.

10 Q. Are those photos similar to the photos that you've already
11 seen today?

12 A. Yes, sir. They're similar.

13 Q. And they depict what you saw on that day, correct?

14 A. It's the same vehicle, yes, sir.

15 Q. Same vehicle.

16 So it's -- and you recognize what's being shown in
17 those four photos, right?

18 A. It's the Mazda.

19 MR. ROGERS: Your Honor, I would ask that those be
20 admitted at this time.

21 THE COURT: Any objection?

22 MS. SCHESNOL: No, Your Honor.

23 THE COURT: What's the exhibit numbers again?

24 MR. ROGERS: 101 through 104, Defense Exhibits 101
25 through 104.

1 THE COURT: 101 through 104 are admitted.

2 (Exhibit Nos. 101 through 104 admitted into evidence.)

3 MR. ROGERS: May I publish, Your Honor?

4 THE COURT: You may.

5 BY MR. ROGERS:

6 Q. So that -- Detective, that is the -- just to clarify, that
7 is the Mazda that you stopped that day that Mr. Ibarra was
8 driving, correct?

9 A. It looks like it, yes.

10 Q. And that is the passenger side from the rear perspective of
11 that vehicle, right?

12 A. Yes.

13 THE COURT: What exhibit number are we looking at?

14 MR. ROGERS: I'm sorry. 101, Your Honor.

15 THE COURT: Okay.

16 BY MR. ROGERS:

17 Q. If I could show you Exhibit 102, Defense Exhibit 102, that
18 shows another photo of the side view of that vehicle, correct?

19 A. Yes, sir.

20 Q. I'm showing you what's marked as Defense Exhibit 103.

21 And that is another side view of that Mazda from a
22 little bit further up the vehicle, correct?

23 A. Yes, sir.

24 Q. And I'm showing you what's been marked as Defense
25 Exhibit 104.

1 That's the front view of that Mazda, correct?

2 A. Yes, sir.

3 Q. And there you do see the Mazda symbol, right?

4 A. Yes, sir.

5 Q. I also want you to take a look at the upper right-hand
6 corner of that photo. I realize that there's some glare there,
7 but is that the other side of the freeway or the highway that
8 you see in that upper right-hand corner?

9 A. I believe so, yes. I believe so.

10 Q. And you don't see any cars on that other side of the
11 highway there, do you, in that photo?

12 A. No, sir.

13 Q. I'm showing you again what's been marked as Exhibit 101.

14 And you don't see any vehicles further down the
15 highway in that direction in that photo either, do you?

16 A. No, sir.

17 Q. Now, it was your testimony that the traffic was moderate
18 that day?

19 A. Yes, sir.

20 Q. At what time?

21 A. Where he was traveling, yes, sir, there was other vehicles.

22 Q. So it was moderate traffic around 3 -- excuse me --
23 moderate traffic around 3:10 on December 18th, 2017?

24 A. When he was traveling, where he was at, yes, sir. There
25 was other vehicles around him.

1 MR. ROGERS: That's all I have, Your Honor. Thank
2 you.

3 THE COURT: Redirect?

4 MS. SCHESNOL: May I have a moment, Your Honor?

5 REDIRECT EXAMINATION

6 BY MS. SCHESNOL:

7 Q. So, Detective Luna, on December 18th, 2017, you were given
8 a tip; is that correct?

9 A. Yes, ma'am.

10 Q. About what kind of car?

11 A. A Mazda, a gray Mazda.

12 Q. And what about this Mazda?

13 A. That it may be possibly carrying narcotics.

14 Q. On December 18th, 2017, did you see a gray Mazda make an
15 abrupt or unsafe lane change?

16 A. I believe as it went by, I believed it was a Mazda, but I
17 wasn't -- I couldn't say for sure. I believed it was a Mazda
18 initially, yes.

19 Q. You saw a car that made an unsafe --

20 A. Matched the description. I'm sorry.

21 Q. -- that made an unsafe lane change?

22 A. Yes, ma'am.

23 Q. When you caught up to the car, at that point you knew for
24 sure it was a Mazda?

25 A. That is correct.

1 Q. At that point, you saw that it was speeding?

2 A. Yes.

3 Q. You also noticed the damage to the vehicle?

4 A. When I was behind it?

5 Q. At some point prior to --

6 A. Oh, prior, yes, ma'am.

7 Q. -- stopping it.

8 All those things coupled together, you believed the
9 driver might be impaired or the car may have been in a recent
10 accident. Do I understand that correctly?

11 A. That crossed my mind, yes. Based on those circumstances.

12 Q. You made a traffic stop of the vehicle?

13 A. Yes, ma'am.

14 Q. You interacted with the driver, who you've identified as
15 the defendant?

16 A. Yes, ma'am.

17 Q. The defendant was nervous. You -- the way you assessed his
18 behavior was nervous?

19 A. Correct.

20 Q. He gave you inconsistent stories within his own version of
21 events regarding insurance, who he was going to see that day,
22 how long the car had been in Mexico; is that right?

23 A. Yes, ma'am.

24 Q. And what he told you was inconsistent with what the adult
25 female passenger told you, correct?

1 A. Their stories, yeah, went back and forth. It was -- they
2 didn't match up.

3 Q. Based on everything that you saw prior to the traffic stop,
4 if you had not received a tip, would you have stopped this
5 vehicle?

6 A. Yes, ma'am.

7 Q. Based on everything that you saw, was that the reason you
8 asked for consent to search the car?

9 A. Yes, ma'am.

10 MR. ROGERS: Your Honor, I'm going to object at this
11 point to leading.

12 THE COURT: Sustained. And vague.

13 BY MS. SCHESNOL:

14 Q. Did you ask for consent to search the car?

15 A. Yes, ma'am.

16 Q. And the defendant's response was?

17 A. He said that he was in a hurry to get to where he was
18 going, Tempe, and I should get a K9.

19 Q. And what did you do?

20 A. I requested a K9.

21 Q. Based on everything you saw up until -- everything that you
22 saw, was it your belief that that Mazda was the same Mazda you
23 had received a tip about?

24 A. Yes, ma'am.

25 MS. SCHESNOL: No further questions.

1 THE COURT: You may step down.

2 (Witness excused.)

3 THE COURT: Do you have further evidence to present?

4 MS. SCHESNOL: Yes, Your Honor. I actually have at
5 least two more witnesses, potentially three.

6 THE COURT: We're not going to finish tonight, it
7 looks like.

8 MS. SCHESNOL: My next witness, I certainly hope to be
9 done with by 5:00 o'clock.

10 THE COURT: We've got to take a break. We've already
11 been going an hour and a half. We have to take a break every
12 hour and a half for the court reporter. And I don't think
13 we're going to get done by 5:00 o'clock if we take that break,
14 so we probably need to reschedule this.

15 How much more time do you think you need?

16 MS. SCHESNOL: Well, based on how long this has taken,
17 I would say at least another hour and a half.

18 THE COURT: Okay.

19 (The Court and the courtroom deputy confer.)

20 THE COURT: Can you do it Monday? Can counsel be
21 available Monday to finish up at 10:45?

22 MS. SCHESNOL: I'm available on Monday. I just sent
23 the case agent to check with the other witnesses to ensure
24 their availability.

25 THE COURT: All right.

1 MR. ROGERS: Monday at what time, Your Honor?

2 THE COURT: 10:45.

3 MR. ROGERS: That's fine, Your Honor. I do have some
4 things I'll have to rearrange, but that should be fine.

5 THE COURT: We may go to 12:15 to get that hour and a
6 half in to finish up.

7 MS. SCHESNOL: Thank you.

8 MR. ROGERS: I can clear the whole morning.

9 THE COURT: All right. We'll reconvene at 10:45.

10 MS. SCHESNOL: May I just have a moment to ensure that
11 my witnesses are available?

12 THE COURT: Sure.

13 MS. SCHESNOL: Thank you.

14 Thank you for your indulgence, Your Honor. All of the
15 government witnesses are available for Monday morning, so we'll
16 be back.

17 THE COURT: Okay. I don't know how we scheduled it --
18 did we think this was all the time we needed? I don't know.
19 But we'll finish up on Monday and we'll get it done.

20 So each -- we will have an hour and a half on Monday
21 starting at 10:45. And that should be ample time, right?

22 MS. SCHESNOL: I certainly hope so, Your Honor.

23 THE COURT: All right.

24 MS. SCHESNOL: I can't account for how long the
25 defense cross might be. That should be enough time for my

1 questioning.

2 THE COURT: You have two more witnesses?

3 MS. SCHESNOL: Yes, Your Honor.

4 THE COURT: Mr. Rogers, do you anticipate putting any
5 evidence on?

6 MR. ROGERS: No, Your Honor. And my cross -- the
7 most -- lengthiest cross that I had prepared was with Detective
8 Luna, so I don't anticipate being that lengthy with them.

9 THE COURT: I'm not faulting you for the time you
10 spent with him. You do what you need to do with your cross.

11 MR. ROGERS: No, I just wanted to make the Court aware
12 that my cross on the other two witnesses will be shorter than
13 that.

14 THE COURT: All right. So we'll see everybody Monday
15 at 10:45.

16 MS. SCHESNOL: Thank you. Have a pleasant weekend.

17 (Proceedings adjourned at 4:33 p.m.)

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C E R T I F I C A T E

I, JENNIFER A. PANCRATZ, do hereby certify that I am
duly appointed and qualified to act as Official Court Reporter
for the United States District Court for the District of
Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 16th day of
September, 2019.

s/Jennifer A. Pancratz
Jennifer A. Pancratz, RMR, CRR, FCRR, CRC

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)
Plaintiff,) No. CR-18-00076-01-PHX-DLR
vs.)
Phoenix, Arizona
September 16, 2019
Martin Ibarra-Ozuna,)
11:01 a.m.
Defendant.)

BEFORE: THE HONORABLE DOUGLAS L. RAYES, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING (Continued)
(Day 2 - Pages 78 - 141, inclusive)

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I N D E X

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PROCEEDINGS

(The defendant was assisted by the Official Court Interpreter.)

(Proceedings continued at 11:01 a.m.)

THE COURT: We ready to proceed?

MS. SCHESNOL: Yes, Your Honor.

THE COURT: Okay. When we left off, I think the government had another two witnesses to call.

MS. SCHESNOL: Yes, Your Honor, that's correct.

THE COURT: You may call your next witness.

MS. SCHESNOL: The government calls Paul Garofalo.

THE COURT: Sir, would you come up here, please. The clerk sitting right in front of me is going to swear you in.

PAUL GAROFALO,

called as a witness herein by the Government, having been first duly sworn or affirmed, was examined and testified as follows:

THE COURT: You may proceed.

MS. SCHESNOL: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. SCHESENOL:

Q. What is your name, sir?

A. Paul Garofalo.

Q. How are you employed?

A. K9 handler with the U.S. Border Patrol.

Q. How long have you been with the U.S. Border Patrol?

1 A. The Border Patrol, I've been just over 11 years, and I've
2 been a K9 handler for coming up on eight and a half years.

3 Q. Can you very briefly describe the training that you've
4 received to be a Border Patrol agent?

5 A. The initial academy is 90 days. That goes over generalized
6 law enforcement techniques and immigration law.

7 Q. I guess I should clarify. I asked you who you work for,
8 but then I assumed what your actual position is.

9 So can you please state what your position is.

10 A. Border Patrol agent and also assigned as a K9 handler.

11 Q. Can you briefly describe your training to be a K9 handler.

12 A. So I've been through two academies because I've had two
13 dogs. The initial academy with the dog, the K9 receives two
14 weeks of training prior to being assigned to his handler, and
15 then it's five weeks of training with the handler and the dog
16 together before we get certified and -- or sent out to the
17 field to work.

18 Q. And when you're working with a K9, where exactly do you
19 work?

20 A. I'd say probably about 95 percent of the time we work at
21 the checkpoints. Then the other 5 percent of the time we
22 actually get to go out to the field, the river, the border.
23 And then throughout both those times, we do receive other
24 agency calls to assist.

25 Q. Do you currently have a K9?

1 A. Yes, ma'am. My partner is Border Patrol K9 Dev.

2 Q. Dev?

3 A. Yeah, D-E-V.

4 Q. And was Dev your partner on December 18th, 2017?

5 A. Yes, ma'am.

6 Q. Can you briefly describe the process that Dev went through
7 to become -- well, is Dev certified?

8 A. Yes, ma'am.

9 Q. Can you describe the -- what he had to go through to become
10 certified?

11 A. So the dogs, when they're brought to the academy, they go
12 through our selection test. Once the instructors agree that
13 the dog has what it needs to perform the duties, the dog goes
14 through two weeks of initial training with just the
15 instructors, getting put on the odors. Then they test him on
16 how good he recognizes the odors. And then the -- after
17 alert/indication training and then five weeks is with us and
18 the handler together, that we -- before we can certify.

19 Q. Is there ongoing training or certification that's required?

20 A. Yes. Every pay period we do an eight-hour training day
21 where the instructors will take us to simulate things that we
22 may encounter in the field. They'll put the aids out. We run
23 the dogs to get the -- put the dogs on odor and also work on
24 our handler skills.

25 Q. You mention that you do that every pay period. What is

1 your typical pay period?

2 A. Every two weeks we do it, at least one day.

3 Q. Is there any annual certification that Dev goes through?

4 A. Yeah. Every year we have to go through a 17-search
5 recertification process, and then we're graded on our handler
6 skills, how well we can read the dog, and the dog is graded
7 also on how well he did.

8 Q. And is Dev currently certified?

9 A. Yes. We recertified in July.

10 Q. Of this year?

11 A. This year, yes.

12 Q. Was Dev certified December 18th of 2017?

13 A. Yes, ma'am.

14 Q. You mentioned something about alert/indication training.

15 Do I have that correct?

16 A. Yes, ma'am.

17 Q. What is that?

18 A. So what we're trained to read is the dog's alert, which his
19 alert is a change of body posture and increased respiration
20 when the dog first encounters the odor he is trained to detect.
21 And then the indication is where he'll sit at the source of the
22 odor.

23 Q. And what -- what kind of odors is Dev trained to detect?

24 A. So the odors of controlled substances, so marijuana,
25 heroin, cocaine, and methamphetamines and their derivatives.

1 Q. Were you and your partner, Dev, working on December 18th,
2 2017?

3 A. Yes, ma'am. We were assigned our K9 maintenance training
4 day that day.

5 Q. Were you called to respond to a traffic stop?

6 A. Yes. I received a call from my supervisor requesting --
7 that DPS was requesting a K9.

8 Q. Do you remember approximately what time you were called?

9 A. It was about 1520 hours.

10 Q. Is that, for those of us in layman terms, is that
11 3:20 p.m.?

12 A. 3:20 in the afternoon, ma'am.

13 Q. Where specifically did you respond to?

14 A. I was requested to respond to Highway 195, Mile Marker 19
15 on the northbound lane.

16 Q. Is that within the District of Arizona?

17 A. Yes, ma'am.

18 Q. Upon arrival, what, if anything, did you see?

19 A. So I was coming from the south, had to go across the median
20 to get into the northbound lane. I saw the detective's vehicle
21 that I was supposed to make contact with, and then I saw the
22 vehicle that he pulled over parked in front of his vehicle.

23 MS. SCHESNOL: Michele, would you be so kind as to
24 hand the witness Exhibit No. 1.

1 BY MS. SCHESNOL:

2 Q. Do you recognize Exhibit No. 1?

3 A. Yes, ma'am. That's the vehicle that was stopped in front
4 of the DPS detective's vehicle.

5 Q. On December 18th, 2017?

6 A. Yes, ma'am.

7 Q. You mentioned you made contact with Detective Luna; is that
8 correct?

9 A. Yes, ma'am, Detective Luna.

10 Q. And what, if anything, did he ask you to do or mention to
11 you?

12 A. He just mentioned that he stopped the vehicle for speeding
13 and that the driver was nervous and asked if I could run my dog
14 on the vehicle.

15 Q. And as far as non-law enforcement individuals that were
16 present on that day, do you remember who -- or describe who was
17 out there that day other than law enforcement?

18 A. There was one male subject, a female subject, and a minor
19 child.

20 Q. And of any of those individuals, did you make contact?

21 A. I spoke with the driver briefly.

22 Q. And what did you do when you spoke with the driver?

23 A. I identified myself as a K9 handler with the U.S. Border
24 Patrol. I asked him to state his citizenship, I asked him who
25 the vehicle belonged to, and I asked him if he would give me

1 consent to perform a K9 sniff on the interior and exterior of
2 the vehicle.

3 Q. When you asked him who the vehicle belonged to, what, if
4 anything, did he tell you?

5 A. He said the vehicle belonged to him.

6 Q. When you asked for his consent to search the vehicle, what,
7 if anything, did he tell you?

8 A. He said, "Sure, go ahead."

9 THE COURT: What did you ask him? How did you ask
10 him?

11 THE WITNESS: I asked him -- I explained why I was
12 here, my position with the Border Patrol. And I asked him, "Do
13 you give me consent to run my dog and perform a K9 sniff on the
14 inside and the outside of the vehicle?"

15 THE COURT: Did you have him sign any documents?

16 THE WITNESS: No, sir.

17 THE COURT: Don't you normally have a consent form?

18 THE WITNESS: No, sir, not for asking for consent, we
19 don't.

20 THE COURT: Okay.

21 BY MS. SCHESNOL:

22 Q. As a result of the defendant answering you affirmatively,
23 what, if anything, did you and Dev do?

24 A. So after I got consent, I returned to my truck to grab my
25 dog, Dev, and we walked back up to the vehicle. I always start

1 my K9 sniffs on the driver's side headlight. So I started
2 there, gave him the "geh" command, which is just to tell him to
3 start sniffing.

4 From there we moved along the outside first, going
5 around the interior of the whole vehicle until we got back to
6 the driver's side headlight. From there I opened up the
7 driver's door and put him inside just halfway, got him back
8 out, put him into the passenger door on the driver's side, and
9 let him sniff halfway in there. And that's when he alerted the
10 first time to the backseat of the vehicle.

11 After that, got him out of there, put him in the
12 trunk, let him sniff in there, got him out, and then we started
13 on the passenger side, the same thing. I opened the door on
14 the passenger side, the rear passenger door, got him inside,
15 and he alerted a second time to the rear passenger seat.

16 From there --

17 Q. Let me ask you a question before you go on.

18 You've described the way you brought Dev around the
19 exterior and interior of the car. Why did you do it in that
20 particular order?

21 A. That's how we were trained and taught to perform a vehicle
22 screen and search. It's a pattern that the dog is used to, so
23 every time we do a vehicle, that dog knows, all right, I need
24 to start sniffing these areas where I'm presenting for him.

25 Q. You mentioned that Dev alerted in the backseat area of the

1 car?

2 A. Yes, ma'am.

3 Q. Can you please describe what Dev did specifically to alert.

4 A. When he went in the vehicle, he closed his mouth and jammed
5 his nose in between the seats and started breathing real hard
6 sounding like a vacuum, basically. He was trying to breathe in
7 as much air as possible.

8 Q. Did he do anything else?

9 A. After I got him out of there and out of the passenger side,
10 I put him in the front passenger door, and then he also alerted
11 in the same way to the dashboard. After I got him out of
12 there, I finished up the front of the vehicle, and then I
13 returned him to my truck.

14 Q. And when you talked about Dev's kind of heavy -- heavy
15 inhalation? Is that correct?

16 A. Respiration.

17 Q. -- respiration, like a vacuum cleaner, is that the alert
18 that you've seen Dev give before?

19 A. Yes, ma'am.

20 Q. How long has Dev been your K9?

21 A. We will be coming up on six years together.

22 Q. As a result of Dev alerting on the vehicle, what, if
23 anything, did you do?

24 A. After I returned Dev to my truck, I went and spoke with
25 Detective Luna, told him that he alerted to the backseat twice

1 and he alerted to the dashboard. And I told him I would help
2 him search the vehicle.

3 MS. SCHESNOL: May I have a moment, Your Honor?

4 THE COURT: Yes.

5 MS. SCHESNOL: No further questions, Your Honor.

6 THE COURT: Cross-examination.

7 CROSS-EXAMINATION

8 BY MR. ROGERS:

9 Q. Good morning, Agent Garofalo.

10 A. Good morning, sir.

11 Q. Did I pronounce that right? I'm sorry.

12 A. "Gar-follow."

13 Q. "Gar-follow."

14 A. Thank you, sir.

15 Q. Now, you just testified -- well, first of all, Agent, you
16 prepared a report in this incident, correct?

17 A. Yes, sir.

18 Q. And you prepare those reports to include important
19 information about the incident, correct?

20 A. Yes, sir.

21 Q. And so everything that you placed in your report was what
22 you felt was important in this case, right?

23 A. Yes, sir.

24 Q. And you testified a moment ago that Detective Luna had
25 mentioned to you when you arrived that he had stopped the

1 vehicle for speeding, correct?

2 A. Yes, sir.

3 Q. And that was the only reason that he had shared with you
4 for the reason for his stop, correct?

5 A. Yes, sir.

6 Q. So he didn't mention anything about any kind of unsafe lane
7 changes, right?

8 A. No, sir.

9 Q. And he didn't mention anything to you about any kind of
10 damage to the vehicle, right?

11 A. No, sir.

12 Q. Now, you would consider your K9, Dev, very well trained,
13 right?

14 A. Yes, sir.

15 Q. And he -- so he conducted an interior and exterior sniff of
16 the vehicle, right?

17 A. Yes, sir.

18 Q. In your report, you indicated that he had alerted to the
19 dashboard?

20 A. Yes, sir.

21 Q. And that he had alerted to the rear passenger area,
22 correct?

23 A. Yes, sir.

24 Q. And in your report, you didn't mention that he had alerted
25 to the backseat, correct?

1 A. Just the rear passenger area.

2 Q. So no detail about having -- having alerted to the
3 backseat?

4 A. To the specific backseat, no, sir.

5 Q. Okay. Now, you had testified a moment ago -- and refresh
6 my memory. I wasn't clear on that. Did he alert to the dash
7 first and then to the backseat area, or which was first?

8 A. The backseat was first on the driver's side of the vehicle,
9 the rear passenger, when I put him in the rear passenger door.

10 Q. And obviously, when you did that -- when you did the K9
11 sniff, there was no passengers in the vehicle, right?

12 A. No. Correct. Everybody was out of the vehicle.

13 Q. Was there anything else that was removed from the vehicle?

14 A. No, not that I was aware of.

15 Q. Okay. And so Agent Dev did not alert to the trunk,
16 correct?

17 A. When I got him in there, no, sir.

18 Q. It's a yes or -- I'm sorry?

19 A. When I got him in there, no, sir.

20 Q. I couldn't quite make out what you said. Slower.

21 A. When I put him there, no, he did not, sir.

22 Q. Okay. So when you did the exterior sniff, he didn't alert
23 to the trunk?

24 A. No, sir.

25 Q. Now, did Detective Luna tell you that -- when you arrived,

1 that Mr. Ibarra had given him consent for you to run the K9?

2 A. No, sir.

3 Q. So you didn't have any knowledge of any consent before you
4 asked Mr. Ibarra?

5 A. No, sir.

6 MR. ROGERS: If I may just have one moment, Your
7 Honor.

8 BY MR. ROGERS:

9 Q. So just to clarify, lastly, you had testified that he --
10 that Dev alerted to the backseat twice, but in your report you
11 didn't mention that, correct?

12 A. No, sir. I just referred to it as the rear passenger area.

13 MR. ROGERS: Okay. That's all I have, Your Honor.

14 THE COURT: When the dog sniffed the trunk, was the
15 trunk open?

16 THE WITNESS: When I first did the outside, it was
17 closed; and then when I did the interior, I opened it. I
18 opened it on the interior sniff, sir.

19 THE COURT: Opened the trunk?

20 THE WITNESS: Yes, sir.

21 THE COURT: And did the dog alert on that?

22 THE WITNESS: No, sir.

23 THE COURT: So why did you search the trunk?

24 THE WITNESS: When we do get a sniff or an alert from
25 the dog, by policy and training, we search everything, not just

1 the areas, because the odor -- depending on wind and
2 everything, the odor will be moving around in the vehicle, so
3 the dog might pick the alert up in a different area. We just
4 don't want to focus our attention to that one area, we want to
5 make sure we cover everything.

6 THE COURT: Is the trunk behind the seat?

7 THE WITNESS: The -- yes, sir.

8 THE COURT: The back passenger seat?

9 THE WITNESS: Yes, sir.

10 THE COURT: All right. Any redirect?

11 MS. SCHESNOL: Thank you, Your Honor.

12 REDIRECT EXAMINATION

13 BY MS. SCHESNOL:

14 Q. I want to focus your attention a little bit more on this
15 line of questioning with regard to Dev not alerting on the
16 trunk.

17 When dogs are trained to alert on odors such as
18 narcotics, can you describe the quantity of the drugs that the
19 dogs train on?

20 A. So when the dogs are initially trained, it is very small
21 amounts. The actual initial training of it is they use cotton
22 balls, dip a cotton ball in the substance that they want to
23 train. They stuff the four odors into a toy, and then they
24 play fetch with the dog.

25 And then our maintenance training is similar to very

1 small amounts of narcotics that we are able to train, because
2 we don't have access to large quantities of narcotics to use
3 for the dogs.

4 Q. In your eight and a half years as a dog handler and your
5 six years with Dev, can you please describe, in your
6 experience, why Dev might not alert on a large amount of drugs?

7 A. So due to the fact that the dogs are trained and maintained
8 using small amounts, if the dog has never encountered a
9 quantity of that size, it will overwhelm the dog.

10 Q. When Dev alerted on the back passenger area or the backseat
11 of the vehicle, can you -- I believe you said he kind of stuck
12 his nose in the seat; is that right?

13 A. Yes, ma'am.

14 Q. And in your experience with Dev, why -- and he alerted in
15 that area, correct?

16 A. Yes, ma'am.

17 Q. Why might he have alerted in that backseat or back
18 passenger area in the direction of the trunk but not on the
19 trunk itself when the trunk is where drugs were found?

20 A. Due to the fact that from where we found the stuff in the
21 speaker box, the speaker box and then all the padding and
22 cushion in the seat, it would filter the amount of odor that
23 was going to the dog, and it brought it to an amount that was
24 more easy for him to recognize.

25 MS. SCHESNOL: No further questions.

1 THE COURT: You may step down. Thank you for coming.

2 THE WITNESS: Thank you.

3 (Witness excused.)

4 THE COURT: The government may call its next witness.

5 MS. SCHESNOL: The government calls Richard Keeling,
6 being fetched now.

7 THE COURT: Mr. Keeling, would you come up here,
8 please. The clerk standing right in front of me is going to
9 swear you in.

10 RICHARD KEELING,
11 called as a witness herein by the Government, having been first
12 duly sworn or affirmed, was examined and testified as follows:

13 MS. SCHESNOL: May I proceed?

14 THE COURT: You may proceed.

15 DIRECT EXAMINATION

16 BY MS. SCHESNOL:

17 Q. Please state your name for the record.

18 A. My name is Richard Keeling.

19 Q. How are you employed?

20 A. I'm a detective with the Arizona Department of Public
21 Safety, attached to the DEA in Yuma full time.

22 Q. How long have you been with the Department of Public
23 Safety?

24 A. A little over six years.

25 Q. And in that six years, how long have you been assigned over

1 to DEA?

2 A. A little over three years.

3 Q. Can you briefly describe the training that you've gone
4 through to become a law enforcement officer.

5 A. I started my training here in Arizona at the Arizona Law
6 Enforcement Academy. I graduated from that academy in April of
7 2013 to be a certified state police officer. I then attended
8 the Arizona Department of Public Safety advanced academy for
9 several more months.

10 During those academies, we were trained in criminal
11 law, civil traffic law. We were trained in drug recognition,
12 crimes of that aspect. And then I went on to a three-month
13 field training program with the department and graduated out of
14 that.

15 I've also been to multiple interdiction schools. I've
16 been to the Department of Public Safety weeklong interdiction
17 school where you specifically look for drug type of activity,
18 searching vehicles, things of that nature. I've been to the
19 Buckeye criminal interdiction school. I've also been a
20 two-week DEA task force officer school in Quantico, Virginia,
21 among other schools.

22 Q. And what are some of your duties and responsibilities as a
23 DPS officer assigned to DEA?

24 A. Assigned to the DEA, I am still a state-certified officer,
25 so I respond to anything that normal highway patrol officers

1 get, any type of crime that needs further investigation. On
2 the DEA side, we're strictly investigating drug smuggling types
3 of crimes. And in our area, we have a heavy emphasis on
4 smuggling from Mexico into the United States, and then from --
5 once it's into the United States, we investigate as they
6 further themselves into destination cities and throughout the
7 U.S.

8 Q. And you mentioned heavy drug smuggling because of the area
9 you're located in. What area is that?

10 A. In Yuma, Arizona, which is close to the border with San
11 Luis, Mexico.

12 Q. As part of your responsibilities, you mentioned
13 drug-related crimes. Does that include conspiracy to possess
14 controlled substances for distribution?

15 A. It does.

16 Q. And does that also include investigating drug trafficking
17 organizations?

18 A. It does.

19 Q. As part of your duties and responsibilities, were you a
20 part of an investigation that involved Martin Ibarra-Ozuna?

21 A. Yes, ma'am.

22 Q. When did that investigation take place?

23 A. I believe it started in December of 2016 and ended in
24 December of 2017.

25 Q. During that yearlong investigation, can you describe what

1 kind of investigative techniques were used throughout that
2 year.

3 A. We conducted surveillance. We conducted geolocation on
4 people's phones. We also were involved in a wiretap, an
5 authorized wiretap, interviews, and things of that nature.

6 Q. And you personally, what -- were you involved in some of
7 those things that you've just described?

8 A. I was involved in those things, as well as reading reports
9 and collaborating with other law enforcement officers,
10 including in office, on things that had taken place with the
11 investigation.

12 Q. Were you involved with any searches, drug seizures,
13 photographs of evidence, things like that?

14 A. Yes, ma'am.

15 Q. Based on the yearlong investigation, did law enforcement
16 know who Mr. Ibarra was married to or who he lived with?

17 A. Yes, ma'am.

18 Q. And who was that?

19 A. Melissa Ortega.

20 Q. And based on your participation in the investigation, did
21 you come to become familiar with what Mr. Ibarra looked like?

22 A. Yes, ma'am.

23 Q. And do you see Mr. Ibarra in the courtroom today?

24 A. I do.

25 Q. Can you please describe where he is sitting and what he is

1 wearing?

2 A. He's the gentleman to my left, and he's appearing to be
3 wearing an orange shirt.

4 MS. SCHESNOL: Your Honor, may the record reflect the
5 identification of the defendant?

6 THE COURT: It may so reflect.

7 MS. SCHESNOL: Thank you.

8 BY MS. SCHESNOL:

9 Q. Based on the investigation, did law enforcement know what
10 kind of cars Mr. Ibarra and Ms. Ortega utilized?

11 A. Yes, ma'am.

12 Q. What cars were those?

13 A. We know that they had a Cadillac. I believe it was a CTS.
14 He had a Toyota MR2 and then a Mazda Mazda3.

15 Q. With regard to the Toyota MR2, was there a point during the
16 investigation that law enforcement came to learn that that car
17 was no longer usable?

18 A. Yes, ma'am. I believe --

19 Q. Approximately when was that?

20 A. I believe it was September of 2017.

21 Q. With regard to the Mazda, did law enforcement know who the
22 registered owner of the Mazda was?

23 A. Yes, ma'am.

24 Q. And who was that?

25 A. Melissa Ortega.

1 MS. SCHESNOL: Michele, would you be so kind as to
2 show the witness Exhibit No. 25?

3 BY MS. SCHESNOL:

4 Q. Are you familiar with what Exhibit No. 25 is?

5 A. Yes, ma'am.

6 Q. What is that?

7 A. This is a Motor Vehicle Division document showing Melissa
8 Ortega as the registered owner of the vehicle with the license
9 plate CDN9763.

10 Q. And is that a certified record?

11 A. It is.

12 MS. SCHESNOL: Your Honor, the government moves for
13 the admission of Exhibit No. 25.

14 THE COURT: Any objection?

15 MR. ROGERS: No objection, Your Honor.

16 THE COURT: Exhibit 25 is admitted.

17 (Exhibit No. 25 admitted into evidence.)

18 MS. SCHESNOL: Your Honor, I can either publish it or
19 I know you have a copy of it up at the bench if you --

20 THE COURT: Whichever you prefer.

21 MS. SCHESNOL: I'll throw it on the overhead.

22 BY MS. SCHESNOL:

23 Q. So is this the certified record you were just referring to?

24 A. Yes, ma'am.

25 Q. And this is the registered owner, Melissa Ortega?

1 A. That is correct.

2 Q. And this is the license plate, CDN9763; is that correct?

3 A. Yes, ma'am.

4 Q. You mentioned that as a part of this investigation, there
5 was a wiretap. Is that correct?

6 A. That is correct.

7 Q. And was that Court authorized?

8 A. It was.

9 Q. Do you know when, approximately, the Court authorized that
10 wiretap?

11 A. In August of 2017.

12 Q. And do you know on whose phone the Court authorized a
13 wiretap?

14 A. Yes, ma'am. It was Mr. Ibarra's.

15 Q. And to the best of your knowledge, was that phone number
16 identified as 928-315-8594?

17 A. Yes.

18 Q. Through the course of the investigation, approximately how
19 many calls on Mr. Ibarra's phone had law enforcement
20 intercepted?

21 A. Hundreds.

22 Q. And based on your role in this investigation, are you
23 familiar with some of those hundreds of calls?

24 A. Yes, ma'am.

25 Q. And with regard to listening to these various calls and the

1 surveillance and other techniques that were used by law
2 enforcement, are you aware of a drug seizure that occurred in
3 September 2017?

4 A. Yes, ma'am.

5 Q. Can you please briefly describe what you know about that
6 seizure.

7 A. I believe in September of 2017, law enforcement intercepted
8 a driver of a vehicle who ultimately had I think approximately
9 32 pounds of methamphetamine in it. And that seizure was tied
10 to Mr. Ibarra and some other Mexican numbers via the wiretap.

11 Q. And was there also surveillance that tied Mr. Ibarra to
12 that seizure as well?

13 A. Yes, ma'am.

14 Q. But just for clarification, it was not Mr. Ibarra that was
15 ultimately caught with those drugs; is that right?

16 A. That is correct.

17 Q. Through the course of this wiretap, did law enforcement
18 identify a Mexican phone number as 653-116-4181 as a number
19 that Mr. Ibarra was in frequent contact with?

20 A. Yes, ma'am.

21 Q. Did law enforcement believe that the user -- I'm going to
22 abbreviate it and call it phone number 4181. Did law
23 enforcement believe that the user of phone 4181 was also using
24 another telephone?

25 A. Yes, ma'am.

1 Q. And was that phone number, to the best of your
2 recollection, 653-113-1744?

3 A. Yes, ma'am.

4 Q. Did law enforcement identify where the user of those two
5 phones was located?

6 A. We believe it was in Mexico.

7 Q. What was the general nature of the calls between
8 Mr. Ibarra's phone and the user of these two phones, 1744 and
9 4181?

10 A. They were generally in contact to coordinate loads coming
11 into the U.S. that Mr. Ibarra would eventually come into
12 contact with those people.

13 Q. Now, you've already described something that occurred in
14 September. Again, for clarification, as far as we know, that
15 particular load was not linked to 1744 or 4181; is that
16 correct?

17 A. Correct.

18 Q. But law enforcement knew that Ibarra was connected to that
19 load?

20 A. Yes, ma'am.

21 Q. So let's talk about November of 2017. Was -- from
22 listening to phone calls, was Mr. Ibarra linked to 1744 and
23 4181 in November of 2017?

24 A. Yes, ma'am.

25 Q. And what, if anything, happened in November of 2017 based

1 on law enforcement listening to intercepted calls and doing
2 surveillance?

3 A. So in November of 2017, law enforcement intercepted a
4 separate driver and vehicle that ultimately was found to be
5 transporting, I believe, 84 pounds of methamphetamine and
6 2 pounds of heroin.

7 Q. Did the calls between the defendant's phone and 4181
8 continue into December 2017?

9 A. Yes, ma'am.

10 Q. Did some of those calls occur on December 17th of 2017?

11 A. They did.

12 MS. SCHESNOL: Michele, would you be so kind as to
13 show the witness Exhibits 19 through 23?

14 BY MS. SCHESNOL:

15 Q. Are you familiar with what Exhibits 19 through 23 are?

16 A. Yes, ma'am.

17 Q. And how is it that you are familiar with these items?

18 A. I have actually reviewed these transcripts from the
19 wiretap.

20 Q. And specific -- so these are -- to be specific, these are
21 transcripts from the wiretap of Mr. Ibarra's phone?

22 A. Yes, ma'am.

23 Q. And what are the dates of these transcripts?

24 A. They are December 17th of 2018 to December -- I'm sorry,
25 '17 to 12/18/18 -- let me look and review them.

1 So they're from 12/17/2017 to 12/18/2017.

2 Q. And to the best of your knowledge, are these fair and
3 accurate translations and transcriptions of the phone calls
4 that occurred that date?

5 A. As far as I know, yes.

6 MS. SCHESNOL: Your Honor, the government moves for
7 the admission of Exhibits 19 through 23.

8 THE COURT: Any objection?

9 MR. ROGERS: No objection, Your Honor.

10 THE COURT: Exhibits 19 through 23 are admitted.

11 (Exhibit Nos. 19 through 23 admitted into evidence.)

12 BY MS. SCHESNOL:

13 Q. Based on these phone calls -- based on these phone calls,
14 did law enforcement have an understanding of what these calls
15 were about and what might be happening?

16 A. Yes, ma'am.

17 Q. Can you please describe what law enforcement understood to
18 be going on.

19 A. So based on these transcripts, we believed that Mr. Ibarra
20 would be transporting a load of illegal drugs on December 18th
21 of 2017. We believed that he would be utilizing the Mazda,
22 that he would be taking his family with him, and that they
23 would be utilizing a speaker box, somehow, and possibly other
24 compartments in the vehicle.

25 Q. So turning your attention specifically to Exhibit 19, which

1 has been admitted, what was the date and time of that call?

2 A. This one is on December 17th of 2017 at 9:24 p.m.

3 Q. And who was that call between, between what phone numbers
4 or what people?

5 A. Mr. Ibarra, 8594, and the user of the phone number ending
6 in 4181.

7 Q. Now, you said based on these calls, the -- law enforcement
8 believed that Mr. Ibarra would be driving the day after this
9 phone call, on December 18th, 2017; is that correct?

10 A. Correct.

11 Q. So I'm going to direct your attention to this area I'm
12 pointing to.

13 And is it based on the conversation regarding
14 "tomorrow," that led law enforcement to believe that Mr. Ibarra
15 would be going on the 18th?

16 A. That is correct.

17 Q. Directing your attention to Exhibit No. 23, what is the
18 date and time of that call?

19 A. It is December 18th, 2017, at 10:27 a.m.

20 Q. And is that call also between Defendant Ibarra and the user
21 of phone 4181?

22 A. Yes, ma'am.

23 Q. And, again, discussing why law enforcement believed that
24 Mr. Ibarra would be driving on the 18th of December, we're now
25 on the 18th of December, and I want to direct your attention to

1 this line I'm pointing to.

2 And can you read for the record what that says?

3 A. It says: "I'll let you know, but it'll be about two more
4 hours."

5 Q. And in this call, Exhibit 23, they're continuing to talk
6 about moving -- what law enforcement believed to be moving
7 drugs; is that correct?

8 A. Yes, ma'am.

9 Q. You also indicated that from listening to these calls, law
10 enforcement believed that Mr. Ibarra would be taking his family
11 with him; is that correct?

12 A. That's correct.

13 Q. So directing your attention back to Exhibit 19, directing
14 your attention right here, could you please read for the record
15 what the transcript says with regard to Mr. Ibarra's family.

16 A. It says: "You're going with family anyway, it's not,
17 not" -- and then there's a stutter -- "a problem. Should
18 they" --

19 Q. Okay. You can stop right there, because I just want to
20 focus on the "family" part.

21 And then directing your attention to where I'm
22 pointing now, if you could read that portion for the record.

23 A. It says: "Oh, no, no, yeah, dude, tomorrow. Tomorrow and
24 as if you're going shopping and shit. I mean, same thing,
25 you're going shopping, go -- uh, vacation and shit, it's no

1 problem."

2 Q. And in your training and experience, do people who
3 sometimes have things that are illegal in their car bring their
4 families with them when they're traveling?

5 A. Yes.

6 Q. Why is that?

7 A. It's to make it look more normal. If they're stopped by
8 law enforcement, it's less likely that the law enforcement will
9 look into them further.

10 Q. You talked about law enforcement believed that Mr. Ibarra
11 would be driving the Mazda. Is that correct?

12 A. Yes, ma'am.

13 Q. But you also mentioned that law enforcement knew that
14 Ibarra had a Cadillac. So how did law enforcement -- why did
15 law enforcement believe that Mr. Ibarra would be driving a
16 Mazda when you know that he has two cars?

17 A. In the transcripts, there's a portion where Mr. Ibarra was
18 asked, I believe, if the Cadillac would make the trip, and
19 Mr. Ibarra said he didn't believe that the Cadillac would make
20 it. Which left the Mazda.

21 Q. So directing your attention to Exhibit 21, which has been
22 admitted, what is the date and time of that call?

23 A. It's December 17th of 2017, at 9:48 p.m.

24 Q. And what numbers is that call or people is that call
25 between?

1 A. It's Mr. Ibarra and the user of phone number ending in
2 4181.

3 Q. So directing your attention, can you please read the
4 pertinent parts regarding the discussion of the Cadillac?

5 A. The user of number 4181 says: "The Cadillac, the Cadillac,
6 the black one. Would it make it?"

7 And Mr. Ibarra replies: "All the way there, I don't
8 think so, dude. You know how it's been."

9 And then Mr. -- the user of 4181 says, "I know. Okay,
10 son, then get that."

11 Q. Did law enforcement also, from listening to calls, come to
12 believe what route Mr. Ibarra might be taking?

13 A. Yes, ma'am.

14 Q. And how did law enforcement come to know that?

15 A. During the calls, the user of number 4181 told him that the
16 preferred route would be the 8, Interstate 8, but if that was
17 not an option, then Mr. Ibarra was to go up the 111, which is
18 in California.

19 Q. And it sounds like you've basically given a synopsis of
20 what is in this portion of the transcript, where they -- where
21 there is a reference to if the 8 is open, that you'll go all
22 the way on the 8; if not, the 111?

23 A. That's correct.

24 Q. Is that correct?

25 A. Yes, ma'am.

1 Q. What is the 8? What is the 111? What are they talking
2 about?

3 A. Interstate 8 is the interstate that runs east-west through
4 Yuma, Arizona. The 111 is a highway in California that you can
5 get to if you basically head west on Interstate 8 and then go
6 north. Around the El Centro area, you can get to the 10 that
7 way on the east side of the Salton Sea on the 111.

8 Q. And directing your attention back to Exhibit 23. And you
9 already testified that this took place the morning of
10 December 18th. What, if anything, is said to Mr. Ibarra
11 about -- just so it's clear, Mr. Ibarra isn't the speaker, it's
12 the other individual -- regarding the roads?

13 A. So the user of phone number 4181 said: "All right. They
14 are going to, they are going to check the roads."

15 Q. And based on your experience, what does that mean? Who's
16 "they"? What does that mean, to "check the roads"?

17 A. So these transnational criminal organizations will
18 typically send scouts to various checkpoints to see how well
19 they're manned, if there's heavy traffic, are there K9s working
20 at the checkpoints at the time. And then they'll make their
21 decisions on which routes to take based on what they feel is
22 the best way to get through or the safest way to get through
23 without getting caught.

24 Q. So are there checkpoints on both the 8 and the 111?

25 A. Yes, ma'am.

1 Q. State Route 195, can you please describe where that fits in
2 with these --

3 A. Sure.

4 Q. -- other routes?

5 A. State Route 195 runs from San Luis, Mexico, into the
6 eastern side of Yuma right around -- and ends at Araby Road.
7 It's about 26 miles long from San Luis to Yuma, and you can get
8 on the Interstate 8 about -- less than a half a mile after
9 getting off of 195.

10 Q. So what's the most direct route from San Luis to I-8?

11 A. To that portion, 195.

12 Q. Have you worked that road, 195?

13 A. I have.

14 Q. And because that's the most direct route, can you describe
15 how -- how utilized 195 is?

16 A. Yes. When I was a uniformed highway patrol officer, it was
17 not uncommon for me to work that road. It's one of our areas
18 of responsibility. So occasionally I would work it. It's the
19 only interstate that runs -- or U.S. Highway 195, it's the only
20 highway that runs from San Luis to Yuma unimpeded. So it's a
21 very direct route. It's a two-lane divided highway, so you're
22 not having to pass vehicles and things of that nature. You
23 don't have to go through any towns until you get to Yuma. I've
24 worked it for speed, other civil traffic violations, things of
25 that nature.

1 Q. And because it is the most direct route, how would you
2 describe how utilized it is?

3 A. It's highly utilized.

4 Q. Finally, with regard to these phone calls, you said law
5 enforcement believed that a speaker box would be utilized. So
6 directing your attention back again to Exhibit 19 with that in
7 mind, was there conversation within Exhibit No. 19, within that
8 phone call, that was about where -- what parts of the vehicle
9 would be used?

10 A. Yes.

11 Q. Can you please describe that.

12 A. So in Call No. 19, they were talking about spreading --
13 spreading it out throughout the vehicle, through the doors and
14 that type of nature.

15 Q. Do they talk about whether or not there's any hollow space
16 within the car?

17 A. They do, when they were having a problem with the amount of
18 space that was available, according to these calls.

19 Q. And based on your training and experience, what are they
20 talking about when they're talking about hollow things and
21 spreading it out? What is that about?

22 A. In vehicles, there are what is known as natural voids. And
23 they're not normally accessible to a regular person. You have
24 to kind of move things out of the way like carpeting or
25 panelling to get to those areas. But once that is removed,

1 these organizations tend to hide items in those natural voids
2 in the vehicles.

3 Q. And why do they do that?

4 A. In order to conceal them from law enforcement.

5 Q. Directing your attention to Exhibit 20, which is admitted,
6 but I don't think we've talked about the exact time or date of
7 that call. What is the time and date of Exhibit 20?

8 A. Exhibit 20 took place on December 17th, 2017, at 9:39 p.m.

9 Q. And was that call also between Mr. Ibarra and the user of
10 4181?

11 A. Yes, ma'am.

12 Q. And in that phone call, do they talk about where they
13 might -- what areas of the vehicle they might utilize?

14 A. Yes, ma'am.

15 Q. And what do they talk about?

16 A. Mr. Ibarra talks about getting a box, and he ends up
17 telling the user of 4181 that it was specifically a speaker
18 box.

19 Q. And is that directly from the transcript that Mr. Ibarra
20 says a speaker box?

21 A. Yes, ma'am.

22 MS. SCHESNOL: I'm going to pause while the
23 interpreters swap out.

24 BY MS. SCHESNOL:

25 Q. Based on these phone calls, did law enforcement conduct any

1 surveillance?

2 A. Yes, ma'am.

3 Q. And when was that conducted?

4 A. The night prior, on December 17th, I want to say about
5 10:20 p.m.

6 Q. And what, if anything, was observed by law enforcement that
7 would be relevant to us?

8 A. So law enforcement observed Mr. Ibarra at a separate
9 location with his vehicle backed into a driveway. He was
10 described as wearing a light on his hat and doing some sort of
11 work in the trunk of the Mazda.

12 Q. So just to be clear, you mentioned something about a second
13 location. Do you -- like, can you narrow it down to like city,
14 state?

15 A. It was also in San Luis, Arizona.

16 Q. But not at the defendant's house?

17 A. Correct.

18 Q. And specifically, was the Mazda observed?

19 A. Yes, ma'am.

20 Q. And was that the Mazda that you referenced in Exhibit 25,
21 the Mazda with the license plate beginning CDN?

22 A. Yes, ma'am.

23 Q. And based on this surveillance and these phone calls, what,
24 if anything, did law enforcement do with regard to speaking
25 with other law enforcement agencies?

1 A. So the next morning, when we believed Mr. Ibarra would be
2 transporting the illegal contraband, we had surveillance on his
3 actual residence waiting for him to leave. We also notified
4 local law enforcement to be on the lookout for his vehicle and
5 to, if they saw it, develop their own probable cause to make a
6 stop and see what they could -- go from there.

7 Q. And collaborating with other law enforcement, is that
8 something that is typical, unusual?

9 A. Very typical.

10 Q. Were you working December 18th, 2017?

11 A. I was.

12 Q. And what, if anything, did you do that day?

13 A. I did respond to the traffic stop of Mr. Ibarra and
14 Ms. Ortega.

15 Q. Do you remember approximately where that took place?

16 A. It was on U.S. Highway 95 near Milepost 19 northbound.

17 Q. And just for my clarification, was it on 95 or 195?

18 A. 195.

19 Q. Thank you.

20 And approximately, if you remember, what time did you
21 respond out there?

22 A. About 3:26 p.m. was when I received the call. It only took
23 me a couple minutes to get there.

24 MS. SCHESNOL: Michele, would you give the witness
25 Exhibits 1 through 8?

1 Sorry, Michele. Can you also give him 28 and 29?

2 Thank you.

3 BY MS. SCHESNOL:

4 Q. Have you had the opportunity to review those exhibits?

5 A. Yes, ma'am.

6 Q. Let's first talk about Exhibit No. 1, which is already
7 admitted into evidence.

8 Do you recognize what Exhibit No. 1 is?

9 A. Yes, ma'am.

10 Q. And what is that?

11 A. That is the Mazda that was pulled over on 195 at
12 Milepost 19 that day.

13 Q. And is that also the vehicle that you've described as being
14 registered to Melissa Ortega?

15 A. Yes, ma'am.

16 Q. And for the -- for all our recollection, who is married to
17 Melissa Ortega?

18 A. Mr. Ibarra.

19 Q. Is that the same Mazda that was seen on surveillance the
20 night before as backed into a residence and Mr. Ibarra was seen
21 working in the trunk area?

22 A. To my knowledge.

23 Q. Directing your attention to Exhibit No. 29, do you
24 recognize what that is?

25 A. Yes, ma'am.

1 Q. What is that?

2 A. It's the same vehicle we've been discussing, the Mazda3.

3 Q. And when you were on the scene on December 18th, 2017, did
4 you notice any damage to the Mazda?

5 A. I did.

6 Q. Can you please describe that?

7 A. That front -- the front left bumper was hanging low.

8 Q. And is that depicted in Exhibit No. 29?

9 A. Yes, ma'am.

10 Q. When you responded to the scene, were there other law
11 enforcement personnel there?

12 A. Yes, ma'am.

13 Q. Who was there?

14 A. When I responded, there were two unmarked DPS vehicles, one
15 Border Patrol vehicle, and to my recollection, I remember
16 speaking with Department of Public Safety Detective George Luna
17 and BP Agent Garofalo.

18 Q. Did either of them sort of bring you up to speed as what
19 had happened before you arrived?

20 A. They did.

21 Q. What did they tell you?

22 A. So Detective Luna told me that he had made the stop based
23 on civic traffic violations, and that during the stop, he had
24 spoken to both Mr. Ozuna and Ms. Ibarra. Their stories didn't
25 match, they seemed nervous, and that he called for a K9.

1 And then Mr. Garofalo told me that his K9 was
2 deployed, the K9 did alert to the vehicle, and that we had
3 probable cause to search.

4 Q. And in addition to the law enforcement personnel that you
5 saw on the scene, what, if any, quote/unquote, civilians were
6 there?

7 A. Mr. Ibarra was there, Ms. Ortega was there, and a small
8 child.

9 Q. And Mr. Ibarra, is that the same person who you previously
10 identified in court as the defendant?

11 A. Yes, ma'am.

12 Q. As a result of what you were told by law enforcement, what,
13 if anything, did you do?

14 A. I then conducted a search of the vehicle.

15 Q. Let's talk about Exhibit No. 2, which is already in
16 evidence.

17 Can you describe what Exhibit No. 2 is?

18 A. Exhibit No. 2 is the speaker box that I pulled out of the
19 trunk of the vehicle.

20 Q. Can -- and okay. So you mentioned that that was in the
21 trunk. When you searched the trunk, can you describe what you
22 saw?

23 A. I saw this speaker box in the trunk of the vehicle with
24 those speakers still covering the holes. I noticed that the
25 speaker box didn't have any wiring attached to it, and I

1 thought that was odd.

2 Q. Why did you think that was odd?

3 A. Well, normally when you're going to have a speaker box in
4 your vehicle to utilize, it's going to be attached to the
5 stereo for use. And we had the calls the night before
6 believing that this -- a speaker box would be utilized somehow.

7 Q. And what, if anything, did you do with the speaker box?

8 Because clearly in this picture it's no longer in the trunk.

9 A. Detective Luna and I pulled it out. As we were pulling it
10 out, I noticed it was very heavy. It was abnormally heavy. I
11 also noticed that there were some screws missing in the actual
12 speakers themselves, so they weren't fully attached to the box.

13 Q. Let's talk about --

14 MS. SCHESNOL: Unless the -- I'm not sure, Your Honor,
15 if you're standing to stretch or if you're -- if you feel
16 you've heard enough at this point.

17 THE COURT: I'm just -- there's a lot of repetition.
18 So if there's something that someone hasn't -- I don't think
19 these facts are in dispute, the things you're talking about,
20 so...

21 MS. SCHESNOL: Okay. My motive was that should one
22 witness's credibility be questioned, what another witness
23 observed.

24 THE COURT: All right.

1 BY MS. SCHESNOL:

2 Q. And why did you find it unusual that the box was heavy?

3 A. I've actually had multiple cases where people have utilized
4 speaker boxes, and I've searched vehicles where they hadn't
5 utilized them before. So I've lifted speaker boxes out of the
6 trunk of vehicles that were both empty and some that had been
7 loaded, and you can tell the difference in weight.

8 Q. And this one was?

9 A. It was loaded.

10 Q. And with regard to the screws that you've mentioned, why --
11 what, if anything, about that did you find unusual?

12 A. It's abnormal, especially for someone who's utilizing a
13 speaker box for its intended purpose. It's unusual to have any
14 of the components missing that have it secured down. It tells
15 that someone has taken them off and putting them back on.

16 Q. And speaking of taking off the speakers, is that what you
17 did?

18 A. Yes, ma'am.

19 Q. And what, if anything, did you find inside the speaker box?

20 A. I observed multiple plastic-wrapped packages that appeared
21 to be illegal contraband, due to my training and experience.

22 Q. Did you ultimately have the opportunity to count how many
23 packages were in that speaker?

24 A. Yes, ma'am.

25 Q. And before you did that, once you saw what you believed to

1 be an illegal substance, what, if anything, happened to the
2 car, the people who had previously been in the car? What
3 happened with all of them?

4 A. So I stopped the search at that point. Detective Luna
5 placed both Mr. Ibarra and Ms. Ortega in custody, and I had the
6 vehicle and both suspects moved to the DEA office for further
7 investigation.

8 Q. Once the vehicle was at DEA, was the car further searched?

9 A. Yes, ma'am.

10 Q. Can you please describe that?

11 A. So once at DEA, I continued the search of the vehicle. I
12 removed the speaker box once again. We counted 44
13 plastic-wrapped packages in the speaker box. Also in the trunk
14 area, underneath the spare tire, was a black plastic bag. When
15 I opened it, I saw more packages and a handwritten note. The
16 handwritten note said: Extra 10, cachete 7, and cajon 44.

17 Q. Okay. We'll talk in detail about that in a moment. For
18 now, I'd like to direct your attention to Exhibit No. 28. Can
19 you take a look at that, please.

20 What is Exhibit 28?

21 A. This is a picture of the packages I found in the black
22 plastic bag, and you can see the handwritten note in the middle
23 of this picture.

24 Q. Is this a fair and accurate depiction of what you saw on
25 December 18th, 2017?

1 A. Yes, ma'am.

2 MS. SCHESNOL: Your Honor, the government moves for
3 the admission of Exhibit No. 28.

4 THE COURT: Any objection?

5 MR. ROGERS: No objection, Your Honor.

6 THE COURT: Exhibit 28 is admitted.

7 (Exhibit No. 28 admitted into evidence.)

8 BY MS. SCHESNOL:

9 Q. So to those of us who are not trained in detecting
10 narcotics, can you please describe what's depicted in this
11 photograph?

12 A. So this is a very typical way to transport what turned out
13 to be methamphetamine in this case. You can see some clear
14 cellophane packaging. If you look at the one on the left,
15 there appears to be browning to it. Sometimes these
16 organizations will use some sort of masking agent. It could
17 be -- this was probably some sort of grease or something like
18 that, and then they'll package over that to hopefully not alert
19 the dogs. But this is a very typical package style.

20 Q. And you mentioned a note. Is that what this little
21 folded-up piece of paper is?

22 A. Yes, ma'am.

23 Q. Directing your attention to Exhibit No. 6, can you take a
24 look at that.

25 And what is Exhibit No. 6?

1 A. It's one of the notes that I found in the vehicle that I
2 described earlier.

3 Q. Okay. Is that a fair and accurate depiction of what you
4 saw on December 18th, 2017?

5 A. Yes, ma'am.

6 MS. SCHESNOL: Your Honor, the government moves for
7 admission of Exhibit No. 6.

8 MR. ROGERS: No objection.

9 THE COURT: Exhibit 6 is admitted.

10 (Exhibit No. 6 admitted into evidence.)

11 BY MS. SCHESNOL:

12 Q. So you had started talking about some handwriting and words
13 and numbers, and I cut you off. So now that we have it in
14 front of us, can you please --

15 THE COURT: What does this have to do with probable
16 cause?

17 MS. SCHESNOL: Just for the continuing to search the
18 vehicle and additional things that were found.

19 THE COURT: Okay. Well, we're looking -- I think the
20 issue here is whether or not there was probable cause to search
21 the vehicle.

22 MS. SCHESNOL: I am happy to leave things where they
23 are then. Even though I will -- the note is -- it's quite
24 intriguing, but you can wait for trial.

25 THE COURT: It might be interesting when we determine

1 what the issues in the whole case are, but for probable cause,
2 this isn't something they knew before they searched.

3 MS. SCHESNOL: Well, this went towards the continuing
4 search, but yes, you are correct; before the initial search,
5 that's correct.

6 THE COURT: Does this go to reasons why they searched
7 beyond this.

8 MS. SCHESNOL: Just why they continued to search the
9 vehicle. But it doesn't affect the initial search, which is
10 probably what's mostly at issue here.

11 THE COURT: Well, whatever's at issue, I think we need
12 to talk about. What's not at issue, we shouldn't talk about.

13 MS. SCHESNOL: Agreed, Your Honor. I'm almost
14 wrapping it up.

15 THE COURT: Okay.

16 BY MS. SCHESNOL:

17 Q. So the note that was found, you talked about 44 packages
18 were counted from the speaker box; is that correct?

19 A. Yes, ma'am.

20 Q. And is the number 44 on the note that you found?

21 A. It is.

22 Q. And what else is on this note that you found?

23 A. The word "extra 10," which matched the number of packages I
24 found in the black plastic bag. And then the word "cachete 7"
25 led me to continue searching the vehicle. "Cachete," I was

1 told meant cheek, so I searched the quarter panels in the
2 vehicle. In the right rear quarter panel, I found another
3 seven packages like these ones and another note like this one.

4 Q. So the amounts that are indicated on this note matched up
5 to the amount of drugs that were recovered; is that correct?

6 A. That is correct.

7 MS. SCHESNOL: May I have a moment, Your Honor?

8 THE COURT: Yes.

9 BY MS. SCHESNOL:

10 Q. Directing your attention back to your testimony regarding
11 notification to DPS on the morning of December 18th, 2017,
12 what, to the best of your knowledge, was DPS told? Or what was
13 the general information provided?

14 A. I didn't speak with Detective Luna, but I did -- I was in
15 contact with another uniformed officer who was waiting a little
16 more northbound. And the instructions that we were giving them
17 were this -- be on the lookout for this vehicle. It may be
18 loaded with drugs. Develop your own probable cause to make the
19 stop.

20 Q. And when you say "this vehicle," what vehicle are you
21 talking about?

22 A. Talking about the Mazda3.

23 MS. SCHESNOL: No further questions.

24 THE COURT: Mr. Rogers?

1 CROSS-EXAMINATION

2 BY MR. ROGERS:

3 Q. So, Detective Keeling, just to be clear, you -- before
4 arriving on scene where the Mazda was at, you had not talked to
5 Detective Luna before that?

6 A. I don't remember if I had talked to him at all that day,
7 but not about making a traffic stop on the vehicle.

8 Q. So if you were told that Detective Luna knew to be on the
9 lookout for a Mazda that might have drugs, he would have got --
10 it's your testimony that he would have gotten that information
11 from somebody else?

12 A. Yes, sir.

13 Q. And you had testified earlier that Detective Luna, when you
14 arrived, that he had told you that Mr. Ibarra and his wife had
15 unmatching stories; is that correct?

16 A. Yes, sir.

17 Q. But you weren't there to hear those so-called unmatching
18 stories, correct?

19 A. That's correct, sir.

20 Q. And as far as you know, it was just Detective Luna who had
21 talked to Mr. Ibarra and Ms. Ortega about that?

22 A. As far as I know.

23 Q. Now, you testified that you had experience with speaker
24 boxes. In those previous incidences where you found speaker
25 boxes, were they always wired?

1 A. No, sir.

2 Q. So in some they were wired, some they weren't?

3 A. Correct.

4 Q. So that in and of itself, that it wasn't wired, wouldn't
5 necessarily be suspicious, correct?

6 A. Not always, sir.

7 Q. And you saw the exhibit that was shown to you of the
8 speaker box. That -- those speaker box was not a brand-new
9 speaker box, correct?

10 A. Correct.

11 Q. It had some scuffing on it?

12 A. Yes, sir.

13 Q. So the fact that it was missing some screws, that wouldn't
14 necessarily be uncommon for a used speaker box either, correct?

15 A. No, sir.

16 Q. So once you found the speaker box in the trunk -- well, let
17 me back up.

18 When you arrived, was the trunk open?

19 A. I don't believe so.

20 Q. So do you remember if you opened the trunk?

21 A. I don't remember, sir. I do know that they had not started
22 the search prior to me getting there. So whether it was myself
23 or one of the other people, it was one of us.

24 Q. Okay. So, but you assisted Detective Luna in removing the
25 speaker box from the trunk, right?

1 A. Yes, sir.

2 Q. And then you removed the speakers?

3 A. I believe so.

4 Q. And then after finding plastic bundles inside the speakers,
5 at some point you put the speaker back in the trunk, right?

6 A. Yes, sir.

7 Q. And then you had the Mazda moved to a DEA office?

8 A. Yes, sir.

9 Q. And that's where you did the -- continued the search?

10 A. Yes, sir.

11 Q. So none of the things that you testified that you had found
12 in other parts of the trunk you had seen before being back in
13 the DEA office?

14 A. Correct.

15 Q. And you weren't there when Mr. Ibarra gave consent to
16 search the vehicle, correct?

17 A. That is correct.

18 Q. Were you -- at the time that you were on the scene, did you
19 ever see anything that had been removed from the interior of
20 the vehicle?

21 A. Not to my knowledge, sir.

22 Q. Well, when you say not to your knowledge, did you see
23 anything removed -- that had been removed from the vehicle,
24 excluding the trunk, anything that had been removed from the
25 vehicle prior to you arriving there?

1 A. I didn't see anything.

2 Q. And when you were there on scene, you didn't see anybody
3 remove anything from the interior of the vehicle, correct?

4 A. I did not.

5 MR. ROGERS: That's all I have, Your Honor.

6 THE COURT: Any redirect?

7 REDIRECT EXAMINATION

8 BY MS. SCHESNOL:

9 Q. Just to be clear, the passengers had been removed prior to
10 the search?

11 A. Yes.

12 Q. And with regard to the missing screws and the speaker box
13 not being wired, that was an indication to you of perhaps there
14 being something in the speaker -- the speaker box being
15 utilized, correct?

16 A. Correct. It gives us a higher probability in our minds.

17 Q. And did the weight of it also do that?

18 A. Yes, ma'am.

19 Q. As well as the phone call that specifically mentioned a
20 speaker box?

21 A. Yes, ma'am.

22 Q. And regarding the information passed from law enforcement
23 to -- one law enforcement officer to Detective Luna, was that
24 officer, to the best of your knowledge, someone also working as
25 part of this investigation?

1 A. Oh, I'm sure it would be.

2 MS. SCHESNOL: Thank you, Your Honor.

3 THE COURT: After the call that was intercepted on
4 December 17th at about 9:39, did you feel you had probable
5 cause to believe there would be evidence of a crime in that
6 Mazda on the next day on U.S. Highway 195?

7 THE WITNESS: Yes, sir.

8 THE COURT: So why didn't you go for a search warrant?

9 THE WITNESS: I am not the case agent in this case,
10 sir. Those decisions were left to the case agents.

11 THE COURT: Okay. So what the case agent decided was
12 to avoid getting a search warrant, he would have an officer
13 find a pretext to stop him?

14 THE WITNESS: If I may, sir, we normally do that in
15 order to protect the integrity of the wire, not have to
16 disclose it at the moment is the reason we generally have law
17 enforcement stop vehicles on probable cause rather than using
18 ours. If that makes sense, sir.

19 THE COURT: Okay. All right.

20 All right. You can step down. Thank you.

21 THE WITNESS: Thank you, sir.

22 (Witness excused.)

23 THE COURT: All right. Any further evidence?

24 MS. SCHESNOL: May I just have a moment, Your Honor?

25 MR. PASHAYAN: Just one moment, please, Your Honor.

1 MS. SCHESNOL: Your Honor, with the Court's
2 permission, we'd like to put our case agent on the stand very
3 briefly.

4 THE COURT: We're going to have to reschedule this
5 then. We set this for an hour and a half, and we've already
6 used that hour and a half now. It's time to go.

7 MS. SCHESNOL: I'm sorry, Your Honor. I thought we
8 started closer to 11:00 o'clock based on the sentencing and --

9 THE COURT: Well, I have an hour and a half with my
10 court reporter.

11 MS. SCHESNOL: Okay. I really need no more than 5
12 minutes with this witness.

13 THE COURT: Okay. Go ahead.

14 MS. SCHESNOL: Thank you. I appreciate it, Your
15 Honor.

16 The government calls Eugene Sardinas.

17 THE COURT: I'll remind you you're still under oath.

18 MS. SCHESNOL: Actually, I'm not sure this witness
19 ever was placed under oath.

20 THE COURT: Sorry. Go ahead.

21 EUGENIO SARDINAS,
22 called as a witness herein by the Government, having been first
23 duly sworn or affirmed, was examined and testified as follows:

24 THE COURT: You may proceed.

25 MS. SCHESNOL: Thank you, Your Honor.

1 DIRECT EXAMINATION

2 BY MS. SCHESNOL:

3 Q. Before you even start, I'm going to ask you to speak as
4 slowly and as clearly as possible.

5 Please state your name for the record.

6 A. Eugenio Sardinas.

7 Q. How are you employed?

8 A. I'm employed -- I'm a Border Patrol agent assigned to the
9 Drug Enforcement Administration out of Yuma.10 Q. Are you part of the investigation team into Martin
11 Ibarra-Ozuna?

12 A. Yes.

13 Q. I want to jump to December 17th, 2017.

14 Are you familiar with the calls that have been
15 admitted into evidence as Exhibits 19 through 23?

16 A. Yes.

17 Q. Are you familiar with the surveillance that was done the
18 night of December 17th, 2017?

19 A. Yes.

20 Q. And with -- as part of your role in this investigation, are
21 you considered the co-case agent?

22 A. Yes, ma'am.

23 Q. Can you please describe how the information was conveyed
24 from your investigative team to Detective Luna regarding the
25 Mazda.

1 A. Sure. Based on the intercepted calls that we got that day
2 before Mr. Ibarra's arrest, my co-case agent, Ms. Venza,
3 notified Detective Valenzuela, who at that time I believe was
4 assigned to GIITEM, which is a task force out of DPS.

5 Detective Valenzuela performed surveillance on
6 Mr. Ibarra the day before, and that's where he observed a
7 vehicle which was identified as the Mazda3 at a location at a
8 house. And Mr. Ibarra appeared to be working on the back end
9 of that vehicle.

10 Based on that and based on the intercepted calls, that
11 led us to believe that there was a drug event that was going to
12 be taking place the day -- a day later. Ms. -- my co-case
13 agent, Venza, notified once again task force agent -- I'm
14 sorry, task force Officer Valenzuela that -- to be on the
15 lookout in case the Mazda3 decided to route -- to take off
16 pretty much from his house.

17 Q. And based on your familiarity with this case, did
18 Detective -- or, excuse me, did Agent -- Officer Valenzuela
19 relay that information to Detective Luna?

20 A. Yes, ma'am.

21 Q. And had Officer Valenzuela been a part of this
22 investigation at -- you know, throughout its course?

23 A. Yes.

24 MS. SCHESNOL: No further questions. Thank you for
25 the Court's indulgence.

1 THE COURT: Any cross-examination?

2 MR. ROGERS: Just briefly, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. ROGERS:

5 Q. So, Agent, so as far as you know, Detective Luna knew that
6 he was looking for a Mazda that might have drugs in it,
7 correct?

8 A. That is correct, sir.

9 MR. ROGERS: All right. Thank you.

10 THE COURT: All right. You may step down.

11 THE WITNESS: Thank you, sir.

12 (Witness excused.)

13 THE COURT: Any further evidence?

14 MS. SCHESNOL: Now the government has no further
15 evidence. Thank you.

16 THE COURT: Mr. Rogers, do you have any evidence to
17 present?

18 MR. ROGERS: No, Your Honor.

19 THE COURT: Does each side want to make a short
20 closing argument?

21 MS. SCHESNOL: Yes. Very briefly, Your Honor.

22 As the Court knows, really, the issue here is the stop
23 and the search of the vehicle. Anything else that was set out
24 in the motions to suppress were abandoned on Friday.

25 THE COURT: So let me make sure. When we're talking

1 about the lawfulness of the stop, we're talking about a
2 reasonable cause to suspect that the defendant had committed a
3 traffic violation?

4 MS. SCHESNOL: Yes.

5 THE COURT: And there's two traffic violations the
6 officer talked about plus the damage to the vehicle.

7 MS. SCHESNOL: Yes, Your Honor.

8 THE COURT: I want to spend more time on the
9 lawfulness of the search.

10 MS. SCHESNOL: Okay.

11 THE COURT: Okay. In considering whether there was
12 probable cause for the search, am I allowed to consider the
13 information that was developed through the wiretaps and any
14 other information that the officers knew?

15 MS. SCHESNOL: Yes, Your Honor.

16 THE COURT: Even though Officer Luna may not have
17 known that specific information?

18 MS. SCHESNOL: That is correct, based on the legal
19 doctrine of collective knowledge.

20 THE COURT: And what about the idea that this was a
21 pretext stop and they could have gotten a search warrant; they
22 had probable cause the day before?

23 MS. SCHESNOL: Well, Your Honor, basically, according
24 to *Wren*, R -- excuse me, W-R-E-N, which is cited in my motion,
25 it's -- it's okay. I mean, with collective knowledge, is

1 acceptable.

2 And if I can just back up a little bit, Detective Luna
3 did testify very clearly and unequivocally that even if he had
4 not been given this tip, he would have stopped that car based
5 on the abrupt and unsafe lane change, based on the speed. He
6 thought potentially the driver was impaired or had been in an
7 accident, based on those things coupled with the bumper.

8 THE COURT: Okay.

9 MS. SCHESNOL: Then, on top of that, both the
10 defendant and the female adult passenger were nervous. They
11 each gave inconsistent stories within their own version of
12 events and inconsistent with each other.

13 Then when he asked for consent to search the car, when
14 Detective Luna asked for consent to search the car, the
15 defendant said, "Get a dog." So Luna got a dog. The dog
16 alerted on the car.

17 THE COURT: I'm familiar with the facts.

18 MS. SCHESNOL: And the law is very clear that a dog
19 alert on a car is probable cause to then go ahead and search
20 the car, which they did.

21 So that's sort of one silo of events. Then coupled
22 with the collective knowledge, the officers -- they had
23 probable cause based on the wire calls and the surveillance to
24 stop and search the car. Yes, they could have gotten a search
25 warrant, but the law does not require that. When they have

1 probable cause, they do not have to get a search warrant.

2 THE COURT: Okay.

3 MS. SCHESNOL: So based on those two theories, it is
4 the government's position that both the stop and the search
5 were lawful and none of the evidence should be suppressed.

6 Thank you.

7 THE COURT: Thank you.

8 Mr. Rogers?

9 THE DEFENDANT: Your Honor, I would like to say
10 something also.

11 THE COURT: Well, does your client want to testify?

12 MR. ROGERS: Your Honor, we discussed the issue of his
13 right to testify previously to this hearing. He did not tell
14 me that he wanted to testify at this hearing, and it was -- and
15 it was not my intention to call him to testify.

16 THE COURT: Okay. But it sounds like he wants to
17 testify.

18 MR. ROGERS: If Your Honor will give me a minute, I'll
19 discuss that with him.

20 THE COURT: Okay.

21 (Conference off the record between the defendant and
22 Mr. Rogers.)

23 MR. ROGERS: Your Honor, thank you for your
24 indulgence. I have discussed the issue with my client, and
25 against my advice, he does wish to testify.

1 THE COURT: Okay. We're going to have to continue
2 this then. We're all out of time.

3 I can either do it probably Friday at 4:00 o'clock or
4 Monday, a week from today, at 4:00 o'clock. So we just got
5 to --

6 MR. ROGERS: Your Honor, I know that I have a bond
7 hearing in immigration court in Florence on Friday at 2:00.

8 THE COURT: So let's do it Monday, then, at 3:45.

9 MR. ROGERS: I have a disposition at 2:30, so I'd be
10 here.

11 THE COURT: Okay.

12 MS. SCHESNOL: The government is available. My only
13 concern is we're starting trial the very next day, so that
14 doesn't give us a lot of time.

15 THE COURT: I'm ruling on it on Monday. I can't rule
16 on it until I hear from the defendant, and I don't have time
17 today now.

18 MS. SCHESNOL: Understandable.

19 THE COURT: Okay.

20 MS. SCHESNOL: Thank you.

21 THE COURT: All right.

22 Okay. We'll stand in recess until Monday at 3:45.

23 (Discussion off the record.)

24 THE COURT: Friday at 8:30 work? Friday, 8:30?

25 MS. SCHESNOL: Yes.

1 MR. ROGERS: Yes.

2 THE COURT: Okay. Friday 8:30.

3 MS. SCHESNOL: Thank you, Your Honor.

4 MR. ROGERS: Thank you.

5 (Proceedings adjourned at 12:31 p.m.)

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C E R T I F I C A T E

I, JENNIFER A. PANCRATZ, do hereby certify that I am
duly appointed and qualified to act as Official Court Reporter
for the United States District Court for the District of
Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 17th day of
September, 2019.

s/Jennifer A. Pancratz
Jennifer A. Pancratz, RMR, CRR, FCRR, CRC

APPENDIX5

CA NO. 20-10412

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, } (D.Ct. 2:18-cr-00076-DLR-1)
Plaintiff-Appellee, }
v. }
MARTIN IBARRA-OZUNA, }
Defendant-Appellant. }

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HONORABLE DOUGLAS L. RAYES
United States District Judge

CARLTON F. GUNN
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Pasadena, California 91103
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Attorney for Defendant-Appellant

II.

STATEMENT OF ISSUES PRESENTED

A. WAS PROLONGING A TRAFFIC STOP AND CONDUCTING SUBSEQUENT SEARCHES UNJUSTIFIED UNDER THE FOURTH AMENDMENT?

1. Does the Collective Knowledge Doctrine Fail to Justify the Stop and Searches?

- a. Does the collective knowledge doctrine fail to justify the stop because the officers who requested the stop did not have probable cause or reasonable suspicion for the broad request they made?
- b. Does the collective knowledge doctrine fail to justify the searches because the requesting officers requested only a traffic stop, with the development of independent probable cause for any search that might take place?

2. Can Prolonging the Stop and Conducting the Searches Be Justified Without the Collective Knowledge Doctrine, Especially in the Absence of Further Findings by the District Court?

- a. Without the collective knowledge doctrine, was the stop improperly prolonged beyond what was necessary for addressing traffic violations, in violation of *Rodriguez v. United States*, 575 U.S. 348 (2015)?
- b. Even if prolonging the stop was permissible, is there a need for findings the district court declined to make about a dog sniff?

B. DID THE DISTRICT COURT ERR IN IMPOSING A “MANAGER” OR “SUPERVISOR” ROLE ENHANCEMENT UNDER THE SENTENCING GUIDELINES BECAUSE THE FACTUAL FINDINGS IT RELIED ON ARE CLEARLY ERRONEOUS AND/OR LEGALLY INSUFFICIENT TO SHOW THE REQUIRED CONTROL OR AUTHORITY OVER ANOTHER PARTICIPANT?

III.

BAIL STATUS OF DEFENDANT

Mr. Ibarra is presently serving the sentence imposed by the district court. His projected release date is August 11, 2028.

IV.

STATEMENT OF CASE

A. STOP AND ARREST.

On December 18, 2017, Arizona Department of Public Safety Detective George Luna was informed a vehicle that was “possibly loaded with narcotics” would be traveling from San Luis, Arizona on Arizona Highway 195. 2-ER-206. Detective Luna was asked “to develop our own probable cause for the traffic stop, and then address it as a regular traffic stop.” 2-ER-206-07. The vehicle was described as a gray Mazda. *See* 2-ER-233-34, 255.

Detective Luna observed a gray Mazda later that day while he was pulled over to help another motorist. *See* 2-ER-199-200. The Mazda moved from the

right lane into the left lane as it passed and then moved back into the right lane after passing. 2-ER-200, 207–08. Detective Luna claimed the front left bumper was “kind of a little bit sagging.” 2-ER-199.

Detective Luna drove after the Mazda, caught up to it, and paced its speed for several miles. 2-ER-200–01. The Mazda’s speed fluctuated, but it did exceed the speed limit at times, and Detective Luna pulled it over. 2-ER-201–02. The stop took place at milepost 19 of Highway 195, 2-ER-202, which is approximately 19 miles from San Luis, near the end of the highway in Yuma, Arizona, *see ADOT Right of Way Section: SR 195*, https://apps.azdot.gov/files/ROW/Plans/SR_195/SR_195_Index.pdf (last visited May 18, 2021).

The driver of the Mazda was Mr. Ibarra, and he had his wife and small child with him. *See* 2-ER-203. Detective Luna asked Mr. Ibarra for his driver’s license, registration, and proof of insurance. 2-ER-204. He also asked if Mr. Ibarra had been involved in a collision, because of the front bumper “sagging” he claimed he saw. 2-ER-214. When Mr. Ibarra started to answer, his wife interrupted and said they had just purchased the car from an elderly woman. 2-ER-214. Detective Luna asked where they were going, and Mr. Ibarra replied they were going to Tempe, Arizona, to pick up his brother. 2-ER-215. Regarding insurance, Mr. Ibarra said he did not have insurance yet, and his wife said the vehicle had been in Mexico. 2-ER-216. Mr. Ibarra said he planned on getting insurance before leaving Yuma, 2-ER-218, and he later explained he had insurance on another vehicle and would be substituting the Mazda for that vehicle, *see* 2-ER-222.

Detective Luna did not address traffic violations at that point, but asked Mr. Ibarra to step out of the car. 2-ER-219. He separated Mr. Ibarra from Mr. Ibarra’s wife by directing Mr. Ibarra back to the patrol car, where there was another officer who had just arrived. 2-ER-219. Detective Luna then “told him that I was going

to go back up and talk to [his wife], and had him just wait with the other officer.” 2-ER-219–20. Detective Luna then walked back to the Mazda and spoke with the wife. *See* 2-ER-220.

After speaking with the wife, Detective Luna returned to Mr. Ibarra. *See* 2-ER-220. He continued to put off addressing traffic violations, asking how long the car had been in Mexico and where Mr. Ibarra was going to pick up his brother. *See* 2-ER-220. Mr. Ibarra clarified that it was his wife’s brother, not his brother, and he had trouble recalling exactly how long the car had been in Mexico. *See* 2-ER-220–21. Detective Luna addressed traffic violations after this discussion, explaining why he had stopped Mr. Ibarra and telling Mr. Ibarra he would just issue a warning and Mr. Ibarra should get the insurance taken care of. *See* 2-ER-221–22.

Even then, Detective Luna did not simply issue the warning and let Mr. Ibarra leave. He did not issue the warning until “the end, when we were done with the whole investigation.” 2-ER-247. What he did after telling Mr. Ibarra he was just going to issue a warning was ask if he could search the car. *See* 2-ER-225–26. Mr. Ibarra replied that he preferred not to allow a search because he was in a hurry to get to where he was going and asked, “Why don’t you just get a K9?” 2-ER-226.

Detective Luna then called a K9 officer to the scene, 2-ER-226, and the K9 officer conducted a search with his dog. *See* 2-ER-129–32. The dog did not alert when it circled around the outside of the vehicle and did not alert when it was placed inside the trunk. *See* 2-ER-131, 135. The officer then placed the dog inside the vehicle and believed the dog did alert at that point. *See* 2-ER-131–32.

Detective Luna then called another officer, Detective Richard Keeling, to

the scene. *See* 2-ER-159, 228. Detective Keeling was an officer on the task force that had requested the stop. *See* 2-ER-159, 228. He had listened to wiretap recordings and participated in surveillance that suggested Mr. Ibarra would be transporting drugs in the Mazda that day. *See* 2-ER-148-58.

After Detective Keeling arrived, the officers searched the entire vehicle. *See* 2-ER-162-63, 228-29. They found methamphetamine in a speaker box in the trunk, in a bag under the spare tire, and in the right rear quarter panel of the car. *See* 2-ER-162-69, 229-33. The officers then arrested Mr. Ibarra and his wife. 2-ER-233.

B. INDICTMENT.

The government subsequently indicted Mr. Ibarra and multiple codefendants. *See* CR 9. Mr. Ibarra was charged with conspiracy to possess methamphetamine and heroin with intent to distribute, money laundering conspiracy, and five substantive possession with intent to distribute counts. *See* CR 9. The substantive counts were possession with intent to distribute methamphetamine on March 31, 2017, with codefendant Fabiola Gomez; possession with intent to distribute methamphetamine on September 20, 2017, with codefendant Flabio Gaxiola; possession with intent to distribute methamphetamine on November 23, 2017, with codefendant Marino Cota-Reyes; possession with intent to distribute heroin on November 23, 2017, with codefendant Marino Cota-Reyes; and possession with intent to distribute methamphetamine on December 18, 2017, with codefendant Melissa Ortega, Mr. Ibarra's wife. *See* CR 9.

A year and a half later, the government filed a superseding indictment. *See*

2-ER-262-68. It removed the money laundering count and codefendants Ortega, Gaxiola, and Reyes-Cota, who had pled guilty, *see* CR 107, 110, 113; broke up the drug conspiracy count into three separate conspiracies; and added two substantive counts charging Mr. Ibarra with possession with intent to distribute methamphetamine on January 19, 2017, with a codefendant named Adrian Gutierrez, and possession with intent to distribute heroin on the same date with Mr. Gutierrez. *Compare* 2-ER-262-68 with CR 9. The superseding indictment also added a codefendant named Fernando Guzman – to the substantive counts of possession with intent to distribute methamphetamine and possession with intent to distribute heroin on November 23, 2017, and possession with intent to distribute methamphetamine on December 18, 2017, and a separate conspiracy count for that time period. *See* 2-ER-265-66.

C. SUPPRESSION HEARING.

Mr. Ibarra’s attorney filed motions to suppress evidence, *see* CR 173, 175, and the district court held an evidentiary hearing, at which Detective Luna, the K9 officer, Detective Keeling, and another task force officer testified. Detective Keeling and the other task force officer testified about the wiretap recordings and surveillance that they believed created probable cause the Mazda would be loaded with drugs. *See* 2-ER-148-58, 177. The K9 officer testified the dog did not alert when it circled around the car or when it was placed in the trunk, but did alert when it was placed inside the car. *See* 2-ER-131-32, 135. The officer claimed the dog alerted to the back seat of the vehicle when the officer “put him inside just halfway,” 2-ER-131; that “[w]hen he went in the vehicle, he closed his mouth and jammed his nose in between the seats and started breathing real hard sounding like

a vacuum, basically," 2-ER-132; and that the dog also alerted to the dashboard, 2-ER-132.

Detective Luna testified about the stop. He claimed it was not just the speeding that justified the stop. He claimed Mr. Ibarra's move into the left lane before passing was an unsafe lane change. *See* 2-ER-199–200, 207–08, 212. He also claimed the unsafe lane change and the bumper he claimed was "sagging" gave him reason to think the driver might be intoxicated:

I wanted to gather more information on what was going on. I mean, at times in – I've been doing this for 16 years. The unsafe lane change, the speed, what I noticed of the front bumper, it's – you know, I started thinking about maybe it was involved in a collision, maybe intoxicated driver, you know, and that's what initially I responded to.

2-ER-207. *See also* 2-ER-211 (referencing "all the factors, just the traffic violations itself and then the damage to the front" and claiming "in past experience, sometimes people have been intoxicated").

Detective Luna also tried to claim the stop was independent of the task force officers' request "to develop our own probable cause for [a] traffic stop," *supra* p. 3. First, he claimed he would not have stopped the car if he had not witnessed the traffic violations he described. *See* 2-ER-235. Second, he made the converse claim that he would have stopped the car based on the traffic violations even without the task force officers' request. *See* 2-ER-207, 257.

In addition to testifying about the reasons for the stop, Detective Luna testified about his interaction with Mr. Ibarra and Mr. Ibarra's wife. He claimed they were both nervous, *see* 2-ER-215–16, 221, though he acknowledged on cross examination that it is not uncommon for motorists to get nervous when they are pulled over, *see* 2-ER-247. He claimed there were inconsistent statements about whether the car had been in Mexico, how long it had been there, and whose brother the couple was going to pick up. *See* 2-ER-216, 220–21. "Their story," he

claimed, “just kind of didn’t make sense.” 2-ER-217. He also claimed it did not make sense that they planned to purchase insurance in Yuma because they were from San Luis, and one can purchase insurance in San Luis. *See* 2-ER-217–18.

In argument after the testimony, defense counsel challenged the credibility of both Detective Luna and the K9 officer. He pointed to a photograph of the front of the car showing there was no sagging bumper. *See* 1-ER-47; 3-ER-271. He pointed to a photograph of the inside of the car that showed there was a child’s car seat where the dog had supposedly put its nose. *See* 1-ER-48; 3-ER-270.

The district court agreed Detective Luna was not credible. *See* 1-ER-44 (“even though I don’t find him credible”). It did believe the testimony about speeding. *See* 1-ER-47. But it did not believe the testimony about an unsafe lane change. *See* 1-ER-47. And it labeled the testimony about “[t]he bumper and intoxication issue” “just incredible.” 1-ER-47.

The district court also expressly found not credible Detective Luna’s claims of independence. First, the court found not credible Detective Luna’s claim he would not have stopped the car if he had not seen the traffic violations. *See* 1-ER-39–40. Second, the court found not credible Detective Luna’s converse claim that he would have stopped the car for the traffic violations even if he had not been asked to make a stop. *See* 1-ER-42. The court also stated more generally, in finding Detective Luna “credible on the speed,” that “I didn’t believe Detective Luna was credible on the other issues.” 1-ER-46.

The court avoided making a finding on defense counsel’s challenge to the credibility of the K9 officer’s testimony. The court relied instead on the “collective knowledge doctrine” argued by the government both orally, *see* 1-ER-41, and in its pleadings, *see* CR 223, at 9-11, and discussed below in this brief. The court ruled that “regardless of whether or not there was a consent and whether

or not there was – the dog alerted at the right area of the car, the law has established that once the police have that collective knowledge, that creates the probable cause.” 1-ER-49. It reasoned:

Under the collective knowledge doctrine, they had probable cause to go into that trunk and to stop that vehicle.

And I found the defendant’s – the stop of the defendant’s vehicle was justified by collective knowledge – by the collective knowledge doctrine, and collectively, there was probable cause to believe the defendant’s vehicle was involved in drug trafficking.

So the stop and search of his vehicle didn’t violate the Fourth Amendment. And there was wiretap information that that vehicle would be traveling on that road about that time of the day and that in the trunk of the vehicle would be speakers that contained methamphetamine.

That was all known before he even got stopped. So there was probable cause for the stop and probable cause for the search.

1-ER-48-49.

D. TRIAL.

The government proceeded to trial on just the counts in which Mr. Ibarra was or had been¹ charged with Mr. Gaxiola, Mr. Cota-Reyes, and Mr. Guzman, though each of those other defendants had pled guilty. It presented evidence of two drug loads transported by Mr. Gaxiola in September, 2017, two drug loads transported by Mr. Cota-Reyes in November, 2017, and the drug load Mr. Ibarra was transporting on December 18, 2017.

¹ Mr. Gaxiola and Mr. Cota-Reyes had been removed in the first superseding indictment, as noted *supra* p. 7.

1. September, 2017 Drug Loads.

For the September, 2017 drug loads, the government presented testimony from Mr. Gaxiola, who was cooperating with the government; surveillance evidence; transcripts of calls recorded in the wiretap; border crossing records; and testimony about a discovery of drugs in Mr. Gaxiola's vehicle on September 20. Mr. Gaxiola testified he lived in Mexico and met a man named Andre who had been in jail with Mr. Gaxiola's father. *See* 2-ER-61, 71-72. Andre asked Mr. Gaxiola if he would be interested in smuggling drugs from Mexico into the United States and introduced him to another man named Beto. *See* 2-ER-72-74. Mr. Gaxiola thereafter brought drugs into the United States five or six times. 2-ER-75-76. Andre and Beto instructed him to take the drugs to Phoenix, and he usually would go to a mall called the Desert Sky Mall. 2-ER-77-78.

On the last two of the five or six trips – on September 9, 2017, and September 20, 2017 – Mr. Gaxiola dealt with Mr. Ibarra. On September 9, Mr. Ibarra called Mr. Gaxiola and asked where he was, came to the mall when Mr. Gaxiola said that was where he was, and took Mr. Gaxiola's car to unload the drugs from the car. *See* 2-ER-81-84. On September 20, things did not go so smoothly. To begin, Mr. Gaxiola was tricked into bringing the drugs into the United States; he told Andre and Beto he did not want to make any more trips, Andre convinced him to do Beto a favor by simply picking up some money, and Mr. Gaxiola agreed to do only that. *See* 2-ER-93-96. When Mr. Gaxiola arrived at the usual mall, Mr. Ibarra called and said he was having car trouble and could not get there. *See* 2-ER-96-97. Mr. Gaxiola called Andre, and Andre told him there were drugs in the car and convinced him to drive the drugs to Tucson. *See* 2-ER-97-100. Officers stopped Mr. Gaxiola on the way to Tucson, searched the car,

and found the drugs. *See* 2-ER-100, 102-04.

Testimony about surveillance, transcripts of calls recorded in the wiretap, and other records and testimony corroborated Mr. Gaxiola's testimony. First, agents conducting surveillance on September 9 witnessed Mr. Ibarra come to the mall, take Mr. Gaxiola's car, and drive the car to another location where two men appeared to be taking something in the vehicle apart. *See* RT(9/25/19) 243-44, 366-69, 380-85; RT(9/26/19) 467. Second, transcripts of calls recorded in the wiretap reflected (a) Mr. Ibarra calling Mr. Gaxiola – on September 9 to find out where to meet Mr. Gaxiola and on September 20 to tell Mr. Gaxiola he was having car trouble – and (b) Mr. Ibarra having conversations with other men that appeared to be about the drugs. *See* 3-ER-272-330. Third, there were border crossing records that showed Mr. Gaxiola and his vehicle crossing the border on September 9 and September 20, *see* RT(9/27/19) 597, 607-08, 631-32, and testimony about the discovery of the drugs in Mr. Gaxiola's vehicle on September 20, *see* RT(9/25/17) 349-54.

2. November, 2017 Drug Loads.

For the November, 2017 drug loads, the government presented no testimony from a cooperating witness, but did present testimony about surveillance, transcripts of calls recorded in the wiretaps, border crossing records, and testimony about a seizure of drugs. Border crossing records showed Mr. Cota-Reyes and a Chevrolet HHR he was driving crossing the border on both November 10 and November 23. *See* RT(9/27/19) 597-98, 651-52, 672. Agents at a Border Patrol checkpoint testified about discovering drugs in the vehicle after it was stopped at the checkpoint on November 23. *See* RT(9/25/17) 402-17, 424-28.

Surveillance evidence and transcripts of calls recorded in the wiretaps then tied Mr. Ibarra to drug loads on November 10 and November 23. For November 10, there was (a) Walmart surveillance video that showed a vehicle registered to Mr. Ibarra arrive in the Walmart parking lot, the vehicle being left overnight, and a Chevrolet HHR returning the next morning, parking next to Mr. Ibarra's vehicle, someone getting out of the HHR, and both the HHR and Mr. Ibarra's vehicle then leaving, *see* RT(9/25/19) 389-91; RT(9/27/19) 651, 672-73; (b) testimony by a surveilling agent who observed Mr. Ibarra driving the car to the Walmart parking lot, *see* RT(9/27/19) 650-51; and (c) monitoring of the GPS tracker on Mr. Ibarra's cell phone that showed him driving from Arizona to the Los Angeles area and then returning to Arizona that night, *see* RT(9/27/21) 654. There were also transcripts of calls recorded in the wiretap that reflected Mr. Ibarra having conversations with Mr. Guzman that appeared to be about drugs and "making the switch," which the prosecutor argued meant switching the cars, *see* RT(10/1/19) 786. *See* 3-ER-331-45.

For November 23, there was (a) testimony by agents who surveilled Mr. Ibarra and observed him driving to and then waiting at a rest stop near the border patrol checkpoint where drugs were found in Mr. Cota-Reyes's vehicle, *see* RT(9/25/17) 371-73, and (b) testimony about GPS tracking of Mr. Ibarra's cell phone that showed him at the rest stop and driving back and forth in the area, *see* RT(9/27/19) 669-71. There were also transcripts of calls recorded in the wiretap in which (a) Mr. Ibarra and Mr. Guzman were talking about another man, presumably Mr. Cota-Reyes, being late and possibly having been stopped at the checkpoint, and (b) Mr. Guzman was instructing Mr. Ibarra to drive past the checkpoint to observe whatever he could observe. *See* 3-ER-346-60.

3. December, 18, 2017 Drug Load.

Finally, there was surveillance evidence, transcripts of recorded calls, and testimony about the traffic stop and drug seizure for the December 18, 2017 drug load. First, Detective Keeling testified about the search of the Mazda and the discovery of the drugs in the speaker box, under the spare tire, and in the right rear quarter panel. *See* RT(9/24/19) 199-216. Second, an agent testified about surveillance the night before during which Mr. Ibarra and another man appeared to be working in the trunk of the Mazda. *See* RT(9/26/19) 529-32. Third, there were transcripts of calls recorded in the wiretaps in which Mr. Ibarra and Mr. Guzman appeared to be discussing a drug trip, and talked about a speaker box. *See* 3-ER-361-74.

4. Verdict.

The jury returned guilty verdicts on only some of the six counts the government chose to try. It found Mr. Ibarra guilty of the two conspiracy counts that were tried and guilty of the possession with intent to distribute methamphetamine on December 18, 2017. *See* CR 296. It found him not guilty of the possession with intent to distribute methamphetamine on September 20, 2017, and not guilty of the possession with intent to distribute methamphetamine and the possession with intent to distribute heroin on November 23, 2017. *See* CR 296.

E. SENTENCING.

After the verdicts, the court referred the matter to the probation office for

preparation of a presentence report. *See* RT(10/1/19) 823. The presentence report recommended a base offense level of 38, *see* PSR, ¶ 42; a 2-level enhancement under § 3B1.4 for use of a minor in the offense, based on Mr. Ibarra having his son in the car while he transported drugs, *see* PSR, ¶ 45; and a 4-level role in offense enhancement under § 3B1.1(a) for being an “organizer” or “leader” of the criminal activity, *see* PSR, ¶ 46. This produced a total offense level of 44 and a guideline range of life. *See* PSR, ¶¶ 48, 74.

Defense counsel objected to the role in offense enhancement. *See* CR 399, at 2-3. He argued Mr. Ibarra was less culpable – and certainly no more culpable – than Mr. Guzman, Mr. Guzman had received no enhancement at all for his role, and so Mr. Ibarra should receive no role enhancement. *See* CR 399, at 2-3 (citing PSR, ¶ 31). The government argued in favor of the 4-level enhancement, and argued alternatively for a 3-level enhancement under § 3B1.1(b) for being a “manager” or “supervisor” of the criminal activity.²

The court upheld the objection to the greater 4-level enhancement for being an “organizer” or “leader,” but agreed with the alternative 3-level enhancement for being a “manager” or “supervisor.” *See* 1-ER-12. This made the offense level 43, but left the guideline range at life. *See* 1-ER-13–14. The court varied downward to a sentence of 150 months. *See* 1-ER-25.

² For criminal activity involving five or more participants, § 3B1.1 provides two different role enhancements. Subsection (a) directs an increase of 4 levels when the defendant is an “organizer” or “leader” of the criminal activity, while subsection (b) directs a lesser increase of 3 levels when the defendant is only a “manager” or “supervisor.”

V.

SUMMARY OF ARGUMENT

Neither prolonging the traffic stop nor conducting the subsequent searches was justified. The collective knowledge doctrine does allow an officer to make a stop, search, or arrest requested by other officers without knowing the other officers' basis for reasonable suspicion or probable cause, but that doctrine did not justify the stop and searches here. The doctrine did not justify the stop because the requesting officers themselves did not have probable cause or reasonable suspicion for the broad request they made – for a non-specific gray Mazda. The doctrine did not allow the searches because the doctrine justifies only the action the other officers request, and the action the other officers requested here was only a stop, not a search.

Prolonging the traffic stop and conducting the searches cannot be justified without the collective knowledge doctrine, moreover, especially in the absence of further district court findings. The stop was improperly prolonged beyond what was necessary for the traffic violation on which it was based, in violation of *Rodriguez v. United States*, 575 U.S. 348 (2015). *Rodriguez* held a traffic stop is limited by its “mission” of issuing a ticket or warning for the traffic violation, and the stop becomes unlawful if it is prolonged beyond the time required for that “mission.” The stop was improperly prolonged here by, first, the time spent questioning Mr. Ibarra’s wife and then Mr. Ibarra about matters unrelated to traffic violations, and, second, the request for consent to a search of the car. And there must be a remand for further findings even if the stop was not improperly prolonged. The district court expressly declined to resolve questions about the dog sniff, and whether the dog sniff was proper and what it showed are critical

questions without the collective knowledge doctrine.

The district court also erred in applying the role in offense enhancement. A “manager” or “supervisor” enhancement applies only if the defendant exercised control or authority over another participant. And each of several factual findings the district court recited in support of the enhancement are either clearly erroneous or legally insufficient to establish the required control or authority. A finding that Mr. Ibarra directed Mr. Gaxiola where to meet is contradicted by both Mr. Gaxiola’s testimony and transcripts of the calls recorded in the wiretap; findings that Mr. Ibarra controlled Mr. Gaxiola’s and Mr. Cota-Reyes’s vehicles at some point is legally insufficient, because there must be control of a participant, not control of property; a finding that Mr. Ibarra initiated calls to plan logistics is rebutted by the call transcripts which establish that he received calls as often as he placed them and that others were instructing him rather than him instructing others; and a finding that it was Mr. Ibarra’s plan to hide the drugs in the speaker box is legally insufficient because that was planning for his own courier conduct, not another participant’s courier conduct.

* * *

VI.

ARGUMENT

A. PROLONGING THE TRAFFIC STOP AND CONDUCTING THE SUBSEQUENT SEARCHES WAS UNJUSTIFIED UNDER THE FOURTH AMENDMENT.

1. Reviewability and Standard of Review.

Defense counsel challenged the traffic stop in a written motion, *see* CR 175, and argued orally that the testimony about the dog sniff was not credible, *see* 1-ER-48. Mr. Ibarra personally asserted there was a violation of *Rodriguez v. United States*, 575 U.S. 348 (2015), *see* 1-ER-35; 4-ER-444-45, which limits the duration of traffic stops to the time necessary to accomplish the “mission” of the stop, *see infra* pp. 24-25. The district court held the stop and searches were proper under the “collective knowledge” doctrine, as noted *supra* pp. 9-10.

The existence of probable cause and/or reasonable suspicion is reviewed de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Whether a traffic stop is impermissibly prolonged in violation of *Rodriguez* is also reviewed de novo. *See United States v. Evans*, 786 F.3d 779, 784 (9th Cir. 2015).

* * *

2. The Collective Knowledge Doctrine Fails to Justify the Stop and Searches.

a. The collective knowledge doctrine fails to justify the stop because the officers who requested the stop did not have probable cause or reasonable suspicion for the broad request they made.

The “collective knowledge doctrine” allows a stop, search, or arrest based on “the collective knowledge of all the officers involved in the criminal investigation although all of the information known to the law enforcement officers involved in the investigation is not communicated to the officer who actually [undertakes the challenged action].” *United States v. Ramirez*, 473 F.3d 1026, 1032 (9th Cir. 2007) (quoting *United States v. Sutton*, 794 F.2d 1415, 1426 (9th Cir. 1986)). The doctrine applies in two situations. The first situation is “where law enforcement agents are working together in an investigation but have not explicitly communicated the facts each has independently learned.” *Ramirez*, 473 F.3d at 1032. *See also Burrell v. McIlroy*, 464 F.3d 853, 857 n.2 (9th Cir. 2006) (applying doctrine where detectives “working in close concert”). The second situation is “where an officer (or team of officers), with direct personal knowledge of *all* the facts necessary to give rise to reasonable suspicion or probable cause, directs or requests that another officer, not previously involved in the investigation, conduct a stop, search, or arrest.” *Ramirez*, 473 F.3d at 1033 (emphasis in original).

The officers requesting the stop, search, or arrest must have the probable cause or reasonable suspicion required for the intrusion, however. The lawfulness of the intrusion “turns on whether the officers who issued the [request] possessed

probable cause [or reasonable suspicion] to make the arrest [or stop or search].” *United States v. Hensley*, 469 U.S. 221, 231 (1985), quoted in *Ramirez*, 473 F.3d at 1033 (emphasis deleted in *Ramirez*). *Accord United States v. Thomas*, 211 F.3d 1186, 1189 (9th Cir. 2000) (“If a police officer relies on information from another government agency in making an investigatory stop, that information must itself be based on reasonable suspicion.”); *United States v. Robinson*, 536 F.2d 1298, 1300 (9th Cir. 1976) (holding that officer could rely on dispatcher if dispatcher had founded suspicion, but dispatcher could not create justification simply by relaying direction to make stop).

As the Supreme Court explained in the context of executing other officers’ arrest warrants in *Whiteley v. Warden*, 401 U.S. 560 (1971):

Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

Id. at 568. Where the requesting officers do not have the required probable cause or reasonable suspicion, the requested stop, search, or arrest is not lawful. *See, e.g.*, *United States v. I.E.V.*, 705 F.3d 430, 441 n.8 (9th Cir. 2012) (frisk unlawful where other officer did not have reasonable suspicion for frisk); *Cuevas v. De Roco*, 531 F.3d 726, 733 (9th Cir. 2008) (officers did not have probable cause for search even if they could rely on other officers’ belief because other officers did not have probable cause); *Thomas*, 211 F.3d at 1189-90 (officers did not have reasonable suspicion where FBI tip upon which they relied was not supported by reasonable suspicion); *United States v. Williams*, 459 F.2d 44, 46 (9th Cir. 1972) (noting that “the question is whether the police officer originating the report had such information as would have justified *him* in personally searching Williams”

(emphasis in original), and concluding originating officer did not have such information).

The requesting officers did have a narrow probable cause here – for the specific gray Mazda that Mr. Ibarra drove – but they did not have probable cause – or reasonable suspicion – for the broad request that was conveyed to Detective Luna. Detective Luna was not asked to stop the particular gray Mazda driven by Mr. Ibarra – with, say, a particular license number, or distinctive damage like Detective Luna claimed he saw (but defense counsel disputed). Detective Luna was simply told “what type of vehicle it was.” 2-ER-234. As explained near the end of the prosecutor’s direct examination:

Q. Directing your attention back to the information that you had received about a Mazda potentially traveling in the area you were patrolling, to the best of your recollection, what were you specifically told?

A. The detective told me that they were looking for a vehicle that was traveling, leaving San Luis, Arizona, area. They didn’t know where, as far as east, west, once it reached where it was going, but it was traveling [Highway] 195. And to develop our own PC as far as it was possibly loaded, and investigate further as needed.

Q. Was – were you told what type of vehicle it was?

A. Yes.

Q. And the type of vehicle that you were told, did that match up with this Mazda that you’ve described and that you’ve identified in these photographs?

A. Yes, ma’am.

2-ER-233–34. *See also* 2-ER-255 (testimony during redirect examination that “kind of car” given tip about was “a gray Mazda”).

This would include any of the presumably dozens or hundreds of gray Mazdas in the Yuma metropolitan area.³ The innocent drivers of all of those

³ 213,787 people were estimated to live in the Yuma Metropolitan Statistical Area in 2020, *see Census Reporter: Yuma, AZ Metro Area*, <https://censusreporter.org/profiles/31000US49740-yuma-az-metro-area/> (last visited May 19, 2021), and the cars owned by those 213,787 people presumably

dozens or hundreds of gray Mazdas were subject to invasion of their Fourth Amendment rights if the collective knowledge doctrine applies to the broad request made here. That could not be permissible because each driver of a gray Mazda on the highway had a separate expectation of privacy, just as each room in a hotel has a separate expectation of privacy, *see United States v. Winsor*, 846 F.2d 1569, 1572 (9th Cir. 1988) (en banc) (recognizing that each room in hotel enjoys own zone of Fourth Amendment protection).

b. The collective knowledge doctrine fails to justify the searches because the requesting officers requested only a traffic stop, with the development of independent probable cause for any search that might take place.

The searches cannot be justified by the collective knowledge doctrine even if the stop could be justified by the doctrine. This is because the other officers requested not a search based on whatever information they had, but only a traffic stop with the “develop[ment of] our own PC,” *supra* p. 3.

The nature of the request is important because an officer acting on other officers’ collective knowledge can do only what he is requested or directed to do. This follows from the rationale for applying the collective knowledge doctrine. That rationale, as articulated in the Supreme Court’s *Whiteley* case is that “police officers called upon to aid other officers in executing arrest warrants [the aid

include additional gray Mazdas. It is appropriate to consider the entire metropolitan area because Mr. Ibarra was stopped at milepost 19, which is approximately 19 miles from San Luis and near the Yuma end of the highway, as noted *supra* p. 4.

requested in *Whiteley*] are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.” *Id.*, 401 U.S. at 568, *quoted in Ramirez*, 473 F.3d at 1033. Such officers are not entitled to assume there is justification for something more than what they are asked to do.

What Detective Luna could assume in the present case is that the requesting officers had *reasonable suspicion* to justify a *stop*. He could not extrapolate from that to make the additional assumption that the other officers had *probable cause* for a *search*. That is especially true in light of the fact that he was asked to “develop our own PC as far as [the car] was possibly loaded,” *supra* p. 21 (quoting 2-ER-234). For all Detective Luna knew, the other officers did *not* have the probable cause needed for a search, but had only the reasonable suspicion needed for a stop, and hoped an officer making a stop would “develop [his] own probable cause.”

In sum, the collective knowledge doctrine justified at most what the other officers requested, which was a traffic stop. To go further and conduct a search, Detective Luna had to “develop our own PC as far as [the car] was possibly loaded.”

3. Prolonging the Stop and Conducting the Searches Cannot Be Justified Without the Collective Knowledge Doctrine, Especially in the Absence of Further Findings by the District Court.

Prolonging the stop and conducting the searches cannot be justified without the collective knowledge doctrine, especially in the absence of further findings. In considering this, it is important to understand the findings the district court did

and did not make.

Initially, on Detective Luna's credibility, the court found him in most instances *not* credible. It found his claim there was an improper lane change not credible. It found his claim there was reason to suspect the driver might be intoxicated not credible. More generally, it found his claim he would have made the traffic stop even without the other officers' request not credible. The only claim the district court found credible was the claim Mr. Ibarra was speeding.

Secondly, the district court declined to make findings about the dog sniff. When defense counsel argued the testimony about the dog sniff was not credible, *see* 1-ER-48, the district court chose to avoid the issue. It stated that "regardless of whether or not there was a consent and whether or not there was – the dog alerted at the right area of the car, the law has established that once the police have that collective knowledge, that creates the probable cause." 1-ER-49. There was thus no finding one way or the other on the testimony about the dog sniff – about either the consent or the alert.

- a. Without the collective knowledge doctrine, the stop was improperly prolonged beyond what was necessary for addressing traffic violations, in violation of *Rodriguez v. United States*, 575 U.S. 348 (2015).

The Supreme Court clarified the rules governing additional investigation during traffic stops in *Rodriguez v. United States*, 575 U.S. 348 (2015). It overruled precedent in some circuits, including this circuit, that allowed officers to briefly prolong traffic stops for inquiries into other matters. *See id.* at 356 (rejecting lower court's "de minimis" additional intrusion reasoning). *See also*

United States v. Landeros, 913 F.3d 862, 867 (9th Cir. 2019) (recognizing *Rodriguez* overruled *United States v. Turvin*, 517 F.3d 1097 (9th Cir. 2008)). *Rodriguez* held a traffic stop is limited by its “mission,” *id.*, 575 U.S. at 354 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)), and “become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission” of issuing a ticket for the violation.” *Rodriguez*, 575 U.S. at 350 (quoting *Caballos*, 543 U.S. at 407).

This Court interpreted and applied *Rodriguez* in *Landeros* and *United States v. Evans*, 786 F.3d 779 (9th Cir. 2015). It recognized the critical question is not whether the additional inquiry took place before the traffic ticket or warning was issued. It is whether the additional inquiry prolonged, or added time to, the stop. As explained in *Evans*, where the Court found an ex-felon registration check impermissibly prolonged a traffic stop:

That the ex-felon registration check “occurr[ed] before . . . the officer issue[d] a ticket” is immaterial; rather, the “critical question” is whether the check “prolongs – *i.e.*, adds time to – the stop.”

Id., 786 F.3d at 786 (quoting *Rodriguez*, 575 U.S. at 357). As explained in *Landeros*:

[T]he Court made clear [in *Rodriguez*] that it would not have mattered if the police officer conducted the dog sniff test before, rather than after, he issued the warning. What mattered was the added time, not at what point, in the chronology of the stop, that time was added.

Landeros, 913 F.3d at 866.

The government claimed the stop here was not prolonged beyond what was necessary for the traffic stop, *see CR 223, at 15-16 & n.15*, but Detective Luna’s testimony belies that claim. The testimony establishes a departure from the traffic stop “mission” and prolonging the stop for other purposes at two points.

First, Detective Luna departed from the traffic stop “mission” and prolonged

the stop when he separated Mr. Ibarra from his wife and separately questioned each of them about matters unrelated to traffic violations. The officer actually admitted he did this for a more general investigative purpose.

I asked [Mr. Ibarra] to step out. I directed him back towards my patrol car. At that point another officer had arrived and was standing by my passenger door. And the reason I did that was *when we do investigations and we're trying to ascertain what's going on*, we like to separate individuals *to try to figure out what the story is or what's going on*.

So I directed him back to the back and then just told him that I was going to go back up and talk to her, and had him just wait with the other officer.

2-ER-219-20 (emphasis added). Separately interviewing Mr. Ibarra's wife while another officer stood with Mr. Ibarra and then interviewing Mr. Ibarra to compare what he said, had nothing to do with the speeding that justified the stop or the additional no insurance violation the officer had discovered. It was driven by other investigative purposes, just as the original traffic stop was, *see* 1-ER-40 (district court finding not credible Detective Luna's claim he would have made stop even in absence of other officers' request).

Second, Detective Luna departed from the traffic stop "mission" and prolonged the stop when he asked for consent to search the car after deciding to simply write a warning. As Professor LaFave has suggested in his respected treatise on search and seizure, "obtaining consent to a search can hardly be deemed a part of the 'mission' of a traffic stop, as discussed in *Rodriguez v. United States*, and thus ought to be a basis for suppression should it 'measurably extend the duration of the stop.'" 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* 548 (6th ed. 2020).

Rodriguez and the Ninth Circuit cases applying it do recognize that a traffic stop can be extended if independent reasonable suspicion of other criminal activity

develops before the stop is prolonged.⁴ *See Rodriguez*, 575 U.S. at 355; *Landeros*, 913 F.3d at 868; *Evans*, 786 F.3d at 788. But that was not established here. The nervousness Detective Luna claimed he noticed falls short of establishing reasonable suspicion under well-established case law in both this circuit and other circuits. *See United States v. Chavez-Valenzuela*, 268 F.3d 719, 725-27 & n.6 (9th Cir. 2001), *amended*, 279 F.3d 1062 (9th Cir. 2002). That Mr. Ibarra’s wife interrupted him and spoke over him adds nothing, for many spouses interrupt and speak over each other. That the car had been in Mexico – and Mr. Ibarra and his wife did not remember exactly how long it had been there – suggested little, for the town Mr. Ibarra and his wife lived in – San Luis – is right on the border. That the couple planned to get insurance in Yuma also is hardly suspicious, for Yuma is a larger city less than 30 miles from San Luis.⁵

Finally, Detective Luna’s overall claim that the “story” “just kind of didn’t make sense,” 2-ER-217, must be taken with a very large grain of salt. While the district court did not expressly address the credibility of this claim, it did expressly find other claims by Detective Luna not credible. It found his claim about the unsafe lane change not credible. It found his claim about the possible intoxication not credible. More generally, it found his claim that he would have made the stop

⁴ Any information obtained after the stop was extended cannot be considered because it would be a fruit of the extended stop. *See Landeros*, 913 F.3d at 870 (holding extension of stop could not be justified by conduct after impermissible extension).

⁵ The population of Yuma in 2019 was 98,285, *see City-Data.com: Yuma, Arizona*, <https://www.city-data.com/city/Yuma-Arizona.html> (last visited May 18, 2021), and the population of San Luis was 34,778, *see City-Data.com: San Luis, Arizona*, <https://www.city-data.com/city/San-Luis-Arizona.html> (last visited May 18, 2021).

even without the other officers' request, or, conversely, that he would not have made the stop without the traffic violations, not credible. And the court did state generally that "I didn't believe Detective Luna was credible on the other issues."

1-ER-46.

In sum, Detective Luna unlawfully prolonged the traffic stop because he prolonged it for reasons unrelated to the purpose of the stop and did not have independent reasonable suspicion. The searches were a fruit of this illegality and so the drugs found in the searches and evidence derived from the subsequent arrests must be suppressed. *See Landeros*, 913 F.3d at 870 (suppressing evidence discovered after unlawful extension of traffic stop as tainted by the illegality).

b. Even if prolonging the stop was permissible, there is a need for the findings the district court declined to make about the dog sniff.

The officer who made the stop did try to do what he was asked to do – develop his own probable cause – by calling the K9 officer to conduct the dog sniff. The problem is that the district court did not make a finding about whether the officer succeeded in this effort, i.e., whether the dog sniff established probable cause, or even whether there was consent to the dog sniff, as noted *supra* p. 24.

This Court cannot resolve these questions on its own, moreover. The question of consent is a classic factual question, *e.g.*, *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007), and the question of whether a dog's signaling behavior indicates the presence of narcotics is also a fact-specific question, *see United States v. Thomas*, 726 F.3d 1086, 1098 (9th Cir. 2013) (describing question as one that "will depend on the facts and circumstances of each case"). Such factual questions should be decided by the district court which heard the live

testimony. *See, e.g., United States v. Evans*, 786 F.3d at 788 (remanding because “the district court did not make the ‘findings of historical fact’ and the ‘inferences drawn from those facts’ critical to resolving the parties’ dispute concerning [independent] reasonable suspicion,” and ruling could depend on witness credibility).

There was also an additional factual question here – about *where* the dog signaled. It was undisputed that the dog did *not* alert to the trunk, either when the trunk was closed or when it was open and the dog was inside. *See* 2-ER-135-36. And where the dog did alert – if it did – was unclear. The K9 officer claimed the dog alerted to the rear passenger seat and jammed his nose between the seats, *see* 2-ER-131-32, but defense counsel argued this was impossible because there was a car seat in the way, *see* 1-ER-48.

And where the dog alerted does matter. The Fifth Circuit recognized this in *United States v. Seals*, 987 F.2d 1102 (5th Cir. 1993). There, a drug dog had alerted to the driver’s side of an automobile, but not to other areas. *See id.* at 1106. The court held this gave the officers probable cause to search inside the passenger compartment, but not elsewhere in the vehicle. *See id.* at 1106-07 & n.8.⁶ The court explained:

The Supreme Court has made a distinction between probable cause to believe that drugs are in a particular section of the car, and probable cause to believe that drugs are generally within the car. In *Ross*, the Court stated, “probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.” *United States v. Ross*, 456 U.S. 798, 824, 102 S. Ct. 2157, 2172, 72 L. Ed. 2d 572 (1982). Whereas on the next page, the Court states, “if probable cause justifies a search of a lawfully stopped vehicle, it justifies the search of every part of

⁶ The court held the officers eventually developed probable cause to search elsewhere, but only because they found a glass pipe with cocaine in the passenger compartment. *See id.* at 1107 & n.8.

the vehicle and its contents that may conceal the object of the search.” *Id.* Thus, if officers have probable cause to believe the contraband is in only one part of the car, then they are limited to that area. If, on the other hand, officers have probable cause to believe that contraband is located somewhere in the car, but they don’t know exactly where, then they can search the entire vehicle.

Seals, 987 F.2d at 1107 n.8.⁷

The facts in the present case support this distinction even more strongly than the facts in *Seals* did. The drug dog here did not just fail to alert to other parts of the car when it was generally walked around the car. It also failed to alert when it was inside the trunk where the speaker box were. This makes extension of the automobile exception to the trunk and speaker box especially inappropriate.

In sum, there is an absence of findings on critical questions about the dog sniff. There must be a remand for those findings even if it was proper to prolong the stop.

B. THE DISTRICT COURT ERRED IN IMPOSING THE ROLE
ENHANCEMENT BECAUSE THE FACTUAL FINDINGS IT RELIED ON ARE
CLEARLY ERRONEOUS AND/OR LEGALLY INSUFFICIENT TO SHOW
THE REQUIRED CONTROL OR AUTHORITY OVER ANOTHER
PARTICIPANT.

1. Reviewability and Standard of Review.

The defense objected to any role in offense enhancement, but the district

⁷ The Tenth Circuit subsequently disagreed with *Seals*, but it did so without considering the *Ross* passages *Seals* quotes. See *United States v. Rosborough*, 366 F.3d 1145, 1152 (10th Cir. 2004).

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN IBARRA-OZUNA, PETITIONER,
vs.
UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 5th day of May, 2022, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

May 5, 2022

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law