
IN THE SUPREME COURT OF THE UNITED STATES

21-1211

FELIPE NORIEGA, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE UNITED STATES**

APPENDIX

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APPENDIX A

Opinion of the United States Court of Appeals for the Eighth Circuit

United States Court of Appeals
For the Eighth Circuit

No. 21-1211

United States of America

Plaintiff - Appellee

v.

Felipe Noriega, Jr.

Defendant - Appellant

No. 21-1324

United States of America

Plaintiff - Appellee

v.

Edgar Javier Alcantar Cuevas, also known as Edgar Alcantar

Defendant - Appellant

No. 21-1419

United States of America

Plaintiff - Appellee

v.

Robert Alan McCleary, also known as Robert McCleary

Defendant - Appellant

No. 21-1421

United States of America

Plaintiff - Appellee

v.

Miguel Angel Alcantar Mercado, also known as Miguel Alcantar

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: January 10, 2022

Filed: May 26, 2022

Before BENTON, SHEPHERD, and STRAS, Circuit Judges.

SHEPHERD, Circuit Judge.

Appellants Felipe Noriega, Jr., Edgar Javier Alcantar Cuevas, Robert Alan McCleary, and Miguel Angel Alcantar Mercado, along with others not currently before this Court, were charged by superseding indictment with conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1). McCleary

was also charged with distribution of a controlled substance, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(a). Appellants pled guilty to conspiracy to distribute a controlled substance, with the government agreeing to dismiss the distribution of a controlled substance charge against McCleary in exchange for his guilty plea. At sentencing, the district court¹ varied downward, sentencing each appellant to a term below the United States Sentencing Guidelines (Guidelines) range. Noriega, Alcantar Cuevas, McCleary, and Alcantar Mercado were sentenced to 72, 60, 180, and 204 months imprisonment, respectively. They now challenge their sentences, with Noriega additionally arguing that the district court erroneously denied his motion to suppress evidence obtained as a result of the traffic stop of his vehicle, an appeal right that he preserved in his plea agreement. Having jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court.

I.

The facts, as set forth in the unobjected-to portions of appellants' Presentence Investigation Reports (PSR) prepared by the United States Probation Office, reveal that appellants were part of a methamphetamine distribution conspiracy in which methamphetamine, sourced from Mexico, was distributed in Minnesota and Iowa. Appellants' roles were as follows. Alcantar Cuevas, a cousin of the supply source, received a shipment of ten pounds of methamphetamine from McCleary and, at the supply source's direction, delivered that methamphetamine to a customer. Alcantar Cuevas also collected drug proceeds and wired those proceeds, a total of approximately \$8,740, to five different recipients in Mexico. The district court attributed a total of 10 pounds, or 4,536 grams, of a methamphetamine mixture to him.² McCleary worked as a drug distributor in the conspiracy, delivering the ten

¹The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

²In Alcantar Cuevas's PSR, 5,527.12 grams of actual or ice methamphetamine is attributed to him. However, at sentencing, Alcantar Cuevas objected to this

pounds of methamphetamine to Alcantar Cuevas and later delivering an additional ten pounds of methamphetamine to a co-conspirator not currently before this Court who, unbeknownst to McCleary, was cooperating with law enforcement. An undercover law enforcement officer also participated in this second transaction. The district court attributed a total of 20 pounds, or 9,072 grams, of actual or ice methamphetamine to McCleary. Alcantar Mercado, like Alcantar Cuevas, is a cousin of the supply source. Alcantar Mercado collected drug debts for the supply source and wired over \$40,000 in drug proceeds from the United States to 22 individuals in Mexico. The district court attributed a total of 5,175.58 grams of actual or ice methamphetamine to him.³

Finally, Noriega acted as a delivery driver for the conspiracy, transporting methamphetamine to Iowa. The district court attributed 22 pounds, or 9,620 grams, of actual or ice methamphetamine to Noriega that originated from a November 15, 2019, traffic stop.⁴ While Noriega was traveling through Colorado, Officer Michael

calculation, arguing that the government assumed the purity of the methamphetamine attributed to him based upon the methamphetamine seized from Noreiga, despite the fact that the ten pounds attributed to Alcantar Cuevas had not been tested for its purity. The district court agreed, finding that the government had not established by a preponderance of the evidence that Alcantar Cuevas was responsible for 5,527.12 grams of actual or ice methamphetamine. It concluded that Alcantar Cuevas should instead be held responsible for 4,536 grams of a methamphetamine mixture.

³Alcantar Mercado's PSR also attributed 1,340 grams of heroin to him, with a total converted drug weight, for the methamphetamine and heroin combined, of 104,851.60 kilograms. Although this heroin was not pertinent to the conspiracy to distribute charge, at sentencing, the district court considered it to be an aggravating factor.

⁴Noriega's PSR initially found that 28 pounds of a methamphetamine mixture was seized from Noriega's vehicle; at Noriega's suppression hearing, his lawyer mentioned Noriega's transport of 28, not 22, pounds of methamphetamine; and in the government's brief to this Court, it discusses the 28, rather than 22, pounds of

Miller of the Mesa County Sheriff's Department stopped Noriega after observing him traveling in the left-hand lane, a violation of Colorado law. See Colo. Rev. Stat. § 42-4-1005(1). Officer Miller later testified about this traffic stop, as did Special Agent Shane Gosnell of the Department of Homeland Security, who arrived after the stop was already in progress to assist Officer Miller. Upon Special Agent Gosnell's arrival, he took a "cover" position at the front passenger side of Officer Miller's patrol vehicle, which was parked behind Noriega's vehicle.

After stopping Noriega, Officer Miller approached Noriega's front passenger-side window and smelled an overwhelming "perfume-type odor" emanating from Noriega's front and rear passenger-side windows. When Noriega handed Officer Miller his driver's license, registration, and proof of insurance, Officer Miller observed that Noriega's hand was "trembling" and his face was "twitching." Officer Miller noticed that Noriega had a Nevada driver's license and license plate and a Las Vegas, Nevada address. Officer Miller testified that Las Vegas is a "transshipment center[]," i.e., a location where large quantities of narcotics are shipped to and then trafficked to states further inland.

Officer Miller testified that when asked about his travel plans, Noriega said that he was traveling to his brother's house for "maybe the weekend" despite not knowing his brother's address or how to find his brother. Officer Miller explained that Noriega appeared to be uncomfortable answering questions about his travel plans and repeatedly attempted to divert the conversation to other topics. Similarly, Special Agent Gosnell explained that when Officer Miller returned to his patrol vehicle to run Noriega's driver's license, registration, and proof of insurance, he mentioned that Noriega was "overly nervous," was providing "vague and

methamphetamine attributable to Noriega. However, Noriega's PSR then explained that following a laboratory analysis of the methamphetamine seized from Noriega's vehicle, 9,620 grams, or approximately 22 pounds, of actual or ice methamphetamine were attributable to Noriega. And, at sentencing, the district court discussed the "9.7 kilograms, approximately 22 pounds" of methamphetamine attributable to Noriega. Therefore, we accept the 22-pound amount.

implausible travel plans,” and a “strong perfume-like odor [was] coming from the vehicle.”

Seeing that Noriega’s license was valid and there were no outstanding warrants for him, Officer Miller returned to Noriega’s front passenger-side window. Officer Miller testified that, at this time, he noticed that the “perfume” scent had dissipated. Officer Miller returned Noriega’s driver’s license, registration, and proof of insurance and told him that he was “good to go.” Noriega thanked Officer Miller and put his vehicle into gear.

However, before Noriega pulled away, Officer Miller asked Noriega if he was carrying any narcotics. Noriega said no, so Officer Miller asked to search Noriega’s vehicle. Noriega expressed his confusion, telling Officer Miller that he thought that he was free to go. This exchange continued, with Noriega asking if he was required to consent to a search and Officer Miller telling Noriega that he had a drug dog in his patrol vehicle. Eventually, Officer Miller directed Special Agent Gosnell to remove the drug dog from the patrol vehicle. Officer Miller testified that upon seeing the dog, Noriega agreed to a dog sniff around the perimeter of his vehicle. Officer Miller testified that Noriega asked to exit the vehicle prior to the dog sniff, which Officer Miller allowed, and according to Officer Miller’s testimony, upon Noriega’s exit, Noriega’s legs were visibly “shaking.” The dog alerted Officer Miller to the driver-side lower rear door seam. Officer Miller testified that he asked Noriega if he could search the interior of Noriega’s vehicle and Noriega agreed.

The search of Noriega’s vehicle revealed 22 packages containing a total of 22 pounds of actual or ice methamphetamine. Noriega explained that he had been hired to deliver methamphetamine to Des Moines, Iowa, and was to be paid \$400 per pound of methamphetamine transported. Officer Miller detained Noriega, and Noriega was then transported to Iowa. In a post-Miranda⁵ interview, Noriega consented to a search of his phone, and on the phone, investigators found

⁵Miranda v. Arizona, 384 U.S. 436 (1966).

photographs of receipts for wire transfers that Noriega had received as payment for his transport of the methamphetamine. While searching Noriega’s phone, investigators also saw that one of Noriega’s “handlers” had sent Noriega an address to which Noriega was to deliver the methamphetamine. That address belonged to one of Noriega’s co-conspirators not currently before this Court.

Noriega later filed a motion to suppress the methamphetamine found pursuant to the stop and search of his vehicle, along with any other evidence derived from that stop, including his subsequent admissions. In this motion, Noriega argued that suppression was appropriate because Officer Miller did not have reasonable suspicion to justify the extension of the traffic stop—a violation of Noriega’s Fourth Amendment rights—and evidence recovered subsequent to the illegal search was fruit of the poisonous tree.

The district court held a suppression hearing and received testimony from both Officer Miller and Special Agent Gosnell. Officer Miller testified about his experience and training, explaining that he had been an officer with the Mesa County Sheriff’s Department since 1992 and had worked in a patrol or drug interdiction capacity for the Western Colorado Drug Task Force since 1999. Officer Miller estimated that he has completed over 1,000 hours of drug interdiction training and has conducted thousands of traffic stops, during which he has seized thousands of pounds of narcotics, including methamphetamine. Officer Miller also acknowledged that he has been recognized on local, state, and national levels for his drug interdiction work.

The district court ultimately denied Noriega’s motion to suppress. First, the district court found that, in light of Officer Miller’s experience and training, his testimony was credible. It then concluded that after Officer Miller returned Noriega’s driver’s license, registration, and proof of insurance, the encounter was consensual, meaning that Noriega was not seized for purposes of the Fourth Amendment, but that even if Noriega was seized, “the facts testified to . . . provide reasonable suspicion for the ongoing investigation of illegal narcotics trafficking.”

II.

We first address Noriega’s argument that the district court erred in denying his motion to suppress. “In the motion-to-suppress context, we review a district court’s legal conclusions *de novo* and its factual findings for clear error.” United States v. Callison, 2 F.4th 1128, 1131 (8th Cir. 2021); see also United States v. Leon, 924 F.3d 1021, 1025 (8th Cir. 2019) (requiring that we “giv[e] due weight to the inferences of the district court and law enforcement officials” (citation omitted)).

Noriega argues that the extension of his traffic stop was not supported by reasonable suspicion and was therefore unlawful and, because evidence was obtained as a result of that unlawfully extended traffic stop, suppression is appropriate. The government responds that after Officer Miller returned Noriega’s driver’s license, registration, and proof of insurance, the encounter between Officer Miller and Noriega became consensual, meaning that Noriega was not “seized” within the purposes of the Fourth Amendment.

We need not decide whether a seizure occurred because, even assuming that Noriega *was* seized, the traffic stop was not unlawfully extended. “A seizure justified only by a police-observed traffic violation . . . ‘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 v. United States, 575 U.S. 348, 350-51 (2015) (second and third alterations in original) (citation omitted). “To extend a routine traffic stop, an officer needs reasonable suspicion of additional criminal activity. Reasonable suspicion requires ‘specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ a brief investigative stop.” Callison, 2 F.4th at 1132 (citations omitted); see also United States v. Englehart, 811 F.3d 1034, 1040-41 (8th Cir. 2016) (“In the normal course, once the officer finishes the tasks involved with the traffic violation ‘the purpose of the traffic stop is complete and further detention of the driver or vehicle would be unreasonable, unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify further detention or unless the continued

encounter is consensual.”” (citation omitted)). “The reasonable suspicion inquiry asks ‘whether the detaining officer has a particularized and objective basis for suspecting wrongdoing.’” United States v. Sanchez, 955 F.3d 669, 674 (8th Cir. 2020) (citation omitted). “[O]ur review on this issue looks to the totality of the circumstances, ‘allow[ing] officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.’” United States v. Dortch, 868 F.3d 674, 680 (8th Cir. 2017) (second alteration in original) (quoting United States v. Arizona, 534 U.S. 266, 273 (2002)).

Here, Officer Miller’s testimony confirms that he had reasonable suspicion to extend the stop based on “specific and articulable facts,” Callison, 2 F.4th at 1132 (citation omitted), that “occurred during the traffic stop,” Englehart, 811 F.3d at 1040 (citation omitted). Noriega was traveling from Las Vegas, Nevada, a location known to Officer Miller as a common origin point for narcotics. Additionally, Noriega’s demeanor was suspicious; he was visibly “shaking,” “twitching,” and “trembling,” his mouth was noticeably dry, he appeared increasingly uncomfortable when pressed about his travel plans, and he attempted to change the topic of conversation, directing Officer Miller away from questions regarding his destination. Officer Miller also explained that, because a strong fragrance was coming from Noriega’s vehicle at the outset of the stop but dissipated over the stop’s duration, he suspected that Noriega had sprayed a substance to mask the scent of narcotics, a tactic that, in his experience, is commonly used by narcotics traffickers to conceal their narcotics. Officer Miller testified about his extensive experience and training, which he was allowed to “draw on,” “mak[ing] inferences from and deductions about” Noriega’s involvement in the transportation of narcotics. See Dortch, 868 F.3d at 680 (citation omitted).

Viewing these facts cumulatively and considering Officer Miller’s extensive experience and training, we find that he had reasonable suspicion to extend the stop of Noriega. See, e.g., United States v. Pacheco, 996 F.3d 508, 512 (8th Cir. 2021) (finding reasonable suspicion to extend stop based on nervousness and odd

responses to “routine questions about travel plans”); United States v. Fuse, 391 F.3d 924, 929 (8th Cir. 2004) (finding reasonable suspicion to extend stop based on trooper’s experience in highway drug interdiction and his testimony regarding vehicle’s “strong odor of air freshener,” driver’s unusual nervousness and unusual explanation of his travel plans, and driver’s origin state being “a ‘source state’ for illegal narcotics”). Because Officer Miller’s extension of the stop was lawful, suppression of the evidence obtained as a result of that extension is inappropriate. Therefore, discerning no error, we affirm the district court’s denial of Noriega’s motion to suppress.

III.

Next, we consider the substantive reasonableness arguments raised by Noriega, McCleary, and Alcantar Mercado, reviewing the substantive reasonableness of their sentences for abuse of discretion. See United States v. Carnes, 22 F.4th 743, 750 (8th Cir. 2022). An abuse of discretion occurs where a district court “(1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in weighing those factors commits a clear error of judgment.” United States v. Ballard, 872 F.3d 883, 885 (8th Cir. 2017) (per curiam) (citation omitted). However, “[a] district court has ‘wide latitude’ to assign weight to give[n] factors, and ‘[t]he district court may give some factors less weight than a defendant prefers or more weight to other factors, but that alone does not justify reversal.’” Carnes, 22 F.4th at 751 (second and third alterations in original) (citation omitted); see also United States v. Beckman, 787 F.3d 466, 499 (8th Cir. 2015) (“[W]here a district court has sentenced a defendant below the advisory guidelines range, it is nearly inconceivable that the court abused its discretion in not varying downward still further.” (alteration in original) (citation omitted)).

A.

First, we address the substantive reasonableness of Noriega’s sentence. Noriega’s PSR, which applied a two-level reduction in the Guidelines offense level for Noriega’s role as a minor participant and a three-level reduction for Noriega’s acceptance of responsibility, calculated a total offense level of 29 and a criminal history category of II, which resulted in a Guidelines range of 97 to 121 months imprisonment. At sentencing, the district court recognized that although Noriega qualified for a safety valve reduction pursuant to 18 U.S.C. § 3553(f), USSG § 5C1.2(a) had not been amended to reflect the safety valve reduction recognized by § 3553(f). The district court nevertheless varied downward as if the provision were applicable, recalculating Noriega’s total offense level as 27, which resulted in a Guidelines range of 78 to 97 months imprisonment. Ultimately, the district court varied downward further, sentencing Noriega to 72 months imprisonment with a 3-year term of supervised release.

Noriega argues that the district court imposed a substantively unreasonable sentence by declining to vary downward based on his policy disagreement with the Guidelines’ treatment of a mixture of methamphetamine as opposed to pure methamphetamine. However, we have frequently stated that while a district court may vary from the Guidelines based on a policy disagreement, it is not required to do so. See United States v. Sharkey, 895 F.3d 1077, 1082 (8th Cir. 2018) (per curiam); see also United States v. Binion, 801 F. App’x 459, 462 (8th Cir. 2020) (per curiam) (“[W]hile the district court could have granted a downward variance based on a disagreement with the Guidelines’ treatment of methamphetamine purity, it had the discretion to decline to do so.” (citation omitted)).

Noriega also contends that the district court abused its discretion in weighing the 18 U.S.C. § 3553(a) factors. Specifically, he believes that the district court failed to consider or give adequate weight to his personal characteristics and history, arguing that he is young, is part of a close-knit, supportive family, is in a long-term, stable relationship with his partner, has children with that partner, and has a

methamphetamine addiction, which caused him to become involved in this conspiracy, jeopardizing the things in his life that he values, such as his family and children. Noriega also briefly addresses the other § 3553(a) factors. However, reversal is not appropriate simply because the district court did not weigh the § 3553(a) factors as Noriega preferred. See Carnes, 22 F.4th at 751; see also United States v. Farmer, 647 F.3d 1175, 1180 (8th Cir. 2011) (“A district court’s choice to assign relatively greater weight to the nature and circumstances of the offense than to the mitigating personal characteristics of the defendant is well within its wide latitude in weighing relevant factors.”). Moreover, “it is nearly inconceivable” that the district court abused its discretion in sentencing Noriega to a below-Guidelines term of imprisonment. See Beckman, 787 F.3d at 499 (citation omitted). Thus, we find that Noriega’s sentence was substantively reasonable and affirm his sentence.

B.

We next consider the substantive reasonableness of McCleary’s sentence. McCleary’s PSR calculated a total offense level of 35, which included a three-level reduction for his acceptance of responsibility, and a criminal history category of II. This calculation resulted in a Guidelines range of 188 to 235 months imprisonment. At sentencing, the district court varied downward, sentencing McCleary to 180 months imprisonment with a 5-year term of supervised release.

McCleary, born in 1962, asserts that his sentence is substantively unreasonable because, although he was sentenced to 180 months imprisonment, his advanced age effectively renders the term a life sentence. However, the district court recognized this argument below, explaining that it was “concerned about protecting the public and providing adequate deterrence” but had chosen to vary downward after “tak[ing] into consideration the current conditions of COVID-19 and the challenges of serving time during this period and the defendant’s age at 59 years old.”

McCleary also argues that the district court overlooked, or placed insufficient weight on, his “lesser role” in the offense. Despite the fact that McCleary characterizes himself as being a “mere courier and waypoint holder in possession for a manager or supervisor co-conspirator,” the district court found that the amount of methamphetamine attributed to McCleary was large. He additionally characterizes himself as an “unsophisticated user of methamphetamine who was enlisted for a fee to make at least one delivery run,” but the district court found that this claim was undermined by the fact that, since 2000, he had “consistent[ly] participat[ed] in methamphetamine distribution,” a fact which the district court found to be particularly aggravating. McCleary suggests that the district court improperly used his prior convictions against him despite the fact that he did not qualify as a career offender, but the district court acknowledged that McCleary was not a career offender, stating, “[T]his is a continuation of a pattern. Because of the age of the 2000 conviction, the defendant doesn’t qualify as a career offender, but the age also means that it isn’t used to elevate the applicable guideline range in any way.” The district court explained that its “concern” was “that this is still happening, which suggests that deterrence and protection of the public require a significant sentence.” Like Noriega, McCleary is unhappy with how the district court weighed the § 3553(a) factors, but that is insufficient to demonstrate any abuse of the district court’s discretion, and accordingly, we affirm McCleary’s sentence. See Carnes, 22 F.4th at 751; see also Beckman, 787 F.3d at 499.

C.

Finally, we consider Alcantar Mercado’s claim that his sentence is substantively unreasonable. His PSR, after applying a three-level reduction for his acceptance of responsibility, calculated a total offense level of 35 and a criminal history category of III, which resulted in a Guidelines range of 210 to 262 months imprisonment. At sentencing, the district court varied downward and sentenced Alcantar Mercado to 204 months imprisonment with a 5-year term of supervised release. He now argues that his sentence is substantively unreasonable because although he was not eligible for a mitigating role reduction, he nevertheless played

a limited role in the conspiracy. However, the district court emphasized that not only were 5.1 grams of actual or ice methamphetamine attributed to Alcantar Mercado, but he was also responsible for a large amount—over 1,300 grams—of heroin. In fact, 90,000 kilograms or more of a converted drug weight were attributed to Alcantar Mercado, which the district court summarized as meaning that “there have been multiple drugs that are converted to a common level.” The district court also found Alcantar Mercado’s criminal history aggravating, noting that although it was “modest . . . comparatively,” it was still “of concern” because he had previously violated the terms of his probation.

Like Noriega and McCleary, Alcantar Mercado also argues that the district court improperly weighed the § 3553(a) factors. However, as we have already explained, the simple fact that a defendant disagrees with how the district court weighed the § 3553(a) factors is insufficient to establish that the district court abused its discretion. See Carnes, 22 F.4th at 751. Therefore, we find that Alcantar Mercado’s sentence is substantively reasonable and affirm that sentence. See Beckman, 787 F.3d at 499.

IV.

Unlike the other appellants, Alcantar Cuevas’s argument is one of procedural error rather than substantive unreasonableness. He contends that the district court procedurally erred by denying him a mitigating role reduction pursuant to USSG § 3B1.2(b) and, consequently, by not applying a three-level reduction pursuant to USSG § 2D1.1(a)(5).

After applying a two-level safety valve reduction, a two-level mitigating role reduction, and a three-level reduction for Alcantar Cuevas’s acceptance of responsibility, Alcantar Cuevas’s PSR calculated a total offense level of 27 and a criminal history category of I. The government objected to the PSR’s application of a two-level mitigating role reduction and argued that Alcantar Cuevas’s total offense level should instead be 29, resulting in a Guidelines range of 87 to 108 months

imprisonment. At sentencing, the district court agreed with the government and found that Alcantar Cuevas was ineligible for a two-level mitigating role reduction. Alcantar Cuevas also objected to the PSR, arguing that the government had not proved by a preponderance of the evidence that the methamphetamine attributed to him was actual or ice methamphetamine, as opposed to a methamphetamine mixture. The district court agreed and found that 4,536 grams of a methamphetamine mixture was attributable to Alcantar Cuevas. After sustaining these objections, the district court recalculated Alcantar Cuevas's total offense level, applying a two-level safety valve reduction and a three-level reduction for Alcantar Cuevas's acceptance of responsibility. The district court calculated a total offense level of 29 and a criminal history category of I, which resulted in a Guidelines range of 87 to 108 months imprisonment. The district court then varied downward, sentencing Alcantar Cuevas to 60 months imprisonment with a 3-year term of supervised release.

“We review the district court’s fact-findings with respect to a participant’s role in the offense for clear error.” United States v. Surratt, 172 F.3d 559, 567 (8th Cir. 1999). “It is well-established that a district court’s determination of whether a defendant was a minor participant may only be reversed if clearly erroneous.” United States v. Johnson, 358 F.3d 1016, 1017 (8th Cir. 2004). “The defendant has the burden of proving he played a minor role.” United States v. Godinez, 474 F.3d 1039, 1042 (8th Cir. 2007). “A defendant may be eligible for the [USSG] § 3B1.2(b) reduction if his culpability for the relevant conduct is relatively minor compared to that of other participants, but the mere fact that a defendant is less culpable does not entitle him to the reduction.” United States v. Johnson, 408 F.3d 535, 538 (8th Cir. 2005) (citation omitted). When deciding whether a mitigating role reduction was appropriate, we “compare[] ‘the acts of each participant in relation to the relevant conduct for which the participant is held accountable’ and measure[] ‘each participant’s individual acts and relative culpability against the elements of the offense.’” Id. at 538-39 (citation omitted).

Here, the district court found that a § 3B1.2(b) reduction was inappropriate because Alcantar Cuevas “played multiple roles within a very large drug trafficking

conspiracy" and "work[ed] directly with the source of supply from Mexico to both transfer money and to distribute large-scale methamphetamine into Iowa and Minnesota." We agree. Alcantar Cuevas was tasked with collecting drug proceeds and wiring those proceeds to multiple recipients in Mexico. In fact, Alcantar Cuevas wired over \$8,000 from the United States to Mexico. He has not shown that he played only a minor role in this conspiracy, and the district court did not clearly err in not applying a two-level mitigating role reduction pursuant to § 3B1.2(b) and, consequently, by not applying a three-level reduction pursuant to § 2D1.1(a)(5). See Johnson, 408 F.3d at 538.

V.

Finding no error, we affirm the judgment in each of these appeals.

APPENDIX B

Opinion of the United States Court of Appeals for the Eighth Circuit on Petition
for Rehearing en Banc

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1211

United States of America

Appellee

v.

Felipe Noriega, Jr.

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:19-cr-00219-RGE-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 08, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) CASE NO. 4:19-cr-219
vs.)
FELIPE NORIEGA, JR.,)
Defendant.)
)

COURTROOM 265, SECOND FLOOR
U.S. COURTHOUSE
123 East Walnut Street
Des Moines, Iowa 50309
Friday, July 31, 2020
9:02 a.m.

BEFORE: THE HONORABLE REBECCA GOODGAME EBINGER, DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: AMY JENNINGS
United States Attorney's Office
U.S. Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, IA 50309

For the Defendant: ERIN CARR
Attorney at Law
300 Walnut Street, Suite 140
Des Moines, IA 50309

Chelsey Wheeler, CSR, RPR, FCRR
United States Courthouse
123 East Walnut Street
Des Moines, IA 50309

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P R O C E E D I N G S

2 (In open court with the defendant present via
3 videoconference.)

4 THE COURT: Thank you. Please be seated.

5 We're here in the matter of the United States of
6 America versus Felipe Noriega, Jr. This is
7 Case No. 4:19-cr-219. This is the time and date set for a
8 hearing on a motion to suppress. My name is
9 Rebecca Goodgame Ebinger. I'm the district judge presiding.

10 If counsel would please identify themselves for
11 purposes of the record.

12 MS. JENNINGS: Your Honor, may I remain seated for
13 the --

22 And you'll note I just took my mask off. I did that
23 so that Mr. Noriega can see my face clearly and know who I am,
24 but I will be putting my mask on and off during the course of
25 the hearing when I am speaking or not.

1 These are unusual times. I can't think of a -- if you
2 had told me a year ago that I would be asking people to wear
3 masks in court, I would have thought there was something very
4 wrong with you. But now I think there would be something very
5 wrong with me if I didn't, in fact, require you to do so.

6 But you were introducing yourself.

7 MS. JENNINGS: Amy Jennings for the Government.

8 MR. CARR: Erin Carr for the defendant.

9 THE COURT: Thank you.

10 And Mr. Noriega is participating via video from the
11 Polk County Jail where he is detained.

12 Mr. Noriega, can you see and hear me adequately, sir?

13 THE DEFENDANT: Yes.

14 THE COURT: I want to talk with you about the
15 proceedings that we're having here today by video. You and
16 your attorney filed a document in our court docket at Document
17 No. 147 that showed that you want to have this video
18 proceeding -- or this proceeding via video.

19 Do you recall that document, sir?

20 THE DEFENDANT: Yes.

21 THE COURT: Did you have the opportunity to talk about
22 that with Mr. Carr?

23 THE DEFENDANT: Yes, I have.

24 THE COURT: My understanding is that you understand
25 that you have the right to be personally present, but at this

1 time we don't have the capacity to have you here personally
2 present, and so we would have to wait to have this hearing
3 unless you consented to have the hearing today.

4 Is that your understanding as well, sir?

5 THE DEFENDANT: Yes. I understand.

6 THE COURT: And do you want to have the hearing here
7 today via video -- with your participation via video, sir?

8 THE DEFENDANT: Yes.

9 THE COURT: You understand that you're waiving or
10 giving up any right that you have to be physically present by
11 consenting to having this hearing via video?

12 THE DEFENDANT: Yes.

13 THE COURT: Any additional record in that regard from
14 the Government?

15 MS. JENNINGS: No, Your Honor.

16 THE COURT: From the defense?

17 MR. CARR: No, Your Honor.

18 THE COURT: Mr. Noriega, a very important part of this
19 is that you make sure that if at any time during the hearing
20 you cannot hear or see something that you indicate it to me.

21 I can see you clearly, I can hear you clearly, but
22 it's very important that you be able to see and hear everything
23 that happens in court today.

24 Would you please stop me and let me know if at any
25 point you can't hear or see adequately, sir?

1 THE DEFENDANT: Okay. I will.

2 THE COURT: Thank you. And then we'll make a record
3 at the end of the hearing that you've been able to see and hear
4 everything throughout the course of the hearing.

5 So the Court does find that the ends of justice are
6 served by having this proceeding via video, that further delay
7 would cause serious harm to the interest of justice. I also
8 find that these are reliable electronic means that allow for
9 the defendant's full participation via video.

10 With that record, let's turn to the substance that
11 we're addressing today. The motion to suppress was filed back
12 in May, May 7.

13 Ms. Jennings, what is the Government's intent as to
14 the evidence to be presented today?

15 MS. JENNINGS: The Government is going to call Deputy
16 Mike Miller and Special Agent Shane Gosnell.

17 THE COURT: Do you anticipate any physical exhibits?

18 MS. JENNINGS: No.

19 THE COURT: Mr. Carr, do you intend to present any
20 evidence today?

21 MR. CARR: We do not, Your Honor.

22 THE COURT: Thank you.

23 Then, Ms. Jennings, I would ask you to call your first
24 witness.

25 MS. JENNINGS: Thank you, Your Honor. And may I stand

1 up at the podium?

2 THE COURT: Yes. That's fine. I will ask you to keep
3 your mask on during your questioning unless for some reason I
4 can't hear you, but, yes, you may be at the podium. Because
5 you're not using any exhibits, I don't imagine you'll ask to
6 approach the witness, but I would say no even if you did.

7 MS. JENNINGS: Okay. The Government calls Michael
8 Miller to the stand.

9 THE COURT: Thank you.

10 MS. JENNINGS: So if you go --

11 THE COURT: Mr. Miller, would you please come forward.
12 Would you please raise your right hand and prepare to be sworn.

13 MICHAEL MILLER, GOVERNMENT'S WITNESS, SWORN

14 THE COURT: Thank you. You may be seated.

15 I see that you've taken off your mask, I appreciate
16 that. You can be seated. Please state and spell your full
17 name for the record.

18 THE WITNESS: It's Michael Miller, M-i-c-h-a-e-l
19 M-i-l-l-e-r.

20 THE COURT: Thank you.

21 Your witness, Counsel.

22 MS. JENNINGS: Thank you, Your Honor.

23 Deputy Miller, just so you're aware, I'm going to keep
24 my mask on. We talked earlier, and I told you I would take my
25 mask off, but I will have my mask on during questioning. The

1 Court would like you to have your mask off, though. Okay?

2 THE WITNESS: Okay. Okay.

3 THE COURT: Ms. Jennings, if you would move the
4 microphone so it's more directed towards you. Thank you.

5 DIRECT EXAMINATION

6 BY MS. JENNINGS:

7 Q. Mr. Miller what's your job?

8 A. I'm an investigator for the Mesa County Sheriff's Office in
9 Grand Junction, Colorado.

10 Q. And how long have you been with the Mesa County Sheriff's
11 Department?

12 A. Since April of 1992.

13 Q. You said you're an investigator. Are you a deputy?

14 A. Yes. So my title is the rank of an investigator, and then
15 above that would be a sergeant and so on and so forth.

16 Q. Since 1992 have you always been an investigator, or have
17 you held other positions?

18 A. No. I started at the jail as a detention officer. I
19 transitioned after about a year and a half to community
20 corrections as a case manager, which is still part of the
21 sheriff's office. In 1995 I went back to the operation
22 division, which was as a patrol officer, and worked as a patrol
23 deputy from 1995 until my assignment with the Western Colorado
24 Drug Task Force as an investigator in 1999.

25 Q. Have you been with the Western Colorado Drug Task Force

1 since 1999?

2 A. Correct. Yes.

3 Q. You said you worked in a patrol capacity. Have you worked
4 in a patrol capacity or an interdiction capacity since 1999?

5 A. Yes.

6 Q. And have you been a K-9 handler since 1999 as well?

7 A. I have been a K-9 handler since 1997, towards 1998.

8 Q. Okay. Now, is there a particular geographical area that
9 you are responsible for patrolling or watching over as part of
10 your job as a deputy?

11 A. Well, I'm responsible for the entire county of Mesa, which
12 is on the western side of Colorado at the Utah border. I
13 primarily work along I-70, Interstate 70, towards the
14 Utah-Colorado border, but I do go assist other task force
15 officers with traffic stops or surveillance in an unmarked
16 capacity on occasion. I do have an unmarked vehicle, so I do
17 that as well and assist them with long-term investigations on
18 occasion.

19 But my primary function is to work Interstate 70
20 intercepting those large drug loads as they go come into and
21 through Mesa County. I also work at the Greyhound bus station
22 on occasion and the Amtrak train station interdicting drugs at
23 those locations as well.

24 Q. And have you been working what we call drug interdiction
25 for approximately the last 20 years?

1 A. Yes, 21 years, I think.

2 Q. And has that been primarily highway drug interdiction?

3 A. Primarily, yes.

4 Q. And during a typical day, are you in one position on the
5 highway, or are you patrolling up and down in your vehicle, or
6 does it depend?

7 A. It kind of depends. I typically stay on, like I said, the
8 west side of the county along the interstate between -- it's a
9 small town called Mack, Colorado, and the Utah state line.

10 And the reason why I do that is there's only one exit
11 between where I sit and the Utah state line, and it's an exit
12 for recreating. There's, like, a dinosaur quarry out there.
13 People ride motorcycles and mountain biking, things of that
14 nature.

15 And one of the things I run into doing my job is it's a
16 sentencing enhancer for importing narcotics into Colorado, so
17 that location just makes it an easier viable way to, I guess,
18 include that charge. In addition, I don't target a lot of
19 commuter traffic out there. It's mostly people that are
20 traveling from Utah or further west.

21 Q. Okay. Now, since you've been in interdiction for the past
22 20 years, do you have an approximation about how many hours of
23 training you have received as an officer?

24 A. Yes. I have had over 1,000 hours of training in
25 interdiction. I don't know how much detail you want me to go

1 into, but my first interdiction class was in 1996 as a course
2 called Desert Snow. It was a weeklong course, and that's what
3 got me interested in doing interdiction work. And since that
4 class in 1996, I have attended the Desert Snow class
5 approximately six other times just as refreshers and training
6 dealing with other types of vehicles such as commercial
7 vehicles.

8 I've also attended other classes, interdiction classes,
9 relating to bus interdiction and train interdiction and airport
10 interdiction and other classes sponsored by other entities in
11 highway interdiction.

12 I am also a member of the Colorado Drug Investigators
13 Association, and I don't want to say I attend that yearly, but
14 I have attended it several times, and, again, that's a weeklong
15 class dealing primarily with general narcotics investigation,
16 and there's some drug interdiction classes in that as well.

17 I'm also a member of the National Interdiction Conference
18 that I attend yearly, and that's a weeklong networking/training
19 class involving criminal interdiction.

20 And, again, I just -- a variety of other types of courses.
21 And, in fact, I have taught interdiction classes along the
22 western slope to smaller agencies, other departments, and I
23 also teach at the Western Colorado Peace Officers Academy, so
24 the new students that are just getting into law enforcement, I
25 teach them search and seizure. For about eight years, I taught

1 vehicle searches and officer safety.

2 Q. Now, in your experience in the past 20 years, do you have
3 an estimate of how many traffic stops you have conducted of
4 vehicles?

5 A. Thousands of traffic stops.

6 Q. And have those included traffic stops that both resulted in
7 searches and seizures and those that did not?

8 A. Yes.

9 Q. And have you had the opportunity to see a lot of drivers of
10 vehicles in the course of your experience?

11 A. Yes.

12 Q. Do you have an estimate of how many?

13 A. In the last 20 years, I would say close to 10,000.

14 Q. Okay. Now, do you have an estimate about how much drugs
15 you have seized over the course of your career?

16 A. I do. Conservative estimates of about 18,000 pounds of
17 marijuana; about 1500 pounds of methamphetamine, 400 of those
18 pounds which were in 2018 and 2019 alone -- I'm sorry --
19 600 pounds in 2018 and 2019 alone; about 11- or 1200 pounds of
20 cocaine; 150 to 200 pounds of heroin; and over 21 million
21 dollars in suspected drug currency.

22 Q. Okay. Have you received awards for interdiction?

23 A. Yes, I have.

24 Q. And at what level have you received those awards?

25 A. I have received them at the local level from my own agency,

1 the state level for Investigator of the Year for the state of
2 Colorado regionally. I have received Interdiction Officer of
3 the Year for our region, which covers Montana, Utah, Colorado,
4 and Wyoming. I received that award twice, and so I was the
5 chairman's award for a consistent performance through my 20
6 years of doing interdiction.

7 I have received recognition from the National Sheriff's
8 Office Association and recently learned that I -- for the 2019
9 NIC Conference, I'm in the top 5 or for receiving another
10 national award. Because of the COVID, that has not taken place
11 yet and is now rescheduled for February 7.

12 Q. Now, when you're on duty, are you in a marked vehicle?

13 A. Yes. It's a marked Chevy Tahoe with "Sheriff's" stickers
14 on the side, reflective stickers. I have an interior light
15 bar, so there's an overhead light bar. It's inside the
16 vehicle.

17 Q. Is your vehicle marked with the K-9 unit sign?

18 A. Yes. There's a K-9 unit sticker on the back of it.

19 Q. When you're wearing your uniform, how many firearms -- or
20 is a firearm visible to a person that would be looking at you?

21 A. Yes.

22 Q. And how many?

23 A. I have one that is visible to the general public.

24 Q. Okay. And then you have another concealed firearm that's
25 not visible?

1 A. Yes. I have a backup firearm that I carry as well.

2 Q. Do you wear a body camera or have a dash camera as part of
3 your work?

4 A. No. Our agency does not have body cameras or in-car
5 cameras.

6 Q. Now, is it common for other officers from different
7 agencies to assist you during a traffic stop?

8 A. Yes, on occasion.

9 Q. Do you work with a partner in your vehicle or not?

10 A. No, I do not.

11 Q. So when you're pulling someone over, it's just you?

12 A. That's correct. Yes.

13 Q. You said you've received a lot of training regarding
14 interdiction. Do you receive training on demeanor?

15 A. Yes. I have actually had a specific class on reading body
16 language both prior to this stop and during the stop. And it's
17 been several years ago, so I don't remember the name of the
18 class, but it did take place probably six, seven years ago.

19 Q. What about your demeanor as an officer? Do you have
20 training or experience about how to conduct yourself during a
21 traffic stop?

22 A. You know, yes. It's been several years ago. I don't
23 remember specifically. But a lot of that is just -- to be
24 quite honest, is just in experience and how I get -- I don't
25 know if you want to call it cooperation, but the ability just

1 to talk to people and try to keep things low key and as
2 friendly as possible. I feel like I get further with the
3 traffic stop by doing that than, I guess, being like a robot or
4 talking down to people, things of that nature. I like to talk
5 to them as person-to-person.

6 Q. Do you also receive training and have experience on what
7 indicators a vehicle might have that you're observing --

8 A. Yes.

9 Q. -- for trafficking narcotics?

10 A. Yes.

11 Q. And based on your training and experience, if you're just
12 viewing a vehicle, you haven't pulled it over yet, either, you
13 know, you're patrolling and you're driving or you're from your
14 post on the side of the road, what are some indicators of
15 trafficking based on your training and experience?

16 A. I guess I'll back up, and I'll clarify that. That's some,
17 like, indicators of some sort of criminal activity, not
18 necessarily -- although it can be included as narcotics as
19 well.

20 But the change in driving behavior. When a motorist sees a
21 marked patrol car -- I park perpendicular to the interstate,
22 and I'm highly visible from about a half a mile in either
23 direction at least. So how that driver reacts to my presence
24 is the probably the biggest one I look for.

25 The other one is certain types of vehicles. Certain

1 types of vehicles are better for transporting narcotics than
2 others, and I look for various types of cars that are trying to
3 blend in, like, lighter-colored cars, for example, not flashy
4 cars.

5 I also look for, for example, like, minivans. If it's just
6 a single occupant in a minivan, which minivans are typically
7 used by families, is that driver intentionally trying to make
8 an effort to blend into traffic instead of just being normal
9 and just being a normal motorist?

10 So those are probably the biggest things I look for is just
11 how they respond to me as they drive by. Do they take a sip of
12 water as they're passing me? Are they taking a puff of a
13 cigarette? Do they pick up a cell phone as they're driving by
14 me? Do they look away from me as they drive by?

15 And probably one of the biggest one is if, as they're
16 driving by, they will tuck their face into, like, their armpit
17 or lean back as they pass me because they don't want to be
18 seen.

19 Q. You talked about light-colored cars or not flashy cars
20 being used by drug traffickers in your training and experience.
21 Are there any other physical characteristics of vehicles that,
22 in your training and experience, have been used by drug
23 traffickers?

24 A. If I can back up. I just -- when I say that those are the
25 things that I typically look for, I'm not saying that, you

1 know, flashy cars can't and that I haven't found narcotics in
2 those. It's just not as common.

3 But, I think to answer your question, if I heard it
4 correctly, maybe, like, tinted windows. There's certain types
5 of vehicles that I do look for that are common that follow
6 trends. I get publications, if you will, about vehicle trends
7 of what's being used by drug cartels or just entrepreneurs that
8 are trafficking narcotics, such as rental cars, and then just
9 certain types of vehicles that are common.

10 The smaller sedans, like, the Nissan Altima, the Toyota
11 Camrys, Chevy Cavaliers, a lot of times those are salvaged
12 titles, but the motors are good, so they're still reliable
13 cars. They're inexpensive but reliable, so those are the type
14 of vehicles they use. There are some types of trucks that are
15 good.

16 And then there's just some that just, you know, I don't
17 really come across to find a lot of narcotics in.

18 Q. Are there some vehicles that are known for voids, having
19 natural voids in them?

20 A. Yes. Yes. Some have natural voids in them or easy access
21 to, like, gas tanks or making traps or hidden compartments in
22 the dash or firewalls of certain vehicles that are more
23 conducive to those type of concealments than others.

24 Q. Okay. And you described that you're on Interstate 70 near
25 the Utah-Colorado border. In your training and experience,

1 with respect to the direction of travel regarding drug
2 traffickers, can you speak to that?

3 A. Sure. If I'm targeting narcotics, the flow of traffic
4 coming up from the West Coast, Southern border, traveling I-70
5 traveling eastbound, I target for narcotics and typically
6 westbound for drug proceeds, drug proceeds going back to those
7 source locations.

8 I have on occasion found money going eastbound and pretty
9 rare, and I never have seized it. And on a handful of
10 occasions, I have found narcotics either with cash or alone
11 traveling back westbound, but it's been very rare.

12 Q. Okay. We talked a little bit about your training and
13 experience as it relates to the physical vehicle that you're
14 looking at. What about when you approach during a traffic
15 stop? What types of indicators of drug trafficking are you
16 aware of based on your training and experience? As you
17 approach a vehicle, are you able to see the driver and look
18 inside the vehicle?

19 A. Okay. Well, it would be in two parts. It would be subject
20 indicators and vehicle indicators. As I talked about, the
21 vehicle indicators, probably the biggest one would be the odor
22 coming from the car, whether it's an air freshener, it's an
23 odor of gas, or an odor Bondo or fiberglass resin.

24 I used to be an aircraft mechanic prior to being in the --
25 with the sheriff's office when I was in the Navy, and so I'm

1 familiar with Bondo smell, fiberglass smell, things of that
2 nature or fresh paint, so those are some of the big clues.

3 Q. I'm going to stop you right there. What are drug
4 traffickers known to use these smells for? What's the purpose
5 of them?

6 A. Sure. I'm sorry. The Bondo and the paint are commonly
7 used when they are building a trap or hidden compartment in the
8 car, and then that trapdoor is covered back up. A lot of times
9 they put Bondo over the trapdoor, or just in general in making
10 the compartment, they'll use Bondo spray paint to make that
11 trap look like part of the vehicle.

12 Q. What about the air freshener?

13 A. Air fresheners or any type of perfume odor is a masking
14 agent used to cover the odor of drugs, which does work a little
15 bit with marijuana for police officers and their ability to
16 maybe smell the marijuana, covering that smell up, but not
17 necessarily for a drug K-9 because the K-9 smells differently
18 than humans do. So that's why they use it, with the belief
19 that it will cover up the odor of the narcotics.

20 Q. Okay. Have you, in the course of your career, had the
21 opportunity to approach vehicles that have air fresheners being
22 used in them?

23 A. Yes.

24 Q. And have you smelled, in the course of your career,
25 different levels of air deodorizer being used in cars?

1 A. Yes.

2 Q. Is that something that you're sensitive to or aware of when
3 you're conducting a traffic stop?

4 A. Yes, ma'am.

5 Q. Why?

6 A. Again, that's probably one of the primary indicators of
7 somebody possibly being involved in trafficking narcotics.

8 Q. And are there different types of air fresheners that can be
9 used in a vehicle?

10 A. Sure.

11 Q. And what are some of the ones you're familiar with?

12 A. Black Ice air fresheners are one of the more common ones,
13 pine scent, even just cologne, just, you know, cherry. There's
14 just a variety of them.

15 Q. What about different types of delivering the scent into the
16 vehicle?

17 A. Sure some of them are, like, a permanent, like, a -- the
18 Christmas tree type of air fresheners that I see on rear-view
19 mirrors on the dash; the one that goes inside the vents; the
20 air fresheners in the vents; and then the spray deodorizer as
21 well where they spray the deodorizer or fresheners in the car.

22 Q. In your experience, are there differences in the potency of
23 the smell between the ones that hang from the rear-view mirrors
24 and the ones that can be sprayed?

25 A. Typically, yes. It depends on the time frame when the

1 deodorizer was sprayed, of course, and it depends on the length
2 of time that the air freshener has been hanging on the
3 rear-view mirror or in the car as well.

4 Q. Okay. We took a little detour on air fresheners. I'm
5 going to bring you back to the indicators of drug trafficking
6 or any type of criminal activity when you're at the vehicle
7 talking to the driver, looking at the vehicle.

8 Can you talk a little bit more about those, please.

9 A. Sure. Some of the other indicators are, like, maybe beef
10 jerky or food items that might be purposely placed or sprinkled
11 on the floor because of the belief that, which is true, it
12 distracts the K-9. If the K-9 gets inside the car, the dog --
13 I'll admit, you know, if my dog sees a piece of beef jerky on
14 the floor, he's going to eat it, you know, so it does work.

15 So a lot of times if I'm able to, depending on the
16 cooperation of the driver, you know, remove those items and put
17 them up on top of the roof before I put my dog in the car is
18 something I would do as just kind of a safety check prior to
19 doing that.

20 Other purposely placed air fresheners, the location of
21 them, are they up on the dash or in the backseat or hanging up
22 in the back? You know, does it appear that they've
23 intentionally put them in a certain place for a reason?

24 An overabundance of religious items and sometimes specific
25 actual religious items, which one of the more common ones would

1 be a Santa Muerte, which is kind of a patron saint, without
2 giving a whole lot of detail, for drug traffickers.

3 And there can be some legitimate purposes, reasons for
4 having it as well. But is that item in the car, is it placed
5 in a particular location in the vehicle, like, maybe on the
6 backseat as -- like I said, an overabundance of religious
7 items?

8 Q. What are some subject indicators? You mentioned those
9 earlier.

10 A. Sure. Subject indicators I look for is -- probably the
11 biggest one is nervous behavior, and I don't know how much
12 detail you want me to go into, nervous behavior but --

13 Q. I'll ask you about that later.

14 THE COURT: I'm going to remind counsel and Mr. Miller
15 that you need to make sure you speak at separate times. In
16 particular, with the use of a mask, it's important to make it
17 as easy as possible on our court reporter.

18 THE WITNESS: Thank you.

19 BY MS. JENNINGS:

20 Q. You said subject indicators, and I'll come back to
21 nervousness. You mentioned that. What about some of the other
22 information you might glean from a driver while you're asking
23 them questions?

24 A. How they respond to a question, the vagueness of the
25 responses. Does their response roll off the tongue? Are they

1 sweating? Does it depend on the temperature? Again, the
2 travel plans, does it make sense, the length of time they're
3 going to be gone for or have been gone for, and what the
4 purpose, again, was for their trip.

5 Q. You talked a little bit about nervousness. Based on your
6 training and experience, what are some indicators of
7 nervousness?

8 A. Shaking hands, carotid artery visibly pulsating, chest
9 raising up and down like they're rapidly breathing, breathing
10 heavily, sweating, especially in colder weather, legs
11 trembling. I've had them pass out before, throwing up,
12 deflection, overly cooperative, deflecting from the original
13 answers they're not comfortable with. The typical ones: The
14 dry mouth, licking of the lips, swallowing, taking sips of
15 water, things like that.

16 Q. You talked a lot about different indicators in the last few
17 minutes. Do you evaluate each stop on a case-by-case basis?

18 A. I do, yes.

19 Q. Now I want to talk to you about November 15, 2019. Were
20 you working that day?

21 A. Yes, ma'am.

22 Q. And can you tell me what happened -- or I guess what you
23 were doing around the 11 a.m. hour on that day?

24 A. I was working, patrolling the interstate west of Grand
25 Junction, Colorado.

1 Q. And did a vehicle catch your attention?

2 A. Yes.

3 Q. Tell us about that.

4 A. I was traveling westbound on the interstate. The median
5 separates the east and westbound lanes by about, I'd say,
6 50 yards where I was at. I observed a white Nissan Altima that
7 was traveling eastbound. The Altima had very dark tinted
8 windows, both front and passenger's side windows, and the
9 vehicle was traveling in the left-hand lane and was not
10 overtaking other vehicles, which is a traffic violation in the
11 state of Colorado for traveling in the left-hand lane without
12 overtaking other cars.

13 Q. And do you know about approximately, roughly, what time you
14 saw this vehicle?

15 A. The first time I saw it would have been about 11:25 or so.

16 Q. Are you making that estimate based on your report and when
17 you called it in?

18 A. Yes, ma'am.

19 Q. And I think your report said around 11:34, 11:35; is that
20 right?

21 A. Correct. That's when I called it into dispatch, correct,
22 for the traffic stop.

23 Q. So your estimate is that you saw it about ten minutes
24 before that?

25 A. Correct.

1 Q. What state were the plates from?

2 A. It was a Nevada license plate.

3 Q. And the traveling in the left-hand lane, is that an issue
4 for drivers in Colorado?

5 A. It is, yes.

6 Q. Okay. And do you frequently pull people over for that?

7 A. I do --

8 Q. Why?

9 A. -- quite frequently. Because people -- drivers in
10 Colorado, most of them know that that's a traffic violation
11 and, to be quite honest, it irritates other motorists when
12 people are traveling in the left-hand lane, especially if
13 they're only going the speed limit or below. That causes road
14 rage and causes people to follow too close, which following too
15 close is probably -- I don't investigate traffic accidents, but
16 I know it's a leading cause for rear-end collisions in the
17 state of Colorado, and that's the purpose of that law.

18 And I know a lot of people out of state aren't familiar
19 with that, but it's more of an educational type of stop to say,
20 Hey, while you're in Colorado, these are our laws, you know,
21 because it irritates a lot of drivers, motorists, and it causes
22 road rage for those reasons.

23 Q. Okay. And that's statute 14-4-1013?

24 A. It's 42- --

25 Q. Oh, sorry. 42. Okay. And were there any other --

1 THE COURT: I'm sorry. Clarify that, please?

2 MS. JENNINGS: Is it 42-4-1013, the statute?

3 THE WITNESS: Yes.

4 THE COURT: Thank you.

5 BY MS. JENNINGS:

6 Q. Were there any other vehicles traveling around this white
7 Altima when you saw it?

8 A. No. Not in the immediate vicinity that it was overtaking,
9 no.

10 Q. So what did you do after you observed the white Altima in
11 the left-hand lane?

12 A. I was approaching the center median where I typically park,
13 which is about Mile Post 10. I took the crossover and began
14 traveling eastbound to catch up to the Nissan Altima.

15 Q. So you got -- turned around and got behind them?

16 A. Yes.

17 Q. And at this point had you observed a traffic violation?

18 A. Yes.

19 Q. Did you conduct a traffic stop of the white Altima?

20 A. I did.

21 Q. Did you at some point call in the stop?

22 A. Yes.

23 Q. Now, what is your procedure for pulling over a vehicle on
24 Interstate 70?

25 A. Just activate my emergency lights. If they yield quickly,

1 then I do nothing else but that. If it takes them longer to
2 yield, then I will activate my siren as well.

3 Q. Did the white Altima yield quickly?

4 A. It did, yes.

5 Q. Where did you park in relation to the white Altima?

6 A. The Altima took -- started to take the Loma exit or the
7 offramp and stopped just as the -- just right at the offramp,
8 and I parked behind the Altima maybe two car lengths.

9 Q. And so you're on the right-hand side of the road?

10 A. Correct. On the right shoulder.

11 Q. Right shoulder. Did you approach the vehicle?

12 A. Yes.

13 Q. How did you approach?

14 A. The passenger's side.

15 Q. And is that your practice?

16 A. It is.

17 Q. And why is that?

18 A. Officer safety. And there's some other things too, but
19 primarily officer safety. The approach with -- the driver's
20 side approach with pull-out traffic isn't safe. My intention
21 is more directed to -- would be more directed towards oncoming
22 motorists instead of what's going on with the traffic stop, so
23 primarily my stop is on the passenger's side.

24 On occasion I will do a driver's side approach, but mostly
25 for officer safety. And then, again, most motorists think an

1 officer is going to approach on the driver's side, so if
2 there's some sort of plan to engage that officer, hopefully,
3 maybe I'll disrupt that a little bit by going on the
4 passenger's side.

5 Q. What part of the vehicle did you walk up to when you made
6 your approach?

7 A. The passenger's side. Walked up to the rear passenger's
8 side window and tapped on the windshield because the windows
9 were extremely dark, and I could not see inside the vehicle.

10 Q. If the windows had not been tinted, would you have gone to
11 the front passenger's side window?

12 A. I would have stopped initially to make sure that the
13 backseat was clear and then walked up to what we call the B
14 pillar, which is the post dividing the front and the rear door,
15 and I position myself at that B pillar kind of at a slight
16 angle facing into the car maybe at about a 45-degree angle to
17 where I can look at the driver and as well glance back when I
18 need to for safety.

19 Q. Okay. What happened when you tapped on the window?

20 A. The driver lowered both the front and passenger side
21 windows.

22 Q. What was your observation when the windows were rolled
23 down?

24 A. My first observation was a very overwhelming strong
25 perfume-type odor that was coming from inside the vehicle. On

1 the backseat was a cooler, on the backseat on the driver's
2 side, and then there was an object on the backseat on the
3 passenger's side that had a blanket covering it, and then the
4 driver, Mr. Noriega, seated behind the steering wheel, and he
5 was the only occupant.

6 Q. Was the air freshener such that you would be comfortable
7 sitting in that vehicle?

8 A. For me, no. It was very strong, and it would be
9 uncomfortable for me to sit in the car for a length of time at
10 that level or strength of air freshener.

11 Q. Based on your training and experience, did you have some
12 sort of indication of when the air freshener had been deployed?

13 A. Well, again, depending on the type of it, I later was able
14 to -- or had some more suspicion of when it was sprayed, but
15 not at that moment I did not.

16 Q. Okay. Now, did you talk to the driver?

17 A. I did.

18 Q. Did you get his information?

19 A. Yes. As I recall, I was just introducing myself, and he
20 was -- the driver was getting his driver's license out and
21 began to hand that driver's license to me rather quickly. I
22 noticed when he handed me his license his hand was just
23 trembling, and I could see a twitch in his cheek, in his face,
24 almost immediately.

25 Q. Okay. What address, city and state, was on the license?

1 A. It was Las Vegas, Nevada.

2 Q. And what was the name of the driver?

3 A. Felipe Noriega.

4 Q. Okay.

5 THE COURT: Mr. Noriega, there are motion sensor
6 cameras -- excuse me -- motion sensor lights in the room in
7 which you're seated, so occasionally the lights will go off if
8 you're still. We can still see you, and I know you can still
9 see us, but if that happens, you can wave your arm, and the
10 lights will come back on.

11 Do you understand?

12 THE WITNESS: Okay. Yes.

13 MS. JENNINGS: Is there no water up there?

14 THE COURT: There's no water for purposes of COVID-19.

15 COURTROOM DEPUTY: There is water.

16 THE COURT: Mr. Ovrom tells me there is water. Is
17 there water --

18 THE WITNESS: It's okay. I was trying to figure out
19 how to operate it, but I don't want to interrupt, so it's okay.

20 THE COURT: Well, we're talking about water. It was
21 just poured this morning, and no one else has touched it, so if
22 you would like some water, you may pour yourself a cup. There
23 are glasses there as well.

24 MS. JENNINGS: Thank you so much, Your Honor.

25 THE COURT: At the end of your testimony, you'll have

1 the opportunity to use some wipes on all of those things, so...

2 Okay. You may proceed.

3 MS. JENNINGS: Thank you.

4 BY MS. JENNINGS:

5 Q. Did you engage the driver in conversation?

6 A. Yes. After he gave me his license, I noticed his hand
7 trembling and the facial twitch. I had told him the reason I
8 had stopped him, and his response was, "I can't travel in the
9 left lane?" I guess, it was a surprise, like, "I can't travel
10 in the left lane?" And so I said, "No," and kind of explained
11 the traffic violation to him and when he can be in the left
12 lane and when he can't.

13 Q. You said he handed you his license. Did he hand you any
14 other information?

15 A. After that and after I had asked him -- or told him the
16 reason for the stop, he gave me an insurance card.

17 Q. Did he give you registration?

18 A. He started looking for the registration.

19 Q. Did you ask him any questions?

20 A. Yes. While he was looking for the registration, I just
21 asked him where he was traveling to, and he --

22 Q. What did he -- I'm sorry. What did he tell you?

23 A. He said he was traveling to Grand Junction to visit his
24 brother for maybe the weekend. And the stop, I believe, was on
25 a Friday, if I remember right.

1 Q. Do you know approximately how much driving time is between
2 Las Vegas and Grand Junction?

3 A. I do. I have made that trip a few times. And it's
4 about -- from Grand Junction to Las Vegas is about seven to
5 seven and a half hours.

6 Q. And at the point that you stopped Mr. Noriega, about how
7 far was he from Grand Junction?

8 A. It was Mile Post 15. The first exit for Grand Junction is
9 the 37, and depending on what exit he would take, anywhere from
10 20 miles to clear all the way up to 30 miles. I'm sorry. My
11 math is wrong. Anywhere from 15 to 20 miles.

12 Q. Okay. Did you ask him where in Grand Junction his brother
13 lived or any follow-up questions after he said Grand Junction?

14 A. I did. I just asked him where in Grand Junction, and he
15 said Clifton, which Clifton is an outskirt of Grand Junction on
16 the east side --

17 Q. Okay.

18 A. -- of the city.

19 Q. Did you ask him the address for his brother?

20 A. I did. I asked him if he knew what street his brother
21 lived on, and his response was 3134 Road, and I asked him if he
22 meant 31 and three quarters Road. Our streets are probably a
23 little bit different than others. It starts from the Utah
24 state line, and for every mile, it would be, like, 1, 2, 3, all
25 the way to 10 Road, 15 Road, 30 Road, and that's how those are

1 numbered.

2 And so he -- and then they are in eighths, like, 32 and an
3 eighth Road, 32 and a quarter Road, depending how many miles,
4 again, from the Utah state line is how they number them.

5 And so I asked him if it was 31 and three quarters Road,
6 and he said, yes, that was it.

7 Q. Did he know the address for the house he was going to?

8 A. No. I asked him if he knew the address, and he said no he
9 did not. I asked him how he was going to find his brother.
10 And he said he wasn't really sure.

11 Q. What was this defendant's, Mr. Noriega's, manner or cadence
12 while he was speaking to you?

13 A. He was very, very hesitant and appeared very nervous and
14 hesitant by pausing before he would speak, like, he was
15 thinking of an answer, not just rolling off of his tongue,
16 like, he was thinking of a response before he replied to my
17 question.

18 Q. And what is that an indication to you of?

19 A. That he was uncertain of his travel plans or making
20 something up.

21 Q. At this point in the conversation when you're asking him
22 about his travel plans and he's talking about his brother's
23 house, did anything else happen in the traffic stop?

24 A. Yes. It was kind of odd. He stopped looking for his
25 registration, grabbed his phone, started scrolling through his

1 phone, and then handed -- or showed me the phone screen, and
2 there was a photo on the phone screen that was -- appeared to
3 be a picture of a semi tractor and trailer traveling in front
4 of him or in front of a vehicle like the vehicle -- or like
5 Mr. Noriega had taken a picture from the driver's steering
6 wheel at oncoming traffic, and he showed me that picture.

7 And he said, "I just sent this to my brother and let him
8 know I was on the road." And it was odd because it had really
9 nothing to do with the questions. I don't know why he did
10 that. It was very unusual.

11 Q. Okay. So let's talk a little bit about what's happened in
12 the stop at this point. You said his license was from Las
13 Vegas, and he was traveling eastbound.

14 Is there any significance to you, as an investigator,
15 of a Las Vegas driver's license and Nevada license plates?

16 A. Sure. I wouldn't say it's, like, a huge indicator, but the
17 location is certainly a factor that I look into, whether it's a
18 source location, such as the southern portion of California or
19 southern Arizona, and then certain transshipment centers where
20 basically large shipments of narcotics, like, hundreds of
21 pounds at a time, will be shipped to transshipment centers.
22 Las Vegas is one of those transshipment centers.
23 Unfortunately, Denver has become a transshipment center as
24 well.

25 But from those transshipment centers, the narcotics are

1 broken down into smaller amounts, the 10, 20, 30 pounds at a
2 time, where they are trafficked even further inland in the
3 United States to be resold.

4 Q. Was the defendant showing the phone to you significant in
5 any way?

6 A. Yes. Based on, like I said, the conversation and how he
7 was responding to those questions and the --

8 THE COURT: Wait.

9 THE WITNESS: I think I lost --

10 THE COURT: No. No. The microphone just turned off.

11 Continue.

12 THE WITNESS: Okay.

13 THE COURT: You may proceed.

14 BY MS. JENNINGS:

15 Q. Do you need me to say the question?

16 A. No. I think -- when he was --

17 THE COURT: You'll have to project because I think
18 that something got disconnected, but thank you.

19 BY MS. JENNINGS:

20 Q. It's okay. You can continue. Maybe speak loudly.

21 A. Sure. I may have bumped something. I apologize.

22 Q. When I had been asking him those questions specifically --

23 THE COURT: It's actually very important because of
24 the fact that Mr. Noriega isn't physically in the room.

25 Mr. Miller, if you'll put your mask back on, Mr. Ovrom

1 will come help you.

2 THE WITNESS: Thank you.

3 THE COURT: Thank you.

4 You may proceed.

5 MS. JENNINGS: Thank you, Your Honor.

6 BY MS. JENNINGS:

7 Q. I asked you: Was the defendant showing you the photo on
8 his phone significant to you as an investigator?

9 A. Yes. When I was talking to him about the specifics of
10 where his brother lived, his nervousness was increasing. I
11 took that as he was not comfortable with that line of
12 questioning and wanted to detract from it or deflect and start
13 talking about something else, is how I took that in showing me
14 the phone.

15 Q. Base on your training and experience, how would you
16 characterize the level of Noriega's nervousness?

17 A. It was extreme. He was very, very nervous.

18 Q. And had you ever met Mr. Noriega before this?

19 A. I had not, no.

20 Q. So what was your assessment based on, then?

21 A. Thinking that he was just extremely nervous, didn't appear
22 that he was being truthful about his travel plans.

23 Q. Was that in comparison to the thousands of drivers you had
24 seen previously?

25 A. I'm sorry. I didn't hear you. I apologize.

1 Q. Were you comparing what you were looking at with
2 Mr. Noriega to the traffic stops you had conducted previously,
3 your training and experience?

4 A. Yes.

5 Q. Did Mr. Noriega eventually find his insurance card?

6 A. He had already handed me the insurance card. He handed me
7 his registration --

8 Q. Oh.

9 A. -- which the registration listed him as the owner of the
10 vehicle.

11 Q. What did you do at this point?

12 A. Well, I noticed that his nervous behavior was increasing.
13 His mouth was dry. He kept licking his lips. His leg started
14 shaking. He still had the nervous twitch in his face.

15 So based on all of those observations, my awareness of, you
16 know, possible criminal activity was, you know, certainly very
17 high.

18 Q. Did you go back to the cruiser at this point?

19 A. And so I walked back to my patrol car to make sure that
20 Mr. Noriega didn't have any warrants and that he had a valid
21 driver's license.

22 THE COURT: Ms. Jennings, if you'll move the
23 microphone towards you. Thank you.

24 BY MS. JENNINGS:

25 Q. When you walked back to the cruiser did, you notice that

1 anyone else had arrived?

2 A. Well, actually, I noticed prior to that that a partner, a
3 friend of mine, Special Agent Gosnell, had arrived on scene and
4 took a cover position fairly early on in the traffic stop when
5 I first was speaking to Mr. Noriega. But, yes, as I walked
6 back to my patrol car, Special Agent Gosnell was at my front
7 passenger's side window. We did have a conversation while I
8 was running Mr. Noriega about the degree of nervousness, the
9 vagueness of his travel plans, the air freshener, things of
10 that nature.

11 Q. So where was Gosnell while you were talking to Noriega
12 before you came back to the cruiser?

13 A. Prior to that, he was standing just in front of my car off
14 on the passenger's side.

15 Q. Okay. Is that what you described as a cover position?

16 A. That's what I described as a cover position, yes.

17 Q. Did you run the checks on Mr. Noriega and his vehicle?

18 A. Yes.

19 Q. What did you find?

20 A. That he had a valid driver's license and there were no
21 warrants for his arrest.

22 Q. What did you do at that point?

23 A. I walked back up to the vehicle to -- at the traffic stop.
24 When I got to the car, I noticed that the air freshener odor
25 had dissipated significantly, which indicated to me, which is

1 sort of common practice, that some sort of deodorizer was
2 sprayed either during or just prior to the traffic stop.

3 Q. Okay. When you reapproached, what side of the Altima did
4 you go back to?

5 A. I again went to the passenger's side of the Altima and
6 again went to the B pillar, which is between the front -- the
7 back side of the front door. And, again, I kind of took a
8 45-degree angle so I could see in and speak with Mr. Noriega.
9 I handed him his driver's license and vehicle documents back
10 and reminded him just to stay in the right lane unless he was
11 passing and told him he was good to go.

12 Q. Were you alone, or was Special Agent Gosnell with you?

13 A. He was with me, but he was still behind his -- behind
14 Mr. Noriega's vehicle. I don't know the exact location he was,
15 but I know he was behind Mr. Noriega's vehicle.

16 Q. So Special Agent Gosnell was not with you at the window at
17 the vehicle of Mr. Noriega?

18 A. Correct.

19 Q. Okay. When you said he was good to go, what did Noriega
20 do?

21 A. Well, I took a step back and to the right and then turned
22 kind of perpendicular to the car, stood up. Mr. Noriega took
23 the gear shift and put it into drive. I then leaned back down
24 and asked Mr. Noriega if he was carrying anything illegal such
25 as cocaine, methamphetamine, heroin, or marijuana. He said no.

1 Q. I'm going to stop you right there. When you were talking
2 to Mr. Noriega, did you put your hand on the vehicle in any
3 way?

4 A. No, ma'am.

5 Q. Okay. You said that he answered your question no; is that
6 right?

7 A. About narcotics, yes. He said no.

8 Q. So when you asked Noriega if he was carrying any narcotics,
9 did you suspect at that point that he was?

10 A. Yes.

11 Q. And why did you suspect that?

12 A. For all of the indicators that I had listed previously:
13 Coming from transshipment center, the vagueness of his travel
14 plans, the extreme nervous behavior, the air freshener inside
15 the car which dissipated over time, and, again, just his
16 general response of his travel plans, the amount of time that
17 he said that he was going to be in Grand Junction for maybe the
18 weekend, which only would insinuate just a couple of days.

19 Q. What about him providing the cell phone to look at the
20 photo?

21 A. Again, that's just a deflection because he -- again, it
22 didn't appear like he was really comfortable with that line of
23 questioning and wanted to detract from those line of questions
24 and have me stop that line of questioning.

25 Q. Okay. Did you believe you had reasonable suspicion to

1 extend the traffic stop at that time?

2 A. I did, yes.

3 Q. Now, after Noriega said no, " what did you do?

4 A. I asked him if he would be willing to voluntarily consent
5 to a search of the vehicle and that he had a right to refuse.

6 Q. What did he say in response?

7 A. His response was, "I thought you said I was good to go."

8 Q. And what did he say back to you --

9 A. I said --

10 Q. Or excuse me. I'm sorry. What did you say back to him?

11 A. I said something to the effect, "I appreciate your
12 cooperation, but there are a few things that I was suspicious
13 of," giving him a reason why I wanted to search the car.

14 Q. What did Noriega say to you?

15 A. He said, "Do I have to let you search the car?" And,
16 again, I said, "No. It's voluntary."

17 Q. What did Noriega do at that point?

18 A. He just started to waver about whether or not he wanted to
19 give me consent. He said, "I don't really mind if you search
20 the vehicle, but I don't know if I should." And please don't
21 quote me. That's not the quote of exactly what he said, but
22 something similar to that. He was like, "Oh, I don't mind if
23 you search, but do I really want you to search," and just
24 wasn't certain what to do.

25 Q. Was he wavering, would you call it?

1 A. Yes. He was wavering, yes.

2 Q. What did you do in response to his wavering?

3 A. Sure. I told him again, like, "Listen, it's voluntary.

4 The search is voluntary." So I told him, I think, three
5 separate times that it was a voluntary search.

6 Q. Did you tell him anything else?

7 A. Yes. I told him -- I said, "If you're not comfortable with
8 me physically searching the car, I have a drug dog with me. I
9 can run my drug around the outside of the car. That way the
10 dog is only going to tell me if there are illegal narcotics in
11 the car or not."

12 And at that point he just sat in his seat, and he was just
13 physically trembling. And to try to describe it is difficult,
14 but his face was twitching, his leg was shaking, and his hand
15 was shaking, and he just sat there and did not respond.

16 Q. Okay. Since he's not responding, what did you make of
17 that?

18 A. I didn't think -- well, he wasn't giving me consent, but
19 then he wasn't denying me consent as well. He was just sitting
20 there.

21 Q. Does that happen sometimes during traffic stops?

22 A. It does. It's just an uncertainty, and I take it as they
23 don't want to -- having been told by people that I've
24 encountered before that they don't want to raise my suspicion
25 by telling me no, but yet then they don't really want me to

1 search the car because they know if I do, I'm going to find the
2 narcotics or there's a good chance of it, so they are really
3 uncertain of themselves. And that's how I took Mr. Noriega's
4 response on that date.

5 Q. At this point were you frustrated with the defendant?

6 A. No. I was hoping that I would get an answer from him one
7 way or the other so I could know what step to take after that.

8 Q. So at that point I believe you told him that he could --
9 that you could do the dog sniff, and he's just sitting there.

10 What did you do next?

11 A. Special Agent Gosnell was, again, behind Mr. Noriega's car.
12 I kind of did a signal to Mr. Gosnell -- or Special Agent
13 Gosnell with my finger, just did a circular motion with my
14 finger. He was a former K-9 handler. That motion is a
15 response to we're going to run a dog around the car. And I
16 mouthed the words either, "Get my dog," or, "Get CJ."

17 And he knew immediately what to do. He went back to my
18 patrol car. Again, Shane -- Special Agent Gosnell is a good
19 friend of mine. He's around my dog all the time. My dog is
20 very friendly. He's a German Shepard. No issue with Shane
21 going to get -- or Special Agent Gosnell going to get my K-9
22 from the patrol vehicle.

23 Q. When you told him to get the dog out of the vehicle, were
24 you going to run the dog at that point, or were you going to
25 engage in further questioning with Mr. Noriega?

1 A. I maybe tried a little bit but not much. And I remember
2 the conversation was he literally just sat there in the
3 driver's seat just shaking.

4 Q. And what did Special Agent Gosnell do once he got the dog
5 out of the car?

6 A. He walked from my patrol car to the back portion of
7 Noriega's car.

8 Q. Did he start the sniff, or did he just wait there?

9 A. No. So he waited because I'm the dog handler, not Special
10 Agent Gosnell. He is a former K-9 handler but not certified
11 with my dog.

12 Q. At that point did Mr. Noriega say something to you?

13 A. He did. He said, "You can walk my [sic] dog around the car
14 if you want to."

15 Q. Okay.

16 A. And he said, "Do you want me to get out of the car?" And I
17 said, "You know what? That's up to you. You can wait in the
18 car or you can get out. That's completely your choice."

19 THE COURT: One moment. You used a pronoun that
20 doesn't make sense. You said that he said, "You can walk my
21 dog around the car." Is that what he said, or did he say you
22 can walk your dog?

23 A. Okay. I understand. I don't know the exact verbiage, but
24 he said, "You can walk your dog," or, "You can walk the dog."
25 I'm not exactly sure of the exact verbiage, but it was

1 certainly an indication that I could walk my dog around the
2 car, however he said it.

3 THE COURT: He didn't have a dog?

4 THE WITNESS: He did not have a dog.

5 THE COURT: Just to be clear. Thank you.

6 BY MS. JENNINGS:

7 Q. After you told Noriega that he could stay in or get out of
8 the vehicle, what did he do?

9 A. He asked if he could get out of the car, and I said that he
10 was more than welcome to, so he started to get out of the
11 vehicle. I walked from the passenger's side towards the
12 driver's side.

13 I don't know exactly at what point I took my dog from
14 Special Agent Gosnell, but it was right at that time frame. We
15 both kind of met him, Mr. Noriega, as he was getting out of the
16 driver's seat of his car and noticed that, as he was getting
17 out, he was still seated and his legs were just trembling, I
18 mean, visibly just trembling.

19 And he stood up, asked Mr. Noriega -- I'm sorry. He
20 started just walking towards the front of the car, of his car.
21 I asked Mr. Noriega just for safety if he would mind waiting
22 off of the shoulder in front of his car, and he -- that's where
23 he walked to.

24 Q. And did you pat him down physically for weapons?

25 A. No. I did not. It's not a common practice of mine.

1 Unless the driver is presenting a serious safety concern, I
2 don't typically pat them down, having -- to be honest, I've
3 gone to court so many times I know that that can be an issue.
4 I just try not to do that. I do a physical inspection of the
5 waistband, and if I have a cover officer there, I won't.

6 But it all depends on certain factors, and in this
7 case, with all the factors given, I did not pat him down for
8 weapons.

9 Q. Did your dog indicate the presence of drugs when he was
10 walked around the Noriega vehicle?

11 A. Yes. And my dog is trained and certified by the Colorado
12 Peace Officers Association to detect three types of drug odors,
13 which is cocaine, methamphetamine, and heroin. He will alert
14 to MDMA as well, but he was not holding a certification on that
15 at that time just because it's kind of difficult to find
16 sometimes.

17 But those are the three primary narcotics that he is
18 trained for. He is not trained to detect the odor of marijuana
19 because of the legality of marijuana in Colorado.

20 Q. What did you do once your dog indicated to the presence of
21 drugs in Noriega's car?

22 A. Sure. My dog alerted to the -- and indicated the presence
23 of narcotics coming from the driver's side lower rear door seam
24 by sitting, as he's trained. It's a two-part -- an alert and
25 an indication are completely separate. He gave me both.

1 I looked towards Noriega and said, "Are there narcotics in
2 your car?" And he shook his head up and down in the
3 affirmative but responded "no."

4 Q. Did you ask him for consent to search?

5 A. I did ask him if he would let us search the car, and I
6 think he was kind of defeated at that point, and he said, "Go
7 ahead."

8 Q. What, if anything, did you find in the car?

9 A. I didn't hear you. I'm sorry.

10 Q. What, if anything, did you find in the car?

11 A. I removed the cooler from the backseat, and underneath the
12 blanket was a suitcase, which I thought was odd that he would
13 have a suitcase covered with a blanket. I searched the
14 suitcase and the cooler, didn't find anything.

15 I moved those two items out of the way, and I could see
16 bulges in the backseat where it was actually sitting. I could
17 see the bulges. And I pressed down on the seat and could feel
18 harder objects inside of it. And then Special Agent Gosnell
19 and I removed that lower portion of the seat, and it had been
20 hollowed out, and there were 16 packages containing suspected
21 narcotics inside that seat.

22 Q. Was Noriega taken into custody?

23 A. Yes.

24 Q. Do you know approximately what time that was?

25 A. I believe it was 11:42.

1 Q. So during the course of a traffic stop and dog sniff, did
2 you ever physically touch Noriega?

3 A. No.

4 Q. Did you observe Special Agent Gosnell touch Noriega?

5 A. I did not.

6 Q. Did either -- excuse me. Did you draw any weapon ever on
7 Mr. Noriega?

8 A. No, I did not.

9 Q. Did you ever observe Special Agent Gosnell draw a weapon on
10 him?

11 A. No.

12 Q. Did you ever tell Noriega that he could leave only if he
13 allowed you to conduct a drug sniff or a search?

14 A. No.

15 Q. Did you ever say to him, "If you don't consent to a search,
16 I'm going to run a dog around this car"?

17 A. No.

18 Q. After you told -- excuse me. When Noriega asked you if he
19 was -- if he could go, when he said, "I thought you said I
20 could go," did you instruct him to stay there while a dog sniff
21 was conducted?

22 A. No.

23 Q. I want to talk about the positions of the vehicles on the
24 side of the road. Describe to me how they were lined up.

25 A. Mr. Noriega's vehicle was parked in front just at the

1 beginning of the Loma exit or offramp. My vehicle was
2 parked -- my marked patrol car was parked behind his, probably
3 two car lengths, and then Special Agent Gosnell had an unmarked
4 vehicle that was parked behind my patrol car.

5 Q. At the time that you were asking Mr. Noriega about there
6 being illegal drugs in his car, about the dog sniff, were you
7 located on the passenger's side of his vehicle?

8 A. Yes.

9 Q. Could he -- were you blocking the way for him to reenter
10 the road?

11 A. No. Again, just based on experience from court and -- I
12 made sure to take a step back away from the vehicle, completely
13 disengage, I stood up, thanked him, told him he was good to go
14 before reengaging him in the conversation.

15 Q. Was there anything blocking Noriega from reentering the
16 roadway?

17 A. No. In fact, when he put the car in gear, I thought, in
18 fact, he was going to start to drive away.

19 Q. Okay. Did you ever tell Noriega that he was not free to
20 leave?

21 A. I did not tell him that, no.

22 Q. Did you ever tell Noriega to get out of his car?

23 A. I did not.

24 Q. Now, did Mr. Noriega ever tell you, "No, you cannot search
25 my vehicle"?

1 A. He did not.

2 Q. Did Mr. Noriega ever tell you, "No, you cannot conduct a
3 dog sniff"?

4 A. No. He did not.

5 Q. Did Mr. Noriega ever say to you, "I want to leave now"?

6 A. No.

7 MS. JENNINGS: No further questions at this time.

8 THE COURT: Thank you.

9 Cross-examination, Mr. Carr?

10 MR. CARR: Thank you.

11 THE COURT: You can question from counsel table, if
12 you choose, or would you prefer to use the podium?

13 MR. CARR: I'll use the table, Your Honor.

14 THE COURT: Thank you.

15 MR. CARR: Thank you.

16 CROSS-EXAMINATION

17 BY MR. CARR:

18 Q. Deputy Miller, Mr. Noriega was originally pulled over for
19 driving in the left-hand lane; is that correct?

20 A. Correct.

21 Q. You spoke a little bit about window tinting, but was there
22 anything about the window tint that was in violation of any
23 Colorado statutes?

24 A. No. And I don't know that I talked to him at all about the
25 window tint because it's a Nevada-plated vehicle, and it would

1 not be a traffic violation to have window tint of that nature
2 in the state of Colorado if it's an out-of-state car. Now, if
3 it was a Colorado-plated car registered in Colorado, then it
4 would certainly be a violation.

5 Q. So at the point in time that you observed the traffic
6 violation and you activated your lights for a traffic stop on
7 Mr. Noriega, would you agree with me that he was seized at that
8 point in time?

9 A. I wouldn't use the term "seized" personally, but he was
10 certainly detained, yes.

11 Q. In other words, he's not free to leave when you activate
12 your lights and perform a traffic stop?

13 A. Sure. I would agree with that, yes.

14 Q. And we mentioned that there's no body cam footage of this
15 event; is that correct?

16 A. That's correct.

17 Q. Do you know of any or are you aware of any departmental
18 policies as to why there are not body cameras on the deputies?

19 A. Sir, I'm not privy to that. I don't know what the
20 sheriff's decision is on not having body cameras, and I can't
21 speak to that.

22 Q. Have you ever had them?

23 A. I'm sorry?

24 Q. Have you ever been equipped with them?

25 A. Sorry. I'm having a hard time hearing. I apologize.

1 Q. Have you ever been equipped with them?

2 MS. JENNINGS: Objection to relevance.

3 THE COURT: Objection is overruled. The Court will
4 give it the weight it's appropriate.

5 Mr. Carr, if you can just adjust your microphone.

6 The question -- he's using a pronoun. He said, "Have
7 you ever been equipped with them?"

8 And I believe by "them," you mean --

9 MR. CARR: The body camera.

10 THE COURT: Are you asking about body cameras, or car
11 cameras?

12 MR. CARR: Body cameras.

13 THE COURT: Do you understand the question, sir?

14 THE WITNESS: I do.

15 THE COURT: You can respond.

16 A. We've never had body cameras, no.

17 BY MR. CARR:

18 Q. I think you mentioned that you're an instructor at several
19 different academies for drug interdiction; is that correct?

20 A. I'm an instructor for one academy, yes.

21 Q. Okay. And are you familiar with best practices as it
22 relates to drug interdiction?

23 A. Am I aware of what?

24 Q. Best --

25 THE COURT: Mr. Carr, because he's having difficulty

1 hearing you, would you take off your mask?

2 Thank you.

3 BY MR. CARR:

4 Q. Are you aware of best practices as it relates to drug
5 interdiction?

6 A. Yes, I would guess so.

7 Q. Are a part of best practices to record interactions with
8 drivers?

9 MS. JENNINGS: Objection. Relevance.

10 THE COURT: The witness has stated he doesn't have any
11 idea about the policies of the sheriff's office in regards to
12 the use of body cameras.

13 Can you explain to me the relevance of this line of
14 questioning?

15 MR. CARR: Yes. We established that this witness is
16 an expert in drug interdiction. One of the things that, as an
17 expert in drug interdiction, he would know would be best
18 practices. The relevance is that if he knows that best
19 practices are to have body cameras and there was not one
20 utilized here, that's relevant as to why we're not utilizing
21 body cameras.

22 THE COURT: The reason why the relevance question is
23 not -- I'm pursuing this is because he stated he has no
24 information about the policies in regards to that.

25 Officer Mitchell; is that correct?

1 THE WITNESS: Miller.

2 THE COURT: Miller. I apologize. Officer Miller, do
3 you have any control over whether or not you have a body camera
4 on your person?

5 THE WITNESS: I do not.

6 THE COURT: Do you have the ability to determine for
7 yourself whether or not you have a body camera?

8 THE WITNESS: I do not. Our department does not
9 supply them. It's not anything that we have, and I don't know
10 what -- the reasons why we don't have those. I just don't.

11 THE COURT: Thank you. In light of the policies and
12 his limited ability to control that, in this instance the
13 relevance objection is sustained.

14 You may proceed, Counsel.

15 MR. CARR: Thank you, Your Honor.

16 BY MR. CARR:

17 Q. Same question. There's no dash camera or recording devices
18 in the vehicle either; correct?

19 A. Correct.

20 Q. So getting back to the stop, once you returned to
21 Mr. Noriega all his documents, at that point in time, was your
22 traffic stop complete?

23 A. For the traffic violation, yes.

24 Q. And so at that point in time you told him, I believe, he
25 was good to go; is that correct?

1 A. Correct.

2 Q. At any time prior to handing back Mr. Noriega his
3 documents, did you ask him if you could search the vehicle?

4 A. No.

5 Q. And so the first time you made that request to him was
6 after he had the documents and you told him he was good to go?

7 A. Correct.

8 Q. We talked a little bit about your positioning, and I want
9 to get pretty specific with this when that request was made.

10 When you first made the request to search the vehicle,
11 where were you located in relation to Mr. Noriega's vehicle?

12 A. Again, I was initially at the B pillar, which is behind the
13 front door on the passenger's side, kind of positioned at a
14 45-degree angle towards the vehicle. I handed Mr. Noriega his
15 documents back, told him he was good to go.

16 I took a step to the right and backed away from the car and
17 stood more perpendicular to the car or straight on to the car
18 as he put the car in gear, and then bent down slightly and
19 asked him about narcotics in the vehicle.

20 Q. At that point in time, were you still at B pillar, or had
21 you moved a little bit more toward the front of the vehicle?

22 A. I had moved to -- just directly -- as I'm facing the front
23 driver's side window, so it would have been a step slightly
24 forward, just to where I could see directly into the car and
25 made sure that he had saw me that I stepped back.

1 Q. And I think you mentioned that you sort of bent forward or
2 bent down when you made that request; is that correct?

3 A. When I asked him about narcotics in the car, yes. I'm
4 fairly tall, and in order for me to talk to somebody, I would
5 have to bend over, and that's what I did.

6 Q. How close would you have placed your head to the vehicle of
7 Mr. Noriega?

8 A. Sir, I don't know. To Mr. Noriega himself or the car?

9 Q. To his vehicle.

10 A. I don't know.

11 Q. At any point in time, did you touch Mr. Noriega's vehicle?

12 A. I probably did when I was speaking to him initially, and
13 then on the second approach, leaning up against -- towards the
14 B pillar is a common practice of mine, yes.

15 Q. When you first made the request to search the vehicle,
16 where was Special Agent Gosnell?

17 A. I wasn't really looking at where he was at. He was
18 somewhere behind me, but I don't know exactly where he was at.

19 Q. If at the time that you made that request -- I think at
20 that time, when you were testifying before, you noted that you
21 had suspicion, at least at that point, that there may be
22 illegal narcotics in the vehicle; correct?

23 A. Correct.

24 Q. And so if at that point, if you would have asked
25 Mr. Noriega if you could search his vehicle, if he would have

1 sped off, what would you have done?

2 MS. JENNINGS: Objection. Relevance.

3 THE COURT: Objection is overruled.

4 A. I'm not 100 percent certain. To be honest with you,
5 probably nothing given our pursuit policy.

6 BY MR. CARR:

7 Q. Have you ever had that happen to you in the past?

8 A. I have had people return to the car after scuffles, get in
9 the car and leave, that type -- this specific instance, I don't
10 think I ever have had anybody do that, no.

11 Q. And so just so I understand, so in the middle of a
12 conversation like that, you've never just had somebody just
13 pull off?

14 A. Yes, I have. I guess just not at that point. I've had
15 people speed off on a few occasions when I first engage them,
16 maybe not even get their driver's license. Sometimes I've got
17 their driver's license and then have them just speed off, yes.

18 Q. And at that point you give chase; correct?

19 A. I'm sorry?

20 Q. And at that point you would give chase?

21 A. It depends. Like I said, our pursuit policy, depends on
22 what it was. Maybe a brief chase to see if they take an exit
23 or something like that, but it's not very -- it's not a lengthy
24 pursuit.

25 Q. I think you said earlier that Mr. Noriega, after you asked

1 him about searching the vehicle, again inquired about whether
2 he was good to go. Am I hearing that correctly?

3 A. He asked or said, "Well, I thought you said I was good to
4 go."

5 Q. And did you affirm that, yes, he was, indeed, free to
6 leave?

7 A. I didn't say that specifically. I just told him I
8 appreciated his cooperation, there were some things I was
9 suspicious of, and again told him it was voluntary. So I did
10 answer the question, I guess.

11 Q. And you would agree with me that whether he was free to
12 leave -- his question to you, "I thought you said I was free to
13 leave," that's a direct question; correct?

14 A. His question was, "I thought you said I was good to go."

15 Q. "Good to go." And that's a direct question; correct?

16 A. Yes.

17 Q. And it's capable of a direct answer "yes" or "no"?

18 A. I did not answer it yes or no. I responded that I
19 appreciated his cooperation, there's some things that I'm
20 suspicious of, and again told him the search was voluntary.

21 Q. And I guess my question, sir, is: It's capable of a direct
22 answer; correct?

23 A. Yes.

24 Q. I want to get to this nervousness somewhat that you claim
25 that you observed. I think you've sort of told us that it

1 increased throughout your interactions with Mr. Noriega; is
2 that fair?

3 A. Yes.

4 Q. At what point in time in this traffic stop did Special
5 Agent Gosnell arrive?

6 A. It was very early on when I first was speaking to
7 Mr. Noriega, getting his license, so within -- and he was in a
8 position where he was at -- within, I would say, a minute of
9 the traffic stop.

10 Q. And so do you have any sense of this increase in
11 nervousness, how it correlated with the arrival of Special
12 Agent Gosnell?

13 A. Well, again, I observed the twitching face and the
14 trembling hand when he handed me his license, which I don't
15 know if Special Agent Gosnell was there or not.

16 When I noticed Special Agent Gosnell was there was after
17 that but prior to -- after he had given me his registration and
18 I noticed his leg was trembling and -- his leg started
19 trembling and his mouth was dry and he was really stuttering
20 and licking his lips.

21 Q. Now, you would agree with me that when people get pulled
22 over in traffic stops, they generally act nervous; is that
23 fair?

24 A. That would be a fair question. When I get pulled over, I
25 do get nervous a little bit, and I would say that the general

1 public does get somewhat nervous. My demeanor is to try to,
2 you know, I guess, keep them at ease.

3 Q. And in your experience, I think you said that you've
4 encountered over 10,000 different motorists. Is it fair to say
5 some are just more nervous sorts than others?

6 A. That's fair, yes.

7 Q. And had you ever met Mr. Noriega prior to this day?

8 A. I had not.

9 Q. So do you have any knowledge as to whether he's one of
10 those more nervous sorts?

11 A. I do not. And I, you know, based that observation on
12 everything at the scene, not just one thing on that traffic
13 stop.

14 Q. Are you familiar with Mr. Noriega's mannerisms or ticks?

15 A. No.

16 Q. You mentioned --

17 THE COURT: I'm sorry. I didn't hear an answer.

18 THE WITNESS: No.

19 BY MR. CARR:

20 Q. You mentioned you look for a person's propensity to sweat
21 or tremble. Are you familiar with Mr. Noriega's propensity to
22 sweat?

23 A. I am not.

24 Q. Do you know if he happens to drink a lot of caffeine which
25 causes him to tremor?

1 A. I do not.

2 Q. So, in short, although you may have observed Mr. Noriega
3 acting nervously on this day, you really don't have any
4 baseline for his day-to-day interactions to determine if he was
5 more nervous in this encounter than he is in just other
6 stressful situations?

7 A. Not from other encounters. I just based it off, again, the
8 totality of everything I had seen, which included his vague
9 travel plans, his deflection, his nervous behavior increasing
10 as the traffic stop went along, based on other individuals that
11 I have seen in the hundreds of seizures that I have seen in the
12 past and their nervous behavior and gauging that with the
13 innocent nervousness of the motoring public. That's how I
14 gauged that, and that's how I took Mr. Noriega's reaction. And
15 his nervous behavior was based on those prior observations and
16 the totality of what I seen on that stop.

17 Q. And one of the things you mentioned is that nervousness
18 increased when you asked if you could search the vehicle;
19 correct?

20 A. The only part that would have been different -- the other
21 nervous behavior I had seen was prior to the -- me asking him
22 for consent to search the vehicle, the only other additional
23 nervous behavior that I had seen is when he started to get out
24 of the car, I could see both of his legs shaking, and I would
25 describe it as, like, he had rubber band legs. He was very

1 uneasy, unsteady, and his legs were physically shaking.

2 So apart from -- that specific nervous behavior was the
3 only thing I observed after I asked for consent to search the
4 car.

5 Q. I think you mentioned earlier that the reason -- or one of
6 the things you look for, an indicator, is how a person responds
7 to that question of whether you're able to search their
8 vehicle. Am I correct on that?

9 A. Are you asking me how somebody responds to the question of
10 whether or not I can search their car?

11 Q. Yes. I believe you testified earlier that you look for how
12 they respond to that as perhaps one of your indicators.

13 MS. JENNINGS: That's a misstatement. Objection.

14 THE COURT: Objection is sustained. You can ask him a
15 new question. I don't recall that line of testimony.

16 MR. CARR: I may be mistaken.

17 BY MR. CARR:

18 Q. Would you agree with me that it's sort of a no-win question
19 when you ask somebody that?

20 MS. JENNINGS: Objection. Relevance.

21 THE COURT: Objection is overruled.

22 A. Can you maybe just explain that a little bit more? I think
23 I know where you're going, but if you could just explain it a
24 little bit more, if you don't mind.

25 BY MR. CARR:

1 Q. Sure. When somebody denies you the ability to search the
2 vehicle, they tell you "no" they don't want you to search, does
3 that give you any additional belief that perhaps there is
4 illegal contraband, narcotics in the vehicle?

5 A. Not necessarily, no.

6 Q. Tell me why.

7 A. People's right to not give consent is -- I mean, it's just
8 that. It's their Fourth Amendment right to deny a consent to
9 search the vehicle.

10 Quite honestly, if I was stopped by law enforcement
11 and they wanted to search my car, I would probably tell them
12 no, you know, whether I had something to hide or not.

13 I have had that happen on a few occasions where I may
14 have had some indicators, but not strong indicators, of
15 criminal activity, and I have asked for consent, and they have
16 said no. I said, "I appreciate your time, and you have a great
17 day. I understand." I have had that happen countless times,
18 and that person would certainly be free -- sorry -- to go on
19 down the road -- I don't want to break anything else today --
20 they're certainly welcome to go about their business. I've had
21 that happen at the bus station, the train station, on traffic
22 stops.

23 Q. I believe you said that you're a K-9 officer and that you
24 primarily work in drug interdiction; is that correct?

25 A. Yes.

1 Q. And so your primary focus as a deputy with the Colorado
2 Sheriff's Department is more for drug interdiction than it is
3 for traffic stops; correct?

4 A. Yes and no. I think my primary concern is keeping the
5 motoring public safe. I like to see that they're visible -- or
6 I like to be visible to the motoring public. I think it is
7 just as important to me personally that if somebody needs
8 assistance, they can stop and ask me for assistance, which I
9 have done several times. I don't know how many tires I've
10 changed on the side of the road, and I'm happy to do that as
11 part of a public servant, I guess, and it gives me great
12 satisfaction to do that.

13 I also don't want to classify what I do as just drug
14 interdiction. I consider it criminal interdiction. Probably
15 one of the best stops was a double homicide suspect that,
16 coincidentally, was from Des Moines, Iowa, on the run who I had
17 stopped in Colorado. So it encompasses a lot of things, not
18 just drug interdiction.

19 But to be fair, that is the primary focus is drug
20 interdiction, but it can be other criminal activities as well.
21 I got an attempted homicide suspect last week. So it
22 encompasses a lot of different criminal activity, not just
23 narcotics.

24 Q. A lot of your training that you've done -- and you've
25 outlined your extensive training -- it is to identify different

1 indicators of not only, I guess, drug interdiction but illegal
2 activities, you're saying; correct?

3 A. Correct.

4 Q. And you're way more highly trained in that area than would
5 be the average patrolman?

6 A. That's correct. Yes.

7 Q. And so because of all this training, when you perform a
8 traffic stop vis-a-vis just an untrained deputy, are you paying
9 a little bit more attention to things that may be indicators to
10 you than would a normal deputy?

11 MS. JENNINGS: Objection. Lack of knowledge.

12 THE COURT: The objection is overruled.

13 A. Yes, I would think so.

14 BY MR. CARR:

15 Q. Do you think that at all makes you perhaps a little more
16 inclined to look at what would otherwise be seemingly innocent
17 factors and see something nefarious about it?

18 A. I didn't hear the first part of your question. I
19 apologize.

20 Q. Sure. Do you think that perhaps makes you a little bit
21 more likely to look at what would seemingly be innocent factors
22 and think of them to be a little nefarious?

23 A. Compared to a normal patrol officer, I may interpret what
24 I'm seeing differently than a normal patrol officer would, yes.

25 Q. I want to talk about this perfume smell for a moment. I

1 have heard it described somewhat differently. What type of
2 smell was it?

3 A. I would call it an unknown type of perfume odor coming from
4 the car.

5 Q. Were you able to distinguish whether it was more cologne in
6 nature or more car freshener in nature?

7 A. If I remember correctly, it was more of an air freshener
8 type.

9 Q. And we've talked about that you haven't ever met
10 Mr. Noriega before. Are you aware if maybe he's just somebody
11 who wears a lot of cologne?

12 A. I don't know. And I kind of -- as you're describing it, if
13 I encountered somebody that just wore a lot of cologne, like,
14 maybe in an elevator or something, that would be somebody that
15 would stand out to me because it's unusual. I don't see that
16 all the time. Just like on this stop, it's not something I see
17 all the time, and I think it's unusual, and I would kind of
18 compare it to, you know, if I were on an elevator with
19 somebody, for example, and they have a lot of perfume on today.
20 That's how I would categorize it, like, as somebody that would
21 stand out to me at that moment, and it would stick with me for,
22 you know, a few minutes after the encounter that that was
23 unusual.

24 Q. I think you mentioned that part of your training is that
25 would-be traffickers use these scents to cover up the scent of

1 narcotics. Is it primarily the scent of marijuana they seek to
2 cover up?

3 A. No. I see it with every type of narcotic.

4 Q. I think you mentioned that the scent dissipated during the
5 stop; is that correct?

6 A. Correct.

7 Q. And how long was the stop in duration? In other words, how
8 long in between the time that you would have gathered
9 Mr. Noriega's documents and then traveled back to your vehicle
10 and then the time for you to travel back from your vehicle to
11 the window, that total time?

12 A. I would say from the time I left, went back to the car, did
13 my checks, went back, it was probably a little over five
14 minutes, roughly.

15 Q. And during that five minutes, did both the rear passenger
16 window and the front passenger window remain down on
17 Mr. Noriega's vehicle?

18 A. That's correct. Yes.

19 Q. When he was traveling down the road, were all of his
20 windows up?

21 A. I didn't see the passenger's side windows as he went by,
22 just the driver's side, so I don't know. Given November, I
23 guess I made some assumptions that they would both be open, but
24 100 percent, no.

25 Q. When you were --

1 A. I'm sorry. Closed as he went by. I made the assumption
2 they were probably closed. I think I misspoke.

3 Q. Was it a particularly windy day that day?

4 A. Sorry. I don't recall.

5 Q. Regardless, during that period of time, the air was able to
6 circulate in and out of the vehicle and dissipate this smell;
7 correct?

8 A. That would be fair to say, yes.

9 Q. I think another factor that you discussed was that
10 Mr. Noriega was driving a fairly common vehicle?

11 A. Yes. And, again, it's not like, you know, a big indicator,
12 like, maybe air fresheners or things of that nature, but just
13 another small piece of the puzzle that I look at. Nissan
14 Altimas, for example, which is what he was driving, is very
15 common among drug couriers as well as certain other vehicles.
16 And then just the color of it, a very benign, a color that's
17 not really attracting a lot of attention, very basic.

18 Q. Now, a Nissan Altima is also just a very common car;
19 correct?

20 A. It certainly is, yes.

21 Q. Would it surprise you to learn that according to auto sales
22 reports in the last ten years, there have been over 2.3 million
23 Nissan Altimas purchased by Americans?

24 A. Sir, I'm not familiar with those numbers. I don't know.

25 Q. Would that surprise you at all based on what you see?

1 A. Sir, I don't know how to answer that question. Would I be
2 surprised? No. Do I know what that number is? I don't know.

3 Q. But in your patrol duties, it's fair to say that Nissan
4 Altimas are just a car you see a lot of?

5 A. Yes. Again, a very benign, very basic car.

6 Q. What about travelers from Nevada going through Colorado?
7 Is that also a very common thing?

8 A. Yes.

9 Q. And so we talked about your training and experience and the
10 fact that you have won many awards for your job. Frankly,
11 you're just really good at your job. Is that a fair statement?

12 A. I guess I don't know how to answer that question. I just
13 love what I do, and people recognize it.

14 Q. And part of your job is finding illegal narcotics; correct?

15 A. Yes.

16 Q. And on this particular occasion, you had some things you
17 observed that gave you a hunch, and that turned out to be
18 correct; correct?

19 A. Yes.

20 Q. And as a result of that, you found a lot of drugs?

21 A. Correct.

22 MR. CARR: Thank you. I have no further questions.

23 THE COURT: Redirect?

24 MS. JENNINGS: Briefly, Your Honor.

25 REDIRECT EXAMINATION

1 BY MS. JENNINGS:

2 Q. Mr. Carr talked to you about the different factors that you
3 discussed on direct examination based on your training and
4 experience that can indicate drug trafficking in general, not
5 talking about this case specifically. Do you recall that?

6 A. Yes.

7 Q. And when you are in a traffic stop, are you looking for
8 just one of those, or are you looking at the totality of what
9 you're seeing?

10 A. I do not look for one. I look at multiple ones, and then
11 it can change on each stop where, of course, I may have three
12 or four indicators on one stop and then have five indicators on
13 a second stop but only one of the indicators that I had seen on
14 the previous stop.

15 So it depends on each stop, and it varies, and it's the
16 totality, of course, of what I see on each individual stop.

17 Q. When you handed back the documents and then stood up and
18 then bent back down and asked him if there was any illegal
19 drugs in his car -- do you recall that testimony?

20 A. Yes.

21 Q. -- did you stick your head in the vehicle?

22 A. No, ma'am.

23 Q. Did you ever stick any body part into his vehicle?

24 A. No.

25 Q. Did you ever position your body in a way in relation to the

1 vehicle that would cause you to be hurt if he drove away?

2 A. No, ma'am.

3 MS. JENNINGS: No other questions.

4 THE COURT: Recross limited to redirect?

5 MR. CARR: Nothing additional, Your Honor.

6 THE COURT: Thank you, Officer. I'm going to ask you
7 just to do your additional public service today and take a wipe
8 from the Court and just wipe down the places where you touched.

9 THE WITNESS: Yes, ma'am.

10 THE COURT: Thank you, sir. And take your cup with
11 you.

12 THE WITNESS: Yes, ma'am.

13 THE COURT: The witness is excused.

14 Any additional evidence on behalf of the Government?

15 MS. JENNINGS: The Government calls Shane Gosnell.

16 THE COURT: Thank you.

17 Thank you, sir.

18 THE WITNESS: Thank you, ma'am.

19 THE COURT: Sir, could you please come forward.

20 Please raise your right hand and prepare to be sworn.

21 SHANE GOSNELL, GOVERNMENT'S WITNESS, SWORN

22 THE COURT: Thank you. Please be seated.

23 I'll ask you to remove your mask during the course of
24 your testimony so I can observe your face for purposes of
25 determining your credibility.

1 Would you please state and spell your full name for
2 the record.

3 THE WITNESS: Yes. It's Shane Gosnell, it's
4 G-o-s-n-e-l-l.

5 THE COURT: Thank you. Your witness, Counsel.

6 DIRECT EXAMINATION

7 BY MS. JENNINGS:

8 Q. What is your job, Mr. Gosnell?

9 A. I am currently a special agent with the Department of
10 Homeland Security, Homeland Security Investigations.

11 Q. How long have you been a special agent with HSI?

12 A. I was hired in January of 2019 and completed training in
13 August of that year.

14 Q. Where is your home office?

15 A. Grand Junction, Colorado.

16 Q. As part of your work as a special agent with HSI, do you
17 investigate drug trafficking?

18 A. Yes, we do.

19 Q. Do you also investigate other portions of the federal
20 criminal code?

21 A. Yes. There are over 400 federal statutes that we have the
22 ability to enforce.

23 Q. Can you tell the Court of your educational history?

24 A. I have a bachelor of science in criminal justice with a
25 minor in psychology. After completing my bachelor's, I went

1 into the private sector and did insurance fraud investigation
2 for a short time, worked in a jail as a supervisor of inmate
3 workers.

4 And I was hired by the Colorado State Patrol in 2011,
5 completed an approximately 26-week academy with them, was post
6 certified, and I spent my time at my first duty station in the
7 mountains in Colorado. In 2014 I promoted to a position with
8 the criminal investigation branch of the Colorado State
9 Patrol's Smuggling and Trafficking Interdiction Section where
10 my primary responsibilities were criminal highway interdiction.

11 In 2017 I became a K-9 handler, had over 300 hours in
12 criminal interdiction training and approximately 300 hours in
13 K-9 training. I trained two dogs -- or participated in the
14 training of two dogs, and I ended my career with the state
15 patrol in 2019 when I took my current position.

16 Q. From 2011 to 2014, were you a patrol trooper with the
17 Colorado State Patrol; is that fair?

18 A. Yes. That's an accurate description. Primary
19 responsibilities were accident investigations, DUI enforcement
20 and investigation, auto theft investigation, and then Colorado
21 traffic code.

22 Q. And then in 2014 you said you promoted to an interdiction
23 investigations --

24 A. Yes. We are considered interdiction troopers. We still
25 have all the other traffic responsibilities, but our primary

1 focus was to interdict criminal activity on the Interstate 70
2 corridor that ran through my assigned area.

3 Q. As a special agent with HSI in the Grand Junction office,
4 is it part of your duties to assist on traffic stops?

5 A. Yes, it is. When I was with the state patrol as a K-9
6 handler and an interdiction officer, I was a task force member
7 with Homeland Security. It gave me a limited Title 19, or
8 Customs enforcement, for the purpose of criminal interdiction.
9 And we currently participate in those task forces as agents
10 with assistance in -- our main focus is to disrupt or dismantle
11 criminal organizations involved in criminal activity, and so
12 part of that is assisting state and locals with interdiction
13 stops.

14 Q. When you assist on interdiction stops, what kind of vehicle
15 are you driving?

16 A. I have an unmarked or a plain Jeep or vehicle that has no
17 markings on it.

18 Q. Are you in a uniform when you assist or in plain clothes?

19 A. Generally, plain clothes. There are times, depending on
20 the situation, where we'll wear a vest on the exterior of our
21 clothing, but we're generally in plain clothes.

22 Q. And what is your role when you assist with traffic stops?

23 A. We serve as a cover officer for the trooper or deputy that
24 makes the stop. If we're there early on, we observe behavior,
25 we can run checks on the subjects involved in the traffic stop,

1 and then we assist in searches and those kinds of things.

2 Q. Do you wear a body camera?

3 A. No, I do not.

4 Q. Do you have a dash camera in your unmarked vehicle?

5 A. No, I do not.

6 Q. I would like to talk to you a little bit about November 15
7 of 2019. Were you working on that day?

8 A. Yes, I was.

9 Q. And were you in plain clothes?

10 A. Yes, I was.

11 Q. And were you in your unmarked vehicle?

12 A. Yes, I was.

13 Q. Okay. Before we talk about the specifics of that date, I
14 want to touch on your training and experience. Based on your
15 training and experience, when you are observing vehicles in
16 traffic prior to a stop, are there certain indicators that you
17 are aware of --

18 A. Yes.

19 Q. -- for drug trafficking? Excuse me.

20 A. With criminal interdiction or drug trafficking, there are
21 indicators that we look for to try to determine or help us
22 determine parties that may be involved in criminal activity
23 before or during a traffic stop. Some of those indicators
24 would -- a nondescriptive vehicle is common so they're not real
25 flashy. That way if you're doing surveillance -- they know we

1 surveil these people to try to detect their behavior. There's
2 not something that sticks out for the vehicle to be easily
3 identified.

4 There are indicators such as a vehicle may be licensed or
5 registered out of a state or area of the country where there's
6 a known origin or source of picking up the controlled
7 substances, and then there are states that are known as
8 destination states for the distribution of those controlled
9 substances.

10 And then once the vehicle is stopped, there are other
11 indicators that we look for within the vehicle, air fresheners
12 or items of strong odor, that are used by individuals involved
13 in the transportation of controlled substances because they
14 believe they will cover the detection of the odor both by the
15 human nose and by our K-9 partners, so they use those odors to
16 try to throw us off.

17 We look for things out of place. For example, someone who
18 maybe says they're going on a one-day trip and they have four
19 large suitcases on the backseat of the vehicle. Based on our
20 experience, that may be something that's uncommon, and that's
21 taken into a totality of a circumstance approach when we're
22 looking for indicators.

23 There's other things like tooling and religious items.
24 There are certain religious items people believe -- or people
25 involved in the transportation of controlled substances believe

1 will give them safe passage or keep them safe as they're on
2 their journey. Some of those are, for example, Santa Muerte,
3 Jesus Malverde, and St. Jude, and so stuff like that that we
4 look for, along with whether it's a third-party registered
5 vehicle, a rental vehicle, newly registered vehicle, and
6 salvage title vehicle.

7 Q. Is window tint -- the level of window tint relevant to this
8 analysis?

9 A. In the last few years of my experience, window tint is
10 something commonly seen on vehicles used in the transportation
11 of controlled substances, and my understanding, based on my
12 experience, is they do this so you can't see the occupants' in
13 the vehicles behavior, how many people are in there, those
14 kinds of things.

15 Q. Okay. So back to November 15 of 2019, you said you were
16 working, you were in plain clothes, and in an unmarked vehicle.
17 What was the primary incident that you worked on that day?

18 A. I was headed out to the area of Interstate 70 near Mile
19 Post 10 in Mesa County to work an interdiction operation with
20 Investigator Miller, and I became aware that he was on a
21 traffic stop, and I responded to the traffic stop for
22 assistance.

23 Q. And is this something that you have done before is assist
24 either on sitting with Officer Miller while he's watching
25 vehicles or assisting specifically on a traffic stop?

1 A. Yes. It just depends. We do both planned enforcement
2 action, where I'll go out, actually sit in his vehicle, ride
3 with him for a shift or a period of time. And sometimes that's
4 planned weeks in advance; sometimes it's, hey, things are slow
5 today, so I go out; sometimes I surprise him and go out.

6 Our supervision works well together. They're aware of
7 the efforts. And sometimes I'm called to respond after a stop
8 has already been made and is in the process.

9 Q. Okay. Did you write a report based on your assisting
10 Deputy Miller?

11 A. Yes, I did.

12 Q. And is there an error with respect to the date on that
13 report?

14 A. Yes, there is.

15 Q. And does the report say September 15 of 2019?

16 A. Yes. That's correct.

17 Q. And the date was actually what?

18 A. It was November 15, 2019.

19 Q. Okay. So tell me where you found Deputy Miller.

20 A. Deputy Miller was on a traffic stop at approximately Mile
21 Post 15 eastbound on Interstate 70, and I believe he was at the
22 bottom of an offramp right there to an exit. I observed his
23 patrol vehicle with its emergency lights on, on the right
24 shoulder of the roadway, and it was behind a white sedan
25 just -- well, the white sedan was just in front of it. And I

1 observed Deputy Miller at the front passenger window of the
2 sedan appearing to talk to the occupants.

3 Q. What did you do?

4 A. I pulled in behind Investigator Miller's patrol vehicle,
5 and I exited my car and stood at a location near the front
6 passenger or right quarter panel of his vehicle and listened
7 and observed.

8 Q. When you say you stood by his vehicle, which vehicle are
9 you referring to?

10 A. Sorry. Investigator Miller's patrol vehicle. So the front
11 door, just in front of the front door kind of by the seam or
12 where your -- we refer to it as a quarter panel, but the
13 headlight-ish area of the vehicle.

14 Q. Is that considered a cover position?

15 A. Yes, it would be because you're standing behind the vehicle
16 and back away from the vehicle that's being contacted.

17 Q. Were you armed that day?

18 A. Yes, I was.

19 Q. And where do you keep your weapon?

20 A. It's covered up inside of my waistband.

21 Q. So your gun is underneath your shirt?

22 A. Yes. That's accurate. It's out of view.

23 Q. Okay. At any time during the stop, did you draw your
24 weapon?

25 A. No, I did not.

1 Q. So at this point, you're at the cruiser. What happened?

2 A. I could hear Investigator Miller talking to the occupants
3 about their travel arrangements. A few moments after I heard
4 them conversing, Investigator Miller returned to his patrol
5 vehicle. It would be common for him to get back in his vehicle
6 to run his checks with a traffic stop, and I would go to the
7 passenger window and speak with him, converse while he's doing
8 his checks.

9 Q. And when you say "converse with him," you mean converse
10 with Investigator Miller?

11 A. Yes. That's accurate.

12 Q. Okay. Did Investigator Miller tell you anything about what
13 was happening?

14 A. Yes. He identified the occupant of the vehicle as Felipe
15 Noriega, Jr., date of birth 10-20-of '92, who I see on the
16 video screen here, as the sole occupant and driver of the
17 vehicle. And he told me Noriega was overly nervous, gave vague
18 and implausible travel plans, and he could observe what he
19 described as a strong perfume-like odor coming from the
20 vehicle.

21 Q. Okay. Did you sit with Investigator Miller or sort of, I
22 guess, stand out by the car and talk to him at that point?

23 A. Yes. I don't recall specifics, but we generally converse
24 about indicators we might see. Sometimes we run an indicator
25 bias on the totality of the indicators we're seeing by each

1 other based on our experience while he's conducting checks,
2 which would generally be of driver's license and wants and
3 warrants and vehicle registration.

4 So I spoke with him that day, and then he returned to the
5 vehicle Noriega was driving.

6 Q. Did you stay back at the cruiser with Investigator Miller
7 at that point?

8 A. So when Investigator Miller returned to the vehicle, I
9 stayed -- or went back to that front headlight area on the
10 passenger side or that front quarter panel area right there by
11 the door.

12 THE COURT: Of Investigator Miller's car?

13 THE WITNESS: Yes. That's correct. Sorry.

14 BY MS. JENNINGS:

15 Q. Okay. So what did you see happen when Investigator Miller
16 went back up to the Altima?

17 A. Yes. I observed Investigator Miller bend down, hand
18 Noriega his documents back, and I heard the statement, "You're
19 good to go."

20 Q. What side of the vehicle, of the Altima, was Investigator
21 Miller on?

22 A. He was on the passenger's side of the sedan.

23 Q. You said you heard him say the words "good to go." Could
24 you hear actual words spoken by the driver?

25 A. I could hear the driver speaking, but I couldn't make out

1 his statements or the words. The location of traffic, I could
2 hear them conversing, but I couldn't make out the occupant's
3 statements.

4 Q. Could you hear all of what Miller was saying or just parts
5 of it?

6 A. Parts of it here and there.

7 Q. From your vantage point, was Miller in any way blocking the
8 white Altima from reentering the roadway?

9 A. No. He was on the passenger's side, so the white Altima
10 could have pulled back out into traffic away from Investigator
11 Miller, and he was standing there. Generally, he has to bend
12 over to talk into vehicles because he's so tall, and he looks
13 at the car here and back towards his vehicle so he can see
14 traffic coming to us in case someone were to hit us on the side
15 of the road. So he was bent down when he handed the documents
16 back and standing kind of bent over initially.

17 Q. Was he standing -- "he" being Deputy Miller -- in a way in
18 relation to the Altima that if the Altima started driving, it
19 would have hurt Deputy Miller, or was he clear of the vehicle?

20 A. He was clear of the vehicle. He was on the side of it
21 along the shoulder.

22 Q. Do you remember seeing him put any of -- you know, his
23 hands, his arms, or anything on the car?

24 A. No. He reached in and gave the documents back, but I
25 didn't -- I don't recall him actually touching the vehicle or

1 leaning on it or anything.

2 Q. From what you saw, what was Deputy Miller's demeanor like?

3 A. Conversational. I have worked with Investigator Miller for
4 a while, and he's relaxed, trying to gain rapport when he talks
5 to people, and it's a conversational demeanor.

6 Q. Did you hear Investigator Miller ask the driver any
7 questions?

8 A. I observed -- Deputy Miller, after he said "good to go" and
9 handed the documents, he started to stand back up, and then he
10 bent over, and I heard him ask the occupant of the vehicle if
11 he was carrying anything illegal.

12 Q. Did you hear Deputy Miller say anything else after that?

13 A. Yes. I recall that he asked the occupant if he would give
14 voluntary consent to search the vehicle.

15 Q. Did he say anything after that?

16 A. Yeah. So I could tell he was conversing and trying to
17 explain to the occupant, and I heard him say a second time,
18 "The search is voluntary." And after he said the second time
19 that the search is voluntary, I heard him tell the occupant if
20 he was worried about searching the car, he had a K-9 trained in
21 the detection of the odor of drugs and that he could have his
22 K-9 sniff the vehicle.

23 Q. What happened at that point?

24 A. Somewhere in that time frame or right there close,
25 Investigator Miller motioned to me. Like I said, we've done

1 this for a while, and I used to be a K-9 handler also,
2 something along the lines of this, and he mouthed maybe, "Get
3 my K-9."

4 I went to the driver's side of his vehicle. The rear
5 driver's side door is the location of his K-9. I retrieved his
6 K-9, put a leash on him, and I walked him to a location where I
7 met Investigator Miller.

8 Q. Okay. Did you start the K-9 sniff when he told you to go
9 get the dog?

10 A. No, I didn't. Dogs who are trained in detection of the
11 odor of narcotics, they on their own will sometimes start
12 sniffing before they get out, but I didn't observe -- I wasn't
13 deploying the K-9. I was taking the dog over to Investigator
14 Miller.

15 Q. So you didn't start the K-9 sniff, and the K-9 did not
16 start doing a sniff at that time?

17 A. Not that I recall observing, no.

18 Q. What happened once you handed the K-9 off to Investigator
19 Miller?

20 A. At that time I observed Noriega exit the vehicle. I walked
21 to his location to stand with him as a cover officer while the
22 K-9 sniff was being conducted, and I ended up on the right
23 shoulder in front of the Altima sedan with Noriega conversing
24 with him.

25 While I was standing and conversing with him, I observed

1 his legs were extremely shaky. It was something that I would
2 compare to someone who I had seen in my younger days in a high
3 school concert with their knees locked. His knees almost
4 started to buckle.

5 And he had retrieved a cigarette and started to light the
6 cigarette, and his hands were very shaky also while he was
7 trying to cover the cigarette with one hand from the wind and
8 light it with the lighter.

9 Q. Did you talk to Noriega while the dog was sniffing?

10 A. Yes, I did.

11 Q. And what did you say to him?

12 A. I just advised Noriega if there were drugs in the vehicle,
13 Investigator Miller and myself would find them and that he
14 needed to start thinking about if we found drugs, whether or
15 not he would be willing to cooperate or whether he was going to
16 face the consequences of the drugs being in the vehicle.

17 Q. Did Noriega respond?

18 A. He said, "I know."

19 Q. What, if anything, did you observe during the dog sniff?

20 A. I don't recall specifically, other than when Investigator
21 Miller had said something over to us along the lines that his
22 K-9 alerted. And then I recall him asking Noriega something
23 along the lines of why his dog would alert and asked if there
24 were drugs in the vehicle. And then he asked Noriega if he
25 could search the vehicle, and I recall that Noriega said

1 something along the lines of, "Go ahead."

2 Q. Did you assist in the search?

3 A. Yes, I did.

4 Q. What was found in the car?

5 A. We located on the roadside 16 packages of suspected
6 methamphetamine under the rear seat in the sedan.

7 Q. And was Noriega taken into custody at that time?

8 A. Yes. I assisted Investigator Miller with putting Noriega
9 into custody.

10 Q. You're both at this traffic stop, you and Deputy Miller.

11 Was he, like, the controlling officer? Would you characterize
12 it as --

13 A. Yes. I would say that he was what I would call the primary
14 officer.

15 Q. Okay.

16 A. And I was there for assistance until it was deemed that it
17 was something that I should handle, I guess, by him or those
18 kind of things.

19 MS. JENNINGS: No further questions, at this time.

20 THE COURT: Cross-examination?

21 MR. CARR: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. CARR:

24 Q. Special Agent Gosnell, at what point in time in the traffic
25 stop did you arrive?

1 A. I can't be specific on how long it had been going on. I
2 know -- like I said, I heard conversations about travel
3 arrangements. Based on my experience with Investigator Miller,
4 I would say that was -- if you want me to, I would guess it was
5 fairly early because, generally, that conversation is happening
6 while we're waiting and obtaining documents from the driver,
7 such as registration, driver's license, those kinds of things.

8 Q. We talked about the position of cover that you took. Would
9 that position have been visible to Mr. Noriega?

10 A. It could have been. I know that other occupants of
11 vehicles have seen me in that position from the rear-view
12 mirror or a side mirror when I'm standing there.

13 Q. You were asked some questions about what you could
14 overhear. And if I understand, you could overhear most of what
15 Deputy Miller was saying; is that correct?

16 A. I don't know if I would say most of it. I heard some of
17 the stuff he would say. Like I said, he would turn, talk to
18 who I later found out was Noriega in the vehicle, and then he
19 would direct his attention back towards me at times and traffic
20 coming to him. And so, based on my recollection, I was most
21 likely to hear him, you know, as he was turning kind of back
22 towards me.

23 Q. Could you hear anything that Mr. Noriega was saying from
24 inside the vehicle?

25 A. Not specifically. Like I said, I heard a voice, but I

1 don't recall anything specific that I heard being said.

2 Q. I want to fast-forward toward sort of the end of this stop.

3 After Deputy Miller gave Mr. Noriega all of his documents back,
4 there was a conversation about whether Deputy Miller would be
5 allowed to search the vehicle.

6 Do you recall -- do you recall that?

7 A. I recall him asking if he -- yeah, if Noriega would give
8 voluntary consent to search the vehicle.

9 Q. If at that point in time, given the positions of the
10 parties and what was happening at that point in time, if
11 Mr. Noriega had just sped off, what would you have done?

12 A. Me personally? I don't know. I would have, I guess, spoke
13 with Investigator Miller, but as a federal agent, I would have
14 done an investigation in another way, a follow-up
15 investigation, but probably nothing.

16 Q. Approximately how many traffic stops have you been involved
17 in in your career?

18 A. I'll give an approximate. I know that the last four years
19 when I was an interdiction officer I did approximately 1200 per
20 year.

21 Q. In all of your traffic stops, have you ever had a situation
22 where you're talking to someone about whether you can search
23 their vehicle and they speed off?

24 A. I haven't had anybody speed off. I've had them walk away
25 from the traffic stop.

1 Q. What did you do in that situation?

2 MS. JENNINGS: Objection. Relevance.

3 THE COURT: Can you help me understand the relevance,
4 Counsel?

5 MR. CARR: Sure. His reaction to that as a law
6 enforcement officer, whether he chased that person, whether
7 that person was just able to walk away, that has to do with the
8 demeanor and the approach the officers are taking towards this
9 particular defendant in that situation.

10 THE COURT: Based on counsel's explanation, the
11 objection is sustained.

12 You may ask a new question, Counsel.

13 BY MR. CARR:

14 Q. During the stop, were you ever -- did you ever get close
15 enough to Mr. Noriega's vehicle to detect the odor that Deputy
16 Miller was mentioning?

17 A. I wouldn't say during the actual traffic stop. I assisted
18 with searching it after the fact.

19 Q. And you could smell it at that time?

20 A. I don't recall specifically. I know there was conversation
21 about odor, but I don't recall -- that one was observed, but I
22 don't recall how strong it was or anything like that.

23 Q. And you mentioned that you observed Mr. Noriega outside the
24 vehicle while the dog sniff was occurring and that he appeared
25 nervous. Prior to him exiting the vehicle, had you had any

1 chance to observe Mr. Noriega's person?

2 A. No, I did not.

3 Q. After the initial conversation that Mr. Miller -- I'm
4 sorry -- that Deputy Miller had with Mr. Noriega where he
5 informed him he was good to go and handed him his documents, at
6 any time after that, did you hear Deputy Miller tell
7 Mr. Noriega that he was free to leave?

8 A. Not specifically, no.

9 Q. And there was ongoing conversation between the two;
10 correct?

11 A. Yes. That's correct.

12 Q. And you talked about at a point in time Mr. Noriega -- I
13 think you said "go ahead and search" is what he said when he
14 was standing outside the vehicle; is that correct?

15 A. Yes. I believe it was along the lines of "go ahead." When
16 he was asked -- when Investigator Miller asked Noriega if he
17 could search, I believe the statement was along the lines of
18 "go ahead."

19 Q. And I just want to be clear. At that point in time,
20 Mr. Noriega was outside of his vehicle; correct?

21 A. Yes. That's accurate.

22 Q. And he had been detained after the traffic stop at that
23 point.

24 A. I don't know if it was detention because I don't know
25 whether it was a consensual encounter at that point, but I know

1 that we were there after the initial traffic stop.

2 Q. And at that point in time, the drug dog had alerted on the
3 vehicle; correct?

4 A. Yes. That's accurate.

5 Q. And had Mr. Noriega been informed of that fact as well?

6 A. Yes, he had.

7 Q. And so all of those things occurred before Mr. Noriega was
8 asked the question, "Can we search," and he said, "Go ahead"?

9 A. Yes.

10 MR. CARR: Thank you. I have no further questions.

11 THE COURT: Additional redirect from the Government?

12 MS. JENNINGS: No additional questions, Your Honor.

13 THE COURT: Thank you, Officer. You may step down.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: Any additional evidence from the
16 Government?

17 MS. JENNINGS: Would you like me to do the --

18 THE COURT: No one else is coming, so --

19 MS. JENNINGS: Oh.

20 THE COURT: Unless you have additional evidence on
21 behalf of the Government.

22 MS. JENNINGS: No, Your Honor.

23 THE COURT: Mr. Carr, you said previously that you
24 didn't intend to present any evidence. Do you continue to not
25 intend to present any evidence?

1 MR. CARR: Correct, Your Honor.

2 THE COURT: The Government bears the burden of
3 establishing the comportment with the Fourth Amendment in the
4 traffic stop.

5 Would you like to be heard by way of argument,
6 Ms. Jennings?

7 MS. JENNINGS: Your Honor, the Government believes
8 that the facts testified to today match the facts that are laid
9 out in the Government's brief. And as far as the legal
10 argument, the Government is also relying on the legal arguments
11 that are set forth, we think, thoroughly in our brief.

12 I would ask the opportunity to be able to respond to
13 Mr. Carr's argument, and I would like the opportunity to answer
14 any questions on behalf of the Court.

15 THE COURT: Thank you.

16 Mr. Carr, any argument in support of your motion?

17 MR. CARR: Yes, Your Honor.

18 THE COURT: First off, I just want to be clear. The
19 nature of the stop itself is not contested? You agree that
20 there was reasonable suspicion at least, if not probable cause,
21 to stop the defendant for purposes of the violation of a
22 Colorado traffic law?

23 MR. CARR: That's correct, Your Honor. The statute
24 that was cited is correct, and I would stipulate that my client
25 was in violation of it.

1 THE COURT: Additionally, there has been nothing
2 raised contesting the validity of the alert by the K-9 at issue
3 here. And you agree that that is not contested as well?

4 MR. CARR: Not contested in this matter, Your Honor.

5 THE COURT: My understanding is that the issue that
6 the Court has to determine is whether or not there was
7 reasonable suspicion to expand the traffic stop after the
8 conclusion of the stop. Is that the scope of the legal issue
9 before the Court at this time?

10 MR. CARR: It is, Your Honor.

11 THE COURT: Thank you. You may be heard.

12 MR. CARR: Thank you, Your Honor.

13 We cited many cases in our brief, so I don't want to
14 go over them too extensively other than to talk about the
15 testimony we heard as it relates to those things.

16 Your Honor, *United States v. Rodriguez* tells us that
17 this search and seizure can only last as long as needed to
18 fulfill the traffic stop. We heard Deputy Miller acknowledge
19 that this interaction exceeded the scope of the traffic stop.
20 That traffic stop ended at that point in time his documents
21 were returned and he was told he was free to leave.

22 So there's no question that we do have an issue here
23 with this traffic stop being extended. That's pretty much
24 stipulated, it sounds like.

25 What matters from there is whether that interaction,

1 whether that was consensual or not, and, if it was not
2 consensual, if it was supported by reasonable suspicion. And
3 that's where I think the Government's case fails on both of
4 those issues.

5 Now, in *United States v. Mendenhall* it tells us that
6 we are to look at the totality of the circumstances to
7 determine whether a person would have felt free to leave.

8 Looking at the facts of this case, we simply don't
9 think that it bears out that Mr. Noriega would have felt free
10 to leave. He asked if he was good to go. That was a direct
11 question. After being asked if his vehicle could be searched,
12 he specifically asked, "I thought you said I was good to go."

13 Rather than respond to that direct question, Deputy
14 Miller continued to press him about searching the vehicle.
15 Deputy Miller could have been very specific and said, "You are
16 free to leave; however, I would like to search your vehicle."

17 Now, that would have been an accurate statement if he
18 was truly free to leave. However, Deputy Miller did a show of
19 force in bending down, getting closer to the vehicle, looking
20 at the defendant and asking if he could search the vehicle.
21 That, instead, led the defendant to believe reasonably that he
22 was not free to leave.

23 And one only has to ask themselves at that point in
24 time, if Mr. Noriega would have sped off, what would the
25 officers have done?

1 THE COURT: You kept on saying sped off when you
2 asking the officers. If there was a new law violation, if he
3 actually sped in terms of going in excess of the speed limit or
4 if he drove in a manner that put the officer's life at risk in
5 terms of assaulting an officer with a vehicle, you would agree
6 that those new law violations would be a separate reason to
7 stop the defendant?

8 MR. CARR: Absolutely. I'm using the word "speed" as
9 almost in haste of it all. If were to say hastily, "I'm going
10 to leave this situation. I am no longer willing to continue in
11 this conversation, and I am going to leave", of course, it is
12 rude, and we know it's rude, and it would be with haste to just
13 leave someone in the middle of a conversation. But this
14 conversation wasn't two-sided. It was one-sided. It was a
15 citizen trying to ask if he was free to leave and an officer
16 asking if he could further intrude upon that citizen's rights.

17 I think it's pretty clear, as you look at that, along
18 with other circumstances that were present, such as the fact
19 that there were two officers present and one of them had to be
20 somewhat confusing as they were in plain clothes and just
21 taking a cover position, that's certainly complicates this
22 situation.

23 I think most importantly, as it is a totality of the
24 circumstances, but it can also be a somewhat subjective
25 approach, if Mr. Noriega was truly as nervous as they claim

1 that he was and he was knowingly carrying 28 pounds of
2 methamphetamine, it defies logic and common sense that he would
3 just sit there and have a casual conversation with a drug
4 interdiction officer with a marked K-9 unit.

5 So the factors not only present in the interactions
6 between the persons, but just the factors that are present and
7 the things that known to us, leads us to believe that this was
8 not some sort of a consensual interaction between the two.

9 Mr. Noriega was seized during the traffic stop, and
10 his seizure continued through this questioning. There was no
11 break.

12 So, again, we turn to Rodriguez. Was there reasonable
13 suspicion to prolong the stop? Because it can only occur if
14 there is reasonable suspicion, similar to a Terry stop. It
15 can't be a hunch, and it can't be based upon otherwise
16 seemingly innocent circumstances that are compiled to make it
17 look suspicious. And that's what I fear was happening here.

18 Some of the factors that were cited as indicators were
19 that the person drives a common car in a nondescript color.
20 Well, the more common the car is and the more nondescript the
21 color is the more likely that person is going to be driving
22 that kind of car.

23 We talked about where the plates are from, from
24 Nevada. But upon cross-examination, Deputy Miller acknowledged
25 that it's very common to have a Nevada-plated cars driving

1 through Colorado.

2 We talked about the perfume smell. But, again, Deputy
3 Miller acknowledged that he has no knowledge of whether
4 Mr. Noriega likes to use a lot of cologne or not. And, further
5 in our brief we cite the prevalent usage of aerosol perfume and
6 of car fresheners. And in one of the cases that we cited,
7 Your Honor -- we even noted it was a dissenting judge -- that
8 this is a red herring and very dangerous trip to go down if we
9 say that just the simple use of these aerosol coverups is going
10 to somehow let them search vehicles more often.

11 THE COURT: In this instance, are the facts
12 distinguishable? The notable fact the Court recognized during
13 the testimony was that when the officer originally approached
14 the car, the scent was overwhelming to the point that it would
15 be uncomfortable for him to sit in the car, and then the scent
16 dissipated over the course of five minutes to the point where
17 it was no longer an overwhelming scent.

18 That seems to be distinguishable from the cases that
19 you've cited in noting in their dissenting opinions as to the
20 use of air freshener in this case.

21 MR. CARR: I don't know that it is. And I would
22 actually turn to Deputy Miller's testimony about that,
23 Your Honor. Now, he spoke sort of off script if you will. He
24 just mentioned that when you get on an elevator with somebody
25 who has a very potent perfume on and how difficult it can be

1 for you to breathe and for you to take it and for you to want
2 to be in that situation. But that person themselves that is
3 wearing that is wearing that all day. It's not bothering them.
4 So it's a subjective thing.

5 Now, as opposed to the dissipation, that has to do
6 with the windows being down.

7 THE COURT: Except for the fact that he'd been in the
8 car for 7 hours. I mean, it's not contested that he was coming
9 from Las Vegas and that he had been driving and that his
10 destination was only a short time away.

11 MR. CARR: Well, we don't know when he would have
12 applied cologne. We don't know when he would have sprayed
13 perfume. We don't know when he would have decided his car
14 smelled. We don't know these things. And so just to say
15 because there is an overwhelming smell that that person is only
16 doing that because of drugs, that's a dangerous road to go
17 down, and that's what those judges caution because they have to
18 say that we cannot just look at that and say that this in and
19 of itself something that is instructive.

20 It's also instructive that Colorado is a state where
21 marijuana is legal, and so the use of aerosol in Colorado to
22 cover up marijuana smell is really not needed because it's
23 legal here, and so that's also --

24 THE COURT: Of course, here we're not dealing with
25 marijuana.

1 MR. CARR: We are not. But that is something that
2 would be considered because in Iowa it's often used to cover up
3 the smell of marijuana, but we don't have to do that in
4 Colorado. I mean, even the Deputy Miller said the drug dog
5 isn't trained on marijuana because it's legal there, so I think
6 that's instructive as well.

7 But we don't know in those other cases if the person
8 rolled the windows back up. Take *Jones*, for example, where he,
9 you know, exits his camper -- or exits his truck and then comes
10 back. We don't know in *Beck*, for example -- which I don't
11 believe that case has any smell to it. But we don't know about
12 whether the windows are rolled up. It's just simply not in the
13 record. In this we do have a record. We know the windows were
14 rolled down. With those windows being rolled down, we would
15 naturally anticipate any smell in there, whether it be perfume,
16 whether it be pizza smell, whether it be anything, it would
17 dissipate with the air circulation. So I don't think that
18 distinguishes our case necessarily from the others other than
19 we just have more information.

20 As we go to some of the other things that they touched
21 on, the cooler in the back or the suitcase that was in the
22 back, somebody who is traveling a long distance to go see their
23 relative very likely will bring a cooler full of things to eat
24 or drink on this long trip. And having one suitcase in your
25 car for weekend vacation is also something that comports.

1 I think also if we look at the travel plans, they
2 mentioned that they were very vague. However, when he was
3 pressed about going to Grand Junction and whereabout in Grand
4 Junction, he didn't just randomly state some place in Grand
5 Junction. He actually named a known suburb to this officer in
6 Grand Junction that is not widely probably known to the general
7 public. So he could actually give some specifics.

8 Now, something is being made of the fact that he
9 doesn't know the address, but in today's world, we all go
10 around to places and use our GPS. Again, that's a red herring.

11 THE COURT: How do you use a GPS if you don't have an
12 address?

13 MR. CARR: Oftentimes I grab it off of whatever I
14 wrote it down on, and I type it in before I go.

15 THE COURT: I understand that, but your client states
16 that -- stated to the officer that he didn't know the address.
17 So you're suggesting that he would use the --

18 MR. CARR: He's waving.

19 THE COURT: Mr. Noriega?

20 THE DEFENDANT: Yes.

21 THE COURT: You have not been called by your attorney
22 to testify in this matter. Do you need to speak to your
23 attorney?

24 THE DEFENDANT: I would like to.

25 THE COURT: Okay. So what we'll do is we'll clear the

1 courtroom and allow the defendant the opportunity to speak to
2 Mr. Carr while that is happening. No one will be listening to
3 the conversation.

4 And, Mr. Carr, I'll ask you to come into the hallway
5 and let Ms. Jennings know when you're prepared to proceed.

6 MR. CARR: Very well, Your Honor.

7 THE COURT: Thank you. We'll be in recess.

8 (Recess taken at 11:25 a.m. until 11:31 a.m.)

9 THE COURT: Thank you. Please be seated.

10 So the record should reflect that the United States
11 Marshal Service very helpfully provided a telephone number for
12 the room in which Mr. Noriega is currently seated and allowed
13 Mr. Carr and Mr. Noriega to speak confidentially over the phone
14 line while everyone was out of the room.

15 Thank you, Deputy Griess, for that. I appreciate it.

16 Mr. Carr?

17 MR. CARR: Thank you, Your Honor. And I will make
18 just a slight record on that. I did get to speak to my client
19 in relation with that, and I was able to communicate with him
20 effectively about what he wanted me to know.

21 THE COURT: Thank you. You may proceed.

22 MR. CARR: So, Your Honor, when we left off, we were
23 talking about this address, and I think kind of where we left
24 off was the fact that Mr. Noriega didn't know the specific
25 address, and we really don't think it's instructive. The

1 majority of people in this world don't drive to a specific
2 address of places they know. They just drive to where they
3 know. And that's the way our world works, and if we don't know
4 something, then that's when you use the GPS, and you find it
5 somewhere and type it in. So we just don't have to know
6 addresses like we used to when we would have to stop at a gas
7 station and tell somebody an address.

8 We think our cases is very analogous to *Jones* and
9 *Beck*. These are two cases we cited in our brief. The
10 nervousness is of limited significance. *Jones* goes into quite
11 some detail about why this is not something the Court should
12 consider. We think our case is even stronger in some respects
13 than those cases because we don't have any video here where the
14 Court can make an independent assessment of Mr. Noriega's
15 nervousness. That would have been a useful tool. This Court
16 would have been able to make that analysis and determine if
17 there was any nervousness that it was observing, and we can't
18 do that in this case.

19 So we're left with Deputy Miller's assessment of that,
20 and the problem with that, like *Jones* says, is there's no
21 baseline to it. We have no idea if Mr. Noriega is a generally
22 nervous sort that was just nervous about a traffic stop or if
23 he was acting in a way that was just extremely, extremely
24 nervous and suspicious in nature.

25 Regardless, what *Jones* tells us is the Court should

1 find minimal weight in that factor and look at other factors.
2 And when we look at the other factors in this case, they simply
3 just don't add up to reasonable suspicion. *Reid v. Georgia*
4 tells us we are not to use these otherwise inocular
5 circumstances to just pile them up and try to make them seem
6 like if there's enough of them, then that's enough for
7 reasonable suspicion.

8 It has to be that there's distinguishable things about
9 these characteristics, not just that it's a white Altima that's
10 common, but that it's a white Altima that they've maybe perhaps
11 seen run drugs before. That would be something that would be
12 significant. Just a white Altima, not significant.

13 So because the Government bears the burden of proof in
14 this case, Your Honor, we just don't believe that under the
15 facts of this case that they've met it. They cannot show
16 reasonable suspicion of criminal activity enough so that it
17 justified the continuing seizure of Mr. Noriega.

18 As it cannot, the continued seizure of Mr. Noriega was
19 in violation of his Fourth Amendment rights. We believe the
20 exclusionary rule applies and the fruit of the poisonous tree
21 rule applies. And, therefore, all evidence seized from the
22 vehicle should be suppressed as well as the subsequent
23 interrogations of Mr. Noriega that are all derivative of that
24 initial illegal seizure.

25 So, Your Honor, we're asking the Court grant our

1 motion to suppress and suppress all evidence that was gained
2 both by the illegal seizure and derivative thereof.

3 THE COURT: Thank you.

4 Ms. Jennings, in response?

5 MS. JENNINGS: The Government is not going to go
6 through its entire brief, you know, in person here, but a few
7 points I would like to touch on.

8 With respect to the issue of the extension of the
9 traffic stop, the defendant never really identified where he
10 thinks it ended and it extended impermissibly. I'm assuming
11 it's at the point that he returned the documents, and it's the
12 Government's position and the evidence bears out that past that
13 point the stop was consensual.

14 *Mendenhall* is cited in our brief on page 9 and says
15 that the Supreme Court says, "We adhere to the view that a
16 person is seized only when, by means of physical force or a
17 show of authority, his freedom of movement is restrained."
18 Only then -- now I'm paraphrasing -- is there any foundation
19 whatever for invoking constitutional safeguards.

20 The idea that bending down is a show of force is not
21 supported anywhere in the case law. An officer bending down
22 outside of a defendant's vehicle to talk to him is not a show
23 of force. And if that's the best argument that we have of show
24 of force here, which I believe it is based on the testimony
25 today that there was nothing coercive, threatening, no guns

1 were drawn, the demeanor was pleasant, there's certainly -- we
2 do not have a show of force in this case.

3 So we're apparently relying on a show of authority --
4 and there have been some significant cases decided in the
5 Eighth Circuit on that point. *Beck* and *Jones* are two of them,
6 and they're both clearly distinguishable from this case.

7 In *Beck* the deputy summoned the K-9 unit to the scene
8 while he was asking for consent. That's not what we have here.
9 Deputy Miller is the K-9 unit. He was there throughout. He
10 was not showing authority or making a veiled threat that if you
11 don't consent, I'm going to run a dog. That's not what was
12 happening here.

13 In *Beck* we have a situation that the defendant was
14 told if he didn't consent to a search, a dog sniff would be
15 conducted. That was considered a show of authority. Again,
16 that's not what happened here.

17 Additionally, Deputy Miller never ordered the
18 defendant to exit the vehicle, and, in fact, the Eighth Circuit
19 found that such an order by the officer in that case
20 extinguished any doubt that the defendant was free to leave.
21 That's not what happened here.

22 With *Jones* the show of authority was also clear. The
23 officer never told the defendant he was free to leave. Deputy
24 Miller did so in this case. And the officer followed the
25 defendant out of the patrol car as the driver exited.

1 In that case the defendant told the officer that he
2 did not consent to a search. We do not have that in this case.
3 Nevertheless, the officer called for a K-9 unit in the
4 defendant's presence and told the defendant in declarative
5 language that a K-9 unit would inspect the vehicle. That is
6 the show of authority that the Eighth Circuit is talking about.
7 Nothing like that happened in this particular case.

8 So, for those reasons, *Beck* and *Jones* are
9 distinguishable. The encounter, beyond returning of the
10 documents, was consensual. We cannot find a seizure just
11 because there was some -- the defendant was -- you know, he
12 could have gotten a direct answer. That's not the standard,
13 whether or not there's a direct answer to a defendant's
14 question. The standard is show of authority that his freedom
15 of movement was restrained. The facts do not support that
16 here.

17 As the Government points out, our facts are more akin
18 to *Munoz*. If the Court should find that the encounter was not
19 consensual, the stop is, nonetheless, okay under the Fourth
20 Amendment because it was supported by reasonable suspicion.

21 I believe the defendant's main argument is that these
22 could all be innocent factors if you look at them separately.
23 And the Eighth Circuit has considered that argument post
24 *Rodriguez* in the 2020 decision of *Sanchez* and rejected it.

25 *Sanchez*, in that decision, the Court stated that no

1 doubt it is correct that there are possible innocent
2 explanations for these various individual factors -- and I'm
3 paraphrasing -- but, as the Court has held, even though each of
4 these factors alone is susceptible of innocent explanation, and
5 some factors are more probative than others, together they
6 suffice to form a particularized and objective basis. The test
7 a viewing the facts collectively and in light of one another.

8 THE COURT: In my reading of *Sanchez*, they're citing
9 to *Arvizu* from the Supreme Court in that discussion as well.

10 MS. JENNINGS: Yes, Your Honor.

11 And we have also cited several cases in our brief from
12 pages 22 and 23 of examples in which the Eighth Circuit has
13 affirmed a district court's finding of reasonable suspicion on
14 similar factors that are present in this case.

15 So, for all of those reasons, we ask the Court to deny
16 the motion to suppress and deny the motion to dismiss,
17 Your Honor.

18 THE COURT: Thank you.

19 So the standards the Court must consider in ruling on
20 this motion to suppress are well-known and are accurately laid
21 out by the parties in their briefing.

22 The question under the Fourth Amendment is whether or
23 not there was unreasonable search and seizure, and we're guided
24 in interpreting that constitutional provision by the decisions
25 of the United States Supreme Court and the Eighth Circuit.

1 In this case there's no question as to the validity of
2 the traffic stop. Defendant concedes that there was a traffic
3 violation and that the initial stop was correct. There's also
4 no contesting the validity of the dog sniff, the accuracy of
5 the alert or indication by the dog.

6 The limited questions that the Court is presented with
7 are questions of law as to whether or not, first, the
8 interaction between the defendant and the law enforcement
9 officers after the conclusion of the initial purpose of the
10 traffic stop was consensual and then whether or not that
11 extension of the stop under *Rodriguez* was supported by
12 reasonable suspicion.

13 The Court is able to rule on that orally at this time
14 based upon the evidence presented here today and the
15 outstanding briefing of the parties.

16 First, the Court had the opportunity to observe both
17 officers as they testified here today. The first officer who
18 testified, Officer Miller, has over 20 years of experience.
19 His experience, he clarified, is 21 years of interdiction
20 experience, over 1,000, he's done thousands of traffic stops,
21 and he has seized thousands of pounds of various controlled
22 substances and millions of dollars in suspected drug proceeds.
23 He's also a K-9 handler and has received numerous awards for
24 his laudable performance as an officer.

25 The Court credits his testimony. The Court found his

1 demeanor and appearance during his testimony to be supportive
2 of truthful testimony. The Court also credits his expertise.
3 The ability to interpret indicators of unlawful conduct and
4 criminal activity is influenced by the experience, expertise,
5 and training of an individual Officer. And in this instance,
6 the Court finds that that training and expertise allowed
7 Officer Miller to accurately assess the behavior of the
8 defendant as inconsistent with that of the innocent motoring
9 public.

10 Similarly, although less experienced but still with a
11 wealth of relevant traffic experience, the testimony of Special
12 Agent Gosnell was corroborative of the testimony of Officer
13 Miller and was similarly credible. He has been involved in
14 interdiction since 2014, has been in traffic enforcement in
15 Colorado since 2011, and has relevant training and experience
16 that the Court credits.

17 He also testified during the course of the hearing in
18 a manner that was consistent with being frank, truthful, and
19 complete, acknowledging when he did not have information and
20 providing his best recollection of this particular traffic
21 stop.

22 So the first question is whether or not the extension
23 of the traffic stop was consensual. The testimony on that
24 point was that the defendant was told he was good to go and
25 that Officer Miller stepped back from the car after having

1 returned the documents, stood up, and then after the defendant
2 shifted the car into gear, reengaged and asked specific
3 interdiction-related questions.

4 The facts and circumstances of this case are
5 distinguishable from those in the Eighth Circuit where it has
6 been determined the extension of the traffic stop was not
7 consensual or lacked validity because of a show of force or
8 other means of shows of authority.

9 In this instance, the officer engaged with the
10 defendant. While he had a weapon on his body and visible, that
11 weapon was not displayed, it was not engaged, he did not
12 physically restrain the defendant, he did not make any physical
13 movements to block the car's departure, nor did he say that the
14 defendant was unable to leave.

15 The secondary presence of one other officer in plain
16 clothes does not increase the show of authority to the point
17 that it would be coercive or render the ongoing interaction to
18 be nonconsensual. The Court agrees that this case is more
19 similar to *Munoz* than the others cited in that the encounter
20 was consensual after that point.

21 The fact that the defendant asked whether he was free
22 to go and was given a general response that the officer was
23 investigating different aspects of the stop that had raised his
24 suspicions does not render it involuntary. He had already been
25 told that he was good to go.

1 Similarly, the statements made by the officer, by the
2 Court's count, three different times that it was -- that any
3 search that would be conducted would be voluntary further
4 corroborates the consensual nature of the encounter and the
5 lack of show of authority or force on behalf of the officers
6 engaged.

7 Even if the continuation of the stop was not
8 consensual, the Court does find that the facts testified to
9 today provide reasonable suspicion for the ongoing
10 investigation of illegal narcotics trafficking.

11 The Court finds *Sanchez* to be particularly probative
12 in this regard, and that's at 955 F.3d 669. It's a 2020
13 opinion decided in May of this year that analyzes an extension
14 of a traffic stop and that finds that the combination of the
15 factors provided reasonable suspicion.

16 And the question is whether the detaining officer has
17 a particularized and objective basis for suspecting legal
18 wrongdoing. And in this the Court is instructed to give due
19 weight to the officers' inferences when assessing the overall
20 level of suspicion.

21 The Court recognizes that the concept of reasonable
22 suspicion is somewhat abstract but that the standard is one of
23 reasonable suspicion and not probable cause and that the facts
24 and circumstances here, taken as a totality, supported
25 continuing investigation as to the trafficking of illegal

1 narcotics, particularly in light of the extensive training and
2 experience of the officers involved.

3 Of particular note, the Court finds compelling the
4 comments in regards to the destination of travel. The Court
5 notes that the testimony was that the defendant said he didn't
6 know how he was going to find his brother's house. He didn't
7 say, "Oh, I've been there a hundred times. I don't have to
8 know the address," as would be suggestive of somewhere that was
9 familiar. His response was to the officer was, "I don't know
10 how I'm going to find it," when the inquiry was pressed.

11 The fact that the masking scent that was a strong
12 perfume scent described by the officer, not as a cologne scent
13 but as a perfume scent or an air freshener scent, was
14 overpowering when the car was originally stopped, despite the
15 fact that he was driving for 7 hours, and then rapidly
16 dissipated on the side of the road is indicative of a recent
17 smell to mask as opposed to a continuous smell that would be
18 present throughout the time.

19 Again, none of these instances individually are what
20 the Court looks at. The Court looks at the totality of the
21 circumstances facing the officer.

22 The Court credits the officer's testimony. Officer
23 Miller began by talking about the nervousness of the defendant,
24 the fact that the nervousness was not consistent with the
25 regular motoring public, that it was extreme. Those visual

1 conclusions were corroborated by the later observations of
2 Special Agent Gosnell in that the defendant was visually
3 shaking while the search was ongoing and his hands were shaking
4 as he tried to light a cigarette.

5 For all of these reasons, the Court does find that
6 reasonable suspicion supported the continuation of the traffic
7 stop for the investigation. Of course, once the dog alerted to
8 the presence of illegal narcotics, that provided probable cause
9 to search the car, and the defendant also provided explicit
10 consent at that time for the car search, which resulted in the
11 discovery of the large quantity of methamphetamine.

12 The Court finds insignificant the fact that it was
13 methamphetamine and not marijuana that was attempting to be
14 masked. All narcotics have a specific scent that drug dogs are
15 trained to. Whether or not it's marijuana, heroin, or
16 methamphetamine, the benefits of masking are similar.

17 So, for these reasons, the Court denies the motion to
18 suppress as filed by the defense at Document No. 90. All of
19 the evidence obtained during the traffic stop and derivative
20 therefrom is admissible at trial, and the grounds laid out for
21 their suppression are insufficient. The stop comported with
22 the Fourth Amendment for the reasons stated.

23 Any additional record in that regard on behalf of the
24 Government?

25 MS. JENNINGS: No, Your Honor.

1 THE COURT: On behalf of the defense?

2 MR. CARR: No, Your Honor.

3 THE COURT: Thank you.

4 So the Court will not issue a written order. The
5 order in regards to the motion to suppress will be based upon
6 the Court's oral ruling here today, and the text order and
7 minutes of testimony will reflect that the motion has been
8 denied.

9 We will be in recess on this matter. This hearing is
10 concluded. Thank you.

11 COURTROOM DEPUTY: All rise.

12 THE COURT: Oh, I'm sorry.

13 Nick, don't let the defendant leave yet.

14 Thank you.

15 I said at the beginning of the hearing that I would
16 make sure that you were able to hear and see everything during
17 the course of this hearing adequately, Mr. Noriega.

18 I know that you were listening carefully and that you
19 were able to hear and see because you interacted with your
20 attorney during the course of the hearing by raising your hand
21 and then had the opportunity to speak with him. I also know
22 that I never saw your indications at any point that you could
23 not see or hear, but I want to make a record with you to
24 confirm that.

25 Were you able to see and hear everything during the

1 course of this hearing, sir?

2 THE DEFENDANT: Yes.

3 THE COURT: Do you have any questions about the
4 material that was presented here today?

5 THE DEFENDANT: No.

6 THE COURT: Any additional record in that regard?

7 MS. JENNINGS: No, Your Honor.

8 THE COURT: Mr. Carr?

9 MR. CARR: No, Your Honor.

10 THE COURT: Thank you.

11 Thank you very much, Deputy United States Marshals,
12 both for returning the defendant to speak with me about this
13 record and for providing access to the telephone during the
14 course of the hearing. We appreciate your assistance.

15 That will conclude the hearing.

16 (The motion hearing concluded at 11:56 a.m.)

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CERTIFICATE

I, Chelsey Wheeler, a Certified Shorthand Reporter of
the State of Iowa and Federal Official Realtime Court Reporter
in and for the United States District Court for the Southern
District of Iowa, do hereby certify, pursuant to Title 28,
United States Code, Section 753, that the foregoing is a true
and correct transcript of the stenographically reported
proceedings held in the above-titled matter and that the
transcript page format is in conformance with the regulation of
the Judicial Conference of the United States.

11 DATED this 17th day of March, 2021.

12

/s/ Chelsey Wheeler

14

Chelsey Wheeler
Certified Shorthand Reporter

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United States District Court for the Southern District of Iowa

Presiding: Honorable Rebecca Goodgame Ebinger

Case No. 4:19-cr-00219-RGE-CFB-2

: Clerk's Court Minutes – Motion Hearing

Plaintiff(s) : Defendant(s)

UNITED STATES OF AMERICA : FELIPE NORIEGA, JR.
: :
: :
: :
: :

Plaintiff(s) Counsel: Amy Jennings

Defendant(s) Counsel: Erin Carr

Court Reporter: Chelsey Wheeler : Interpreter: N/A

Motion(s) for Ruling: Ruling / Ruling Reserved

Def.'s Mot. Suppress, ECF No. 90 DENIED :
: :
: :
: :

Proceedings:

Counsel for Government and Defendant appear. Defendant appears by video conference. Court discusses mask protocols for hearing. Defendant confirms consent to appear by video conference, as allowed by CARES Act. Court finds ends of justice warrant proceeding with the hearing. At 9:08 a.m., Government calls Michael Miller and conducts direct examination. At 10:10 a.m., Defense conducts cross-examination. At 10:38 a.m., the Government conducts redirect examination. At 10:40 a.m., witness steps down. At 10:40 a.m., Government calls Shane Gosnell and conducts direct examination. At 11:05 a.m., Defense conducts direct examination. At 11:11 a.m., witness steps down. At 11:12 a.m., Government argues against motion to suppress. At 11:13 a.m., Defendant's counsel argues in support of motion to suppress. At 11:24 a.m., Court recesses. At 11:31 a.m., Court returns from recess. Defendant's counsel continues argument. At 11:35 a.m., Government's counsel presents rebuttal argument. Court orally denies Defendant's motion to suppress, for the reasons stated on the record. Court adjourns. Order to follow.

Time Start: 9:02a.m.

Time End: 11:55a.m.

Date: July 31, 2020

/s/ Ted Ovrom

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

FELIPE NORIEGA, JR.,

Defendant.

No. 4:19-cr-00219-RGE-CFB

**MOTION TO SUPPRESS HEARING
WITNESS LIST**

GOVERNMENT WITNESSES

NAME	DATE	TIME	
		START	STOP
Michael Miller	7/31/2020	9:08a.m.	10:40a.m.
Direct	7/31/2020	9:09a.m.	10:10a.m.
Cross	7/31/2020	10:10a.m.	10:38a.m.
Re-direct	7/31/2020	10:38a.m.	10:40a.m.
Shane Gosnell	7/31/2020	10:40a.m.	11:11a.m.
Direct	7/31/2020	10:41a.m.	11:05a.m.
Cross	7/31/2020	11:05a.m.	11:11a.m.

DEFENSE WITNESSES

NAME	DATE	TIME	
		START	STOP
No witnesses.			

APPENDIX D

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

4:19-cr-00219-RP-CFB-2

FELIPE NORIEGA, JR.,

Defendant.

REPORT AND RECOMMENDATION CONCERNING PLEA OF GUILTY

The United States of America and the Defendant both filed a written consent to proceed before a U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(b) and both parties stipulated to conducting the plea hearing by videoconference, and that the plea hearing could not be further delayed without serious harm to the interests of justice. The Defendant entered a plea of guilty to Count 1 of the Superseding Indictment.

After cautioning and examining the Defendant under oath concerning each of the subjects mentioned in Fed. R. Crim. P. Rule 11 I determined that for each Count to which the Defendant pled guilty, the guilty plea was knowing and voluntary. For each Count to which the Defendant pled guilty, there was an independent factual basis for each of its essential elements. Defendant understands and agrees to be bound by the terms of the plea agreement. I, therefore, recommend that the plea of guilty be accepted, that a pre-sentence investigation and report be prepared, and that the Defendant be adjudged guilty and have sentence imposed accordingly. I further recommend that the District Judge specifically adopt the finding that the plea hearing was conducted by the reliable electronic means of videoconference, and that further delay of the plea

hearing would cause serious harm to the interests of justice for the following reason(s): to meet the plea entry deadline, age of the case, amount of time Defendant has spent in custody, and the need for reasonably speedy resolution of the case.

Date: September 2, 2020



HELEN C. ADAMS
CHIEF U.S. MAGISTRATE JUDGE

NOTICE

Failure to file written objections to this Report and Recommendation within fourteen (14) days from the date of its service shall bar an aggrieved party from attacking such Report and Recommendation before the assigned United States District Judge. 28 U.S.C. § 636(b)(1)(B).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
Felipe Noriega, Jr.
Defendant.

No. 4:19CR00219-002

**ORDER FOR PRESENTENCE
INVESTIGATION, SCHEDULING OF
SENTENCING, AND CONCERNING
SUBMISSION OF MOTIONS, OBJECTIONS,
AND OTHER SENTENCING MATERIALS**

I. PRESENTENCE INVESTIGATION AND DISCLOSURE OF PRESENTENCE REPORT

Within fourteen (14) calendar days following the date of adjudication or plea proceeding, pursuant to the Administrative Order filed on December 5, 1994, counsel for the United States Attorney's Office shall provide to the United States Probation Office and serve upon opposing counsel a written statement of the defendant's offense conduct in the case. In accordance with this Order, the offense conduct statement shall be provided no later than September 16, 2020.

The United States Probation Office shall complete a presentence investigation, and the initial presentence report (PSR) shall be completed and disclosed to parties within sixty (60) calendar days following the date of adjudication or plea proceeding. In accordance with this Order, the initial PSR shall be disclosed on October 30, 2020. Initial disclosure of the PSR shall occur via electronic filing on CM/ECF.

Within fourteen (14) days after the disclosure of the initial PSR, pursuant to Fed. R. Crim. P. 32(f)(1), counsel shall file with the Court any objections counsel may have to any material facts, information, sentencing classifications, sentencing guideline ranges, and policy statements contained in, or omitted from, the PSR. In accordance with this Order, objections shall be filed no later than November 13, 2020. **If a party has no objections to the PSR, a statement indicating such shall be filed by this same date.**

II. OBJECTION MEETING

It is the responsibility of counsel to be prepared for and participate in an objection meeting, if one is necessary. In accordance with Fed. R. Crim. P. 32(f)(3), the United States Probation Office shall contact counsel to determine the parties' readiness to proceed with sentencing and conduct a meeting to address any objections or logistics relating to sentencing.

November 20, 2020

No later than _____, the Probation Officer shall contact the Court and confirm that the case is ready to proceed to sentencing as scheduled; reschedule the sentencing date, if necessary; and/or address any other logistical matters related to sentencing.

III. SENTENCING DATE

A sentencing date will be scheduled by the Court when the Court is notified by the Probation Officer that the case is ready for sentencing. At the time of notification the Probation Officer will inform the Court of the estimated time required for the sentencing hearing. In accordance with 18 U.S.C. § 3552(d), the final PSR shall be disclosed to the Court and parties at least ten (10) days prior to the date set for sentencing and, in addition, the Probation Officer will advise the Court further as to the projected length of the sentencing hearing, whether the parties intend to call witnesses, whether it is anticipated that any victims may wish to be present and/or address the Court, and whether there are any other unique logistical or scheduling issues.

IV. PRE-SENTENCE SUBMISSIONS

On or before five (5) days prior to the date set for sentencing, the parties shall each file a sentencing memorandum, setting forth any outstanding disputes as to the application of the United States Sentencing Guidelines and the position of the party as to the appropriate sentence to impose under the factors set forth in 18 U.S.C. § 3553(a). Any other motion or brief the party would like the Court to consider must be filed by the same date. Additionally, by the same deadline, the parties shall file, **under seal**, any letters or other exhibits the party would like the Court consider at the sentencing hearing, with copies provided to opposing counsel and the Probation Officer. The requirements in this section do not apply to resistances or responses to motions or briefs served less than five (5) days before the sentencing hearing, Government motions under USSG §5K1.1 or U.S.C. § 3553(e), or rebuttal or impeachment exhibits.

IT IS SO ORDERED.

Dated this 2nd day of September, 2020.



Helen C. Adams

Chief U.S. Magistrate Judge