

No. SC91760

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In the  
**Supreme Court of Missouri**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**MELVIN STOVER, Jr.,**

**Appellant.**

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**Appeal from Clay County Circuit Court  
Seventh Judicial Circuit  
The Honorable Larry D. Harman, Judge**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	3
JURISDICTIONAL STATEMENT .....	10
STATEMENT OF FACTS .....	11
ARGUMENT .....	15
I (sufficiency). .....	15
A. Standard of review. ....	15
B. The law pertaining to the possession of drugs in a jointly occupied vehicle.....	17
C. The record contains substantial evidence showing that Defendant jointly possessed the PCP found in the trunk of his rental car. ....	20
D. The cases on which Defendant relies are distinguishable. ....	29
II (motion to suppress—duration of stop). ....	35
A. The record regarding the traffic stop. ....	36
B. Standard of review. ....	43
C. The Fourth Amendment permits police to detain a person to investigate a reasonable suspicion that criminal activity may be occurring.....	44
1. The law regarding investigatory “ <i>Terry</i> ” stops. ....	44
2. Fourth-Amendment law pertaining to traffic stops. ....	48

D. Defendant’s detention did not violate the Fourth Amendment. .... 50

E. The cases on which Defendant relies are inapposite because the trooper had reasonable suspicion to detain Defendant beyond the traffic offense itself. .... 61

F. The exclusionary rule should not apply in this case. .... 66

III (motion to suppress— no *Miranda* warnings)..... 69

IV (evidence—refusal of consent to search). .... 73

    A. The facts relating to this claim. .... 73

    B. Standard of review. .... 76

    C. The trial court did not abuse its discretion. .... 78

V (evidence—DEA commendation). .... 85

    A. The record regarding this claim. .... 85

    B. Standard of review. .... 87

    C. The trial court did not err in overruling Defendant’s objection. .... 87

VI (verdict director)..... 90

    A. The record regarding this claim. .... 90

    B. Standard of review. .... 90

    C. The trial court did not plainly err in giving this instruction..... 92

CONCLUSION ..... 95

CERTIFICATE OF COMPLIANCE ..... 96

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. Charles</i> , 447 U.S. 404 (1980) .....	81
<i>Arizona v. Johnson</i> , 129 S. Ct. 781 (2009).....	44, 48, 59
<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984).....	70
<i>Cady v. Sheahan</i> , 467 F.3d 1057 (7 <sup>th</sup> Cir. 2006) .....	59
<i>Carpenter v. Countrywide Home Loans, Inc.</i> , 250 S.W.3d 697 (Mo. banc 2008) .....	76
<i>Coulthard v. Commonwealth</i> , 230 S.W.3d 572 (Ky. 2007) .....	81
<i>Doyle v. Ohio</i> , 426 U.S. 610 (1976).....	81, 82
<i>Fletcher v. Weir</i> , 455 U.S. 603 (1982).....	81
<i>Florida v. Bostick</i> , 501 U.S. 429 (1991) .....	49, 59, 80
<i>Florida v. Royer</i> , 460 U.S. 491 (1983).....	80
<i>Herring v. United States</i> , 129 S. Ct. 625 (2009).....	66, 67, 68
<i>Hiibel v. Sixth Judicial Dist. Court of Nevada</i> , 542 U.S. 177 (2004).....	70
<i>Illinois v. Caballes</i> , 543 U.S. 405 (2005).....	61
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....	46
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979) .....	16
<i>Longshore v. State</i> , 924 A.2d 1129 (Md. 2007) .....	80
<i>Maryland v. Wilson</i> , 519 U.S. 408 (1997).....	48

*Miranda v. Arizona*, 384 U.S. 436 (1966) ..... 70

*Muehler v. Mena*, 544 U.S. 93 (2005)..... 49, 59

*Padgett v. State*, 590 P.2d 432 (Alaska 1979)..... 80

*Pennsylvania v. Bruder*, 488 U.S. 9 (1988)..... 70

*Pennsylvania v. Mimms*, 434 U.S. 106 (1977)..... 48

*Reeves v. State*, 969 S.W.2d 471 (Tex. Ct. App. 1998)..... 80

*State v. Aderholdt*, 545 N.W.2d 559 (Iowa 1996) ..... 58

*State v. Barriner*, 34 S.W.3d 139 (Mo. banc 2000) ..... 82

*State v. Black*, 50 S.W.3d 778 (Mo. banc 2001) ..... 82, 83

*State v. Blankenship*, 830 S.W.2d 1 (Mo. banc 1992)..... 43

*State v. Brown*, 814 S.W.2d 304 (Mo. App. S.D. 1991)..... 71

*State v. Campbell*, 143 S.W.3d 695 (Mo. App. W.D. 2004) ..... 79

*State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998) ..... 16, 17

*State v. Cox*, 248 S.W.3d 1 (Mo. App. W.D. 2008) ..... 59, 60, 63

*State v. Crawford*, 68 S.W.3d 406 (Mo. banc 2002)..... 16

*State v. Crump*, 986 S.W.2d 180 (Mo. App. E.D. 1999)..... 88

*State v. Davis*, 126 S.W.3d 398 (Mo. App. W.D. 2004)..... 71

*State v. Dolittle*, 896 S.W.2d 27 (Mo. banc 1995) ..... 92

*State v. Driskell*, 167 S.W.3d 267 (Mo. App. W.D. 2005) ..... 33

*State v. Dulany*, 781 S.W.2d 52 (Mo. banc 1989) ..... 17

*State v. Forrest*, 183 S.W.3d 218 (Mo. banc 2006)..... 87

*State v. Freeman*, 269 S.W.3d 422 (Mo. banc 2008)..... 15, 16

*State v. Gonzalez*, 235 S.W.3d 20 (Mo. App. S.D. 2007) ..... 29, 30

*State v. Graham*, 294 S.W.3d 61 (Mo. App. S.D. 2009)..... 50

*State v. Granado*, 148 S.W.3d 309 (Mo. banc 2004)..... 64

*State v. Griffin*, 876 S.W.2d 43 (Mo. App. E.D. 1994)..... 88

*State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993)..... 17

*State v. Haddock*, 24 S.W.3d 192 (Mo. App. W.D. 2000) ..... 88

*State v. Harris*, 870 S.W.2d 798 (Mo. banc 1994) ..... 79

*State v. Holman*, 965 S.W.2d 464 (Mo. App. W.D. 1998)..... 91

*State v. Hosto-Worthy*, 877 S.W.2d 150 (Mo. App. E.D. 1994) ..... 72

*State v. Hutchinson*, 796 S.W.2d 100 (Mo. App. S.D. 1990) ..... 44

*State v. Ingram*, 249 S.W.3d 892 (Mo. App. W.D. 2008)..... 30, 93

*State v. Johnson*, 244 S.W.3d 144 (Mo. banc 2008)..... 92

*State v. Keeth*, 203 S.W.3d 718 (Mo. App. S.D. 2006) ..... 71

*State v. King*, 157 S.W.3d 656 (Mo. App. W.D. 2005) ..... 64

*State v. Kovach*, 839 S.W.2d 303 (Mo. App. S.D. 1992) ..... 64, 65

*State v. Logan*, 914 S.W.2d 806 (Mo. App. 1995) ..... 55

*State v. Mahan*, 971 S.W.2d 307 (Mo. banc 1998)..... 81

*State v. Martindale*, 945 S.W.2d 669 (Mo. App. E.D. 1997) ..... 91

*State v. McCleod*, 186 S.W.3d 439 (Mo. App. W.D. 2006)..... 19

*State v. McCoy*, 971 S.W.2d 861 (Mo. App. W.D. 1998) ..... 92

*State v. McKinney*, 718 S.W.2d 583 (Mo. App. E.D. 1986) ..... 87

*State v. McNaughton*, 924 S.W.2d 517 (Mo. App. W.D. 1996)..... 18

*State v. Mercado*, 887 S.W.2d 688 (Mo. App. S.D. 1994) ..... 19, 30, 31

*State v. Metz*, 43 S.W.3d 374 (Mo.App.W.D. 2001) ..... 82

*State v. Mickle*, 164 S.W.3d 33 (Mo. App. W.D. 2005) ..... 80

*State v. Miller*, 798 So.2d 947 (La. 2001)..... 57, 58

*State v. Morrow*, 968 S.W.2d 100 (Mo. banc 1998)..... 77

*State v. Neal*, 682 S.W.2d 860 (Mo. App. E.D. 1984) ..... 71

*State v. Neely*, 979 S.W.2d 552 (Mo. App. S.D. 1998) ..... 87

*State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993)..... 15, 16

*State v. Oliver*, 293 S.W.3d 437 (Mo. banc 2009) ..... 44

*State v. Palenkas*, 933 P.2d 1269 (Ariz. App. 1996) ..... 80

*State v. Pena*, 784 S.W.2d 883 (Mo. App. W.D. 1990) ..... 71

*State v. Pond*, 131 S.W.3d 792 (Mo. banc 2004) ..... 18

*State v. Ross*, 254 S.W.3d 267 (Mo. App. E.D. 2008)..... 49

*State v. Sanad*, 769 S.W.2d 436 (Mo. App. W.D. 1989) ..... 71

*State v. Sanderson*, 169 S.W.3d 158 (Mo. App. S.D. 2005)..... 19

*State v. Santillan*, 1 S.W.3d 572 (Mo. App. E.D. 1999) ..... 77

*State v. Schroeder*, 330 S.W.3d 468 (Mo. banc 2011) ..... 43, 44

*State v. Simmons*, 955 S.W.2d 729 (Mo. banc 1997)..... 77

*State v. Slavin*, 944 S.W.2d 314 (Mo. App. W.D. 1997) ..... 79

*State v. Sloan*, 998 S.W.2d 142 (Mo. App. E.D. 1999)..... 88

*State v. Stolzman*, 799 S.W.2d 927 (Mo. App. S.D. 1990)..... 33

*State v. Sund*, 215 S.W.3d 719 (Mo. banc 2007)..... 62, 63, 64

*State v. Villa-Perez*, 835 S.W.2d 897 (Mo. banc 1992) ..... 17

*State v. Waldrup*, 331 S.W.3d 668 (Mo. banc 2011)..... 49

*State v. Watkins*, 73 S.W.3d 881 (Mo. App. E.D. 2002)..... 49

*State v. Watson*, 290 S.W.3d 103 (Mo. App. S.D. 2009) ..... 31, 32

*State v. West*, 21 S.W.3d 59 (Mo. App. W.D. 2000) ..... 79

*State v. West*, 559 S.W.2d 282 (Mo. App. St.L.D. 1977)..... 32

*State v. Wilson*, 169 S.W.3d 870 (Mo. App. W.D. 2005)..... 72

*State v. Woods*, 284 S.W.3d 630 (Mo. App. W.D. 2009).....passim

*State v. Woolfolk*, 3 S.W.3d 823 (Mo. App. W.D. 1999)..... 48, 50

*State v. Wurtzberger*, 40 S.W.3d 893 (Mo. banc 2001) ..... 91

*State v. Zink*, 181 S.W.3d 66 (Mo. banc 2005)..... 92

*Terry v. Ohio*, 392 U.S. 1 (1968)..... 44, 46

*United States v. Dozal*, 173 F.3d 787 (10<sup>th</sup> Cir. 1999) ..... 80, 81

*United States v. Allegree*, 175 F.3d 648 (8<sup>th</sup> Cir. 1999)..... 50

*United States v. Arvizu*, 534 U.S. 266 (2002) ..... 44, 45, 46

*United States v. Beck*, 140 F.3d 1129 (8<sup>th</sup> Cir 1998)..... 65

*United States v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994)..... 56

*United States v. Booker*, 269 F.3d 930 (8<sup>th</sup> Cir. 2001) ..... 65

*United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) ..... 60

*United States v. Cortez*, 449 U.S. 411 (1981)..... 45, 46

*United States v. Donnelly*, 475 F.3d 946 (8th Cir. 2007) ..... 56

*United States v. Hardy*, 855 F.2d 753 (11<sup>th</sup> Cir. 1988) ..... 58, 59

*United States v. Lee*, 317 F.3d 26 (1<sup>st</sup> Cir. 2003) ..... 57

*United States v. Lyons*, 486 F.3d 367 (8<sup>th</sup> Cir. 2007)..... 50, 56

*United States v. Mayo*, 394 F.3d 1271 (9<sup>th</sup> Cir. 2005)..... 55

*United States v. McCarthy*, 77 F.3d 522 (1<sup>st</sup> Cir. 1996)..... 59

*United States v. McNatt*, 931 F.2d 251 (4th Cir. 1991) ..... 81

*United States v. Orsolini*, 300 F.3d 724 (6<sup>th</sup> Cir. 2002) ..... 58

*United States v. Payne*, 534 F.3d 948 (8th Cir. 2008)..... 56

*United States v. Place*, 464 U.S. 696 (1985) ..... 47

*United States v. Sanchez*, 417 F.3d 971 (8th Cir. 2005) ..... 56

*United States v. Sharpe*, 470 U.S. 675 (1985) ..... 47

*United States v. Simmons*, 172 F.3d 775 (11 Cir. 1999)..... 58

*United States v. Sokolow*, 490 U.S. 1 (1989) ..... 46

*United States v. Thame*, 846 F.2d 200 (3d Cir. 1988) ..... 80

*United States v. White*, 42 F.3d 457 (8th Cir. 1994) ..... 56

*United States v. Wood*, 106 F.3d 942 (10th Cir.1997)..... 80

Statutes

Section 195.010(34), RSMo Cum. Supp. 2010 ..... 18

Section 195.010(8), RSMo Cum. Supp. 2009 ..... 18

Section 195.222.5, RSMo Cum. Supp. 2009 ..... 17

Section 590.650.2, RSMo Cum. Supp. 2009 ..... 38

Rules

Rule 28.03 ..... 91

Rule 83.04 ..... 10

Other Authorities

MAI-CR 3d 325.10.2 ..... 93

## **JURISDICTIONAL STATEMENT**

Appellant (Defendant) appeals from a Clay County Circuit Court judgment convicting him of one count of first-degree trafficking, for which he was sentenced to 12 years' imprisonment. After the Missouri Court of Appeals, Western District, issued an opinion reversing Defendant's conviction, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Rule 83.04.

## STATEMENT OF FACTS

Defendant was charged in Lafayette County with one count of first-degree trafficking for having 10 gallons of PCP in the trunk of his car. (L.F. 13-14, 58-59). The case was transferred to Clay County on a change of venue. (L.F. 4, 11-12, 19). After waiving jury sentencing, (Tr. 124-27; L.F. 66), Defendant was tried before a jury on September 8-10, 2008. (L.F. 21-22; Tr. 110).

Viewed in the light most favorable to the verdict, the evidence presented at trial showed that:<sup>1</sup>

A trooper pulled over Defendant's rental car on eastbound I-70 after he observed it following a tractor-trailer too closely. (Tr. 385-86, 397-99, 409-14, 430-31; State's Ex. 33<sup>2</sup>). Although gift bags and recently-purchased items were in the back seat, no luggage or other traveling materials were visible. (Tr. 417). Defendant produced a Washington, D.C. driver's license, and the

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<sup>1</sup> To avoid needless repetition, additional facts are included in Points I (sufficiency) and II (motion to suppress).

<sup>2</sup> State's Exhibit 33, which was admitted into evidence and viewed by the jury, is a video recording of the traffic stop taken by a camera in the trooper's patrol car. (Tr. 490-505).

trooper asked him to sit in the patrol car, while the passenger remained in Defendant's car. (Tr. 421-23; State's Ex. 33).

Defendant told the trooper that he was driving from Nevada to his home in Washington, D.C. (Tr. 420-21; State's Ex. 33). He said that he and his passenger had bought one-way airfare and flown from Washington, D.C. to Las Vegas on the previous Saturday (November 22) for a one-day gambling trip. (Tr. 419-20, 422, 517, 540; State's Ex. 33). Defendant said they did not bring any luggage. (Tr. 422, 466). Although they had planned on staying in Las Vegas for only one day, Defendant said they decided to drive back in a rental car after losing money. (State's Ex. 33).

Leaving Defendant in the patrol car, the trooper went to Defendant's car to retrieve the rental agreement. (Tr. 424; State's Ex. 33). The passenger told the trooper that they had left for Las Vegas on Friday—the day before Defendant had said. (Tr. 431; State's Ex. 33). He also said they had not brought any luggage. (State's Ex. 33).

The trooper returned to his patrol car and ran a records check on the passenger. (State's Ex. 33). While the officer ran the check, Defendant, who was becoming more argumentative, repeatedly asked why he had been stopped. (State's Ex. 33). The records check showed that the passenger had had several drug-related arrests. (Tr. 571).

The rental agreement showed that Defendant had rented the vehicle at the Las Vegas airport on Friday, November 21 and that it had been scheduled to be returned to a Washington, D.C. airport on Monday, November 24—the day before the stop. (Tr. 444-45, 517, 521; State’s Ex. 33).

The trooper eventually asked Defendant for permission to search the car. (State’s Ex. 33). After Defendant suggested that the trooper get a warrant, the trooper said he would just call for a drug dog to sniff the car for drugs. (State’s Ex. 33). Defendant repeatedly interrupted the officer as he attempted to use the radio to call for the drug dog. (Tr. 439-40; State’s Ex. 33). During the wait, Defendant “correct[ed]” his story and said he had flown to Las Vegas on Friday. (State’s Ex. 33).

The drug dog alerted on the rear of Defendant’s vehicle. (Tr. 353; State’s Ex. 33). Defendant said that he did not have a problem with the troopers “going through that vehicle” because he did not have anything in it. (State’s Ex. 33).

After the troopers opened the trunk of the car, Defendant demanded to know what was in there. (State’s Ex. 33). Defendant asked what was in the trunk and added that he and his passenger had put nothing in the trunk and repeatedly said that “all our belongings are in the backseat.” (State’s Ex. 33).

The troopers searched the trunk and found a large black suitcase that covered most of the trunk. (Tr. 355, 465, 468; State’s Ex. 33). Sitting

immediately next to the suitcase was a gift bag containing a watch. (Tr. 57, 60, 465, 73, 482). As the arresting officer wheeled the suitcase into Defendant's view, Defendant twice said, "Oh shit, that's not ours." (State's Ex. 33). Defendant said the suitcase didn't belong to them "because we don't have no goddamn luggage." (State's Ex. 33).

Inside the suitcase were 11 plastic containers (2 two-quart jugs and 9 one-gallon jugs) each containing a yellowish liquid. (Tr. 355-56, 465, 467, 476, 480, 628). The containers were wrapped in towels and the lids were secured with duct tape. (Tr. 467, 476). Although Defendant repeatedly denied being in the trunk of the car, he admitted that the watch found there belonged to him. (Tr. 362-64, 375-76, 488; State's Ex. 33).

Testing of samples from each of the 11 containers showed that the liquid inside contained PCP. (Tr. 669-79). The total weight of the samples was 224.12 grams, but the containers held a total of 10 gallons of liquid, enough for 37,850 doses of PCP. (Tr. 628, 663-64, 677-79).

The jury found Defendant guilty as charged, and the court sentenced him to twelve years' imprisonment. (Tr. 805-06, 928; L.F. 22, 129-30). After the Court of Appeals, Western District, issued an opinion reversing Defendant's conviction, this Court granted the State's application for transfer.

## ARGUMENT

### I (sufficiency).

**The trial court did not err in overruling Defendant's motion for judgment of acquittal on the charge of first-degree trafficking because the record contains sufficient evidence from which the jury could reasonably find that Defendant had knowledge and control of the 10 gallons of PCP contained in the trunk of his rental car.**

The only element of the crime that Defendant contends was not proven was whether the evidence was sufficient to show that he knew about the 10 gallons of PCP found in the trunk of his rental car. But the record contains substantial, and largely undisputed, evidence from which the jury could infer Defendant's knowledge and control over the PCP in his trunk.

#### **A. Standard of review.**

When considering sufficiency-of-evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008); *State v. O'Brien*, 857 S.W.2d 212, 215-16 (Mo. banc 1993). Appellate courts do not review the evidence de novo; rather, they consider the record in the light most favorable to the verdict:

To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ "a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.

*O'Brien*, 857 S.W.2d at 215-16 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998) (quoting *Jackson*, 443 U.S. at 326); see also *Freeman*, 269 S.W.3d at 425 (holding that an appellate court should "not weigh the evidence anew since 'the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case'" (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002))).

Appellate courts do not act as a “super juror with veto powers”; instead, they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993); *State v. Chaney*, 967 S.W.2d at 52. In addition, a reviewing court may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact’s province to believe all, some, or none of the witnesses’ testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Finally, circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 405-06.

**B. The law pertaining to the possession of drugs in a jointly occupied vehicle.**

Defendant was charged with first-degree trafficking in violation of § 195.222.5, RSMo Cum. Supp. 2009, which provides:

A person commits the crime of trafficking drugs in the first degree if . . . he distributes, delivers, manufactures, produces or attempts to distribute, deliver, manufacture or produce more than thirty grams of a mixture or substance containing a detectable amount of phencyclidine (PCP).

The word “deliver” is defined as “the actual, constructive, or attempted transfer from one person to another of . . . a controlled substance . . . ; and includes a sale.” Section 195.010(8), RSMo Cum. Supp. 2009.

“Although possession of the controlled substance is not an element of the crime [of first-degree trafficking], the circumstances supporting conviction may include possession.” *State v. McNaughton*, 924 S.W.2d 517, 526 (Mo. App. W.D. 1996), *overruled on other grounds by State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004). The legislature has defined the word “possessed” or the phrase “possessing a controlled substance” to mean:

a person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possession may also be sole or joint. If one person alone has possession of a substance possession is sole. If two or more persons share possession of a substance, possession is joint;

Section 195.010(34), RSMo Cum. Supp. 2010.

“Proof of a defendant’s knowledge of the presence and character of a substance is normally supplied by circumstantial evidence of the acts and conduct of the accused from which it can be fairly inferred he or she knew of the existence of the contraband.” *State v. McCleod*, 186 S.W.3d 439, 444 (Mo. App. W.D. 2006). “The State may establish constructive possession by proving that the defendant had access to and control over the premises where the substance was found.” *State v. Sanderson*, 169 S.W.3d 158, 164 (Mo. App. S.D. 2005). “If there is joint control over premises where drugs were found, further evidence is necessary to connect an accused with the drugs.” *State v. Mercado*, 887 S.W.2d 688, 691 (Mo. App. S.D. 1994).

“In cases involving joint control of an automobile, ‘a defendant is deemed to have both knowledge and control of items discovered within the automobile, and, therefore, possession in the legal sense, where there is additional evidence connecting him with the items.’” *State v. Woods*, 284 S.W.3d 630, 640 (Mo. App. W.D. 2009) (quoting *Sanderson*, 169 S.W.3d at 164-65). “This additional evidence must demonstrate sufficient incriminating circumstances to permit the inference of a defendant’s knowledge and control over the controlled substance.” *Id.* The court in *Woods* then listed the following as “[a]dditional incriminating circumstances that will support an inference of knowledge and control” of drugs found in a jointly occupied vehicle:

- Finding a large quantity of drugs in the vehicle
- Finding drugs having a large monetary value in the vehicle
- Easy accessibility or routine access to the drugs
- The odor of drugs in the vehicle
- The presence of the defendant's personal belongings in close proximity to the drugs
- Making false statements in an attempt to deceive the police
- The defendant's nervousness during the search
- The defendant's flight from law enforcement
- The presence of drugs in plain view
- Other conduct and statements made by the accused
- The fact that the defendant rented the vehicle.

*Id.* “In determining whether the State has proven sufficient additional incriminating circumstances, [courts] must consider the totality of the circumstances.” *Id.*

**C. The record contains substantial evidence showing that Defendant jointly possessed the PCP found in the trunk of his rental car.**

In Defendant's case, there is a plethora of additional incriminating circumstances to support a finding that Defendant had knowledge and control over the 10 gallons of PCP found in his trunk.

The trooper, who had over 200 hours of specialized drug interdiction training and had made over 1000 drug-interdiction arrests, pulled over Defendant's rental car, a Grand Marquis with California plates, at 11 a.m. on Tuesday, November 25, 2003, as it traveled on eastbound I-70 after the trooper observed it following a tractor-trailer too closely. (Tr. 385-86, 397-99, 408-14, 430-31; State's Ex. 33). After the trooper pulled in behind Defendant's vehicle, but before he activated his emergency lights, Defendant tapped his brakes and slowed down well below the speed limit. (Tr. 411, 414; State's Ex. 33). The officer testified that drug smugglers often rent vehicles to avoid the forfeiture of their personal cars. (Tr. 389-90, 422). In addition, most significant drug seizures occur on eastbound I-70 as smugglers move drugs from drug-source states in the west—of which California is one—to states in the east. (Tr. 387-89, 391-92, 556).

The trooper observed gift bags and newly-purchased items in the backseat, but saw no luggage or other traveling materials. (Tr. 417). Defendant produced a Washington D.C. driver's license and the officer asked him to sit in the patrol car, while Defendant's passenger remained in the vehicle. (Tr. 421-23; State's Ex. 33).

Defendant said that he was driving from Nevada to his home in Washington, D.C. (Tr. 420-21; State's Ex. 33). He explained that he and his passenger had bought one-way airfare and flown from Washington, D.C. to

Las Vegas on the previous Saturday (November 22) for a one-day gambling trip, and that they did not bring any luggage. (Tr. 419-20, 422, 466, 517, 540; State's Ex. 33). Although they had planned on staying in Las Vegas for only one day, Defendant said they decided to drive a rental car home after losing money. (State's Ex. 33). Defendant also explained that they had stayed in cheaper hotels away from the places where they gambled. (State's Ex. 33). The trooper had to repeat some of his questions to get a response from Defendant. (State's Ex. 33).

In the trooper's experience, same-sex occupants in a vehicle traveling without luggage and who have made one-way travel arrangements, especially one-way vehicle rentals, can be indicative of criminal activity. (Tr. 422, 448-49, 561, 568-69, 604-05).

Leaving Defendant in the patrol car, the trooper went to Defendant's car to retrieve the rental agreement and speak with the passenger. (Tr. 424; State's Ex. 33). The passenger, who had a Maryland driver's license, told the trooper that they had left for Las Vegas on Friday—the day before Defendant had said. (Tr. 431; State's Ex. 33). He also said that they did not have any luggage. (State's Ex. 33).

After the trooper returned to his patrol car and as he began checking the passenger's information, he asked Defendant if his passenger had ever been arrested. (State's Ex. 33). Defendant said the passenger had not been

arrested in the past four or five years. (Tr. 423-24; State's Ex. 33).

Defendant's demeanor then changed, and he became more argumentative and made large hand gestures while he spoke; he also repeatedly asked why he had been stopped. (State's Ex. 33). A records check on the passenger revealed several drug-related arrests. (Tr. 571).

The rental agreement showed that Defendant had rented the vehicle at the Las Vegas airport on Friday, November 21 and that it was to be returned to a Washington, D.C. airport on Monday, November 24. (Tr. 444-45, 517, 521; State's Ex. 23). The rental agreement showed Oris Butler, Defendant's passenger, as an additional driver. (Tr. 444-45; State's Ex. 23).

When the trooper asked Defendant for permission to search the car, Defendant became even more argumentative. (State's Ex. 33). At first, Defendant objected to a search and suggested that a warrant be obtained. (State's Ex. 33). But after the trooper said that he would just call a drug dog to sniff the car for drugs, Defendant repeatedly interrupted the trooper as he attempted to use the radio to request a drug dog. (Tr. 439-40; State's Ex. 33). Defendant then mentioned for the first time that he needed to leave because his mother was sick. (Tr. 438; State's Ex. 33). Defendant also asked the trooper to get his cigarettes so he could smoke, but when the trooper went to retrieve them, the passenger told him that Defendant didn't smoke. (Tr. 440-41; State's Ex. 33). While waiting for the canine unit to arrive, Defendant

“correct[ed]” his story and said that he and his passenger had flown to Las Vegas on Friday. (State’s Ex. 33).

The drug dog alerted on the rear of the vehicle. (Tr. 353; State’s Ex. 33). When he was told this, Defendant said that he did not have a problem with the troopers “going through that vehicle” because he did not have anything in it, except for some pictures he had bought. (State’s Ex. 33). Defendant repeated that he didn’t “have anything in that vehicle.” (State’s Ex. 33).

After the officers opened the trunk, Defendant demanded to know what was in there. (State’s Ex. 33). Defendant said that he and his passenger had put nothing in the trunk and repeatedly said that “all our belongings are in the backseat.” (State’s Ex. 33). Defendant said, “We have nothing in the trunk of that car.” (State’s Ex. 33). He also exclaimed that there was “nothing in that motherfucker.” (State’s Ex. 33).

The officers searched the trunk and found a large black suitcase that covered most of the trunk. (Tr. 355, 465, 468; State’s Ex. 33). Sitting immediately next to the suitcase was a gift bag containing a \$75 Fossil watch in a tin container. (Tr. 357, 360, 465, 473, 482). As the trooper wheeled the suitcase into Defendant’s view, Defendant twice said, “Oh shit, that’s not ours.” (State’s Ex. 33). Defendant said the suitcase didn’t belong to them “because we don’t have no goddamn luggage.” (State’s Ex. 33).

Defendant was then arrested and given the *Miranda* warnings. (State's Ex. 33). As the warnings were being read, Defendant said that all his belongings were in the car's backseat. (State's Ex. 33). Defendant then asked, "What's in the suitcase?" and if there were "drugs in the suitcase." (State's Ex. 33).

Inside the suitcase were 11 plastic containers (2 two-quart jugs and 9 one-gallon jugs) each containing a yellowish liquid. (Tr. 355-56, 465, 467, 476, 480, 628). The containers were wrapped in towels and the lids to the containers were secured with duct tape to prevent leakage. (Tr. 467, 476). The trooper smelled a chemical aroma after unzipping the suitcase. (Tr. 467).

After being given the *Miranda* warnings a second time and told that it appeared PCP was in the containers, Defendant replied: "As God is my witness on this thing, I ain't been nowhere in that goddamn trunk. I had no reason to go in that trunk. So, whatever is in that goddamn trunk I got nothing to do with it." (State's Ex. 33). Defendant also told the trooper that he was "innocent to whatever the fuck is in that car." (State's Ex. 33). Defendant admitted, however, that the watch found in the trunk belonged to him. (Tr. 362-64, 375-76, 488).

Defendant later said that he, his passenger, and a third man flew to Las Vegas together to gamble and win enough money to fly back, but they lost money and decided to drive back. (Tr. 636). He claimed that he took a

taxi to the airport to rent the car and then returned to the hotel to pick up his passenger. (Tr. 637).

Inside the vehicle, officers found a passenger receipt for an airline ticket and a boarding pass stub in the name of Oris Butler (Defendant's passenger) for a November 21<sup>st</sup> (Friday) flight from Los Angeles International Airport to Las Vegas. (State's Exhibits 29, 30). Also found were three credit-card receipts from aborted attempts to make a cash withdrawal from a Las Vegas casino dated November 20 (Thursday) (State's Ex. 31) and a "Vehicle Condition Report" signed by Defendant on November 21 showing that he had "inspected the vehicle and noted any damage." (State's Exhibits 31, 25).

Testing of samples retrieved from each of the 11 containers found in the suitcase confirmed that the liquid inside them contained PCP. (Tr. 669-79). The total weight of the samples was 224.12 grams, but the containers had a total of 10 gallons of liquid in them. (Tr. 663-64). Since one dose of PCP is approximately 1 milliliter, which is applied to a regular or marijuana cigarette and then smoked, the amount of liquid found in the suitcase was enough for 37,850 doses. (Tr. 677-79). The criminalist who tested the liquid testified that she had never before seen that much PCP. (Tr. 672).

The record contains evidence of nearly all the factors courts look for in determining if additional incriminating circumstances exist to support an

inference that the defendant had knowledge and control over drugs found in a jointly-occupied vehicle.

First, a large quantity of drugs was discovered in the trunk of the car. Second, although there was no specific testimony on the monetary value of the drugs, it can be easily inferred that 37,850 doses of PCP is worth a substantial amount of money. Third, Defendant, as the renter and driver of the vehicle, presumably had access to the trunk where the drugs were found. Fourth, Defendant claimed ownership of a watch found in a gift bag sitting immediately next to the suitcase containing the drugs. This factor also buttresses the inference that not only did Defendant have access to the trunk, but that he also opened it. Fifth, the record contains false statements Defendant made to the police during the time leading up to the search, including telling them that he arrived in Las Vegas on a date after he actually did and that he went there for a one-day gambling trip, yet stayed in a hotel for several days thereafter. Sixth, Defendant exhibited nervousness during the time leading up to the search and became more belligerent when he learned the car was going to be sniffed by a drug dog. During the search Defendant repeatedly said that all his belongings were in the passenger compartment, and when the troopers opened the trunk, Defendant denied having anything in the trunk before he even knew that something had been

found. Seventh, Defendant rented the vehicle in which the drugs were found; his passenger was listed only as an additional driver.

The record also contains other evidence supporting a finding of guilt. This includes the making of one-way travel arrangements that involved a return trip from a drug-source state by rental car on a known drug corridor. The rental agreement showed that the car, which was rented the day before Defendant said he arrived in Las Vegas, was overdue to be returned to a Washington, D.C. airport. It also appears that the car was rented on the day Defendant arrived in Las Vegas, though Defendant claimed that the car was rented after they had lost money gambling. Defendant's passenger had previous drug-related arrests. Although Defendant had been traveling several days, neither he nor his passenger had any luggage. Documents in the vehicle showed that the passenger, with whom Defendant said he traveled, had flown one-way from Washington, D.C. to Long Beach California, and then from Los Angeles to Las Vegas. Credit card receipts in the car showed that Defendant may have been in Las Vegas as early as Thursday afternoon. These additional factors further supported the jury's finding that Defendant had knowledge of, and control over, the drugs found in the trunk of his rental car.

**D. The cases on which Defendant relies are distinguishable.**

The cases on which Defendant relies to support his claim that the evidence was insufficient to prove his knowledge or possession of the PCP are readily distinguishable on their facts and, thus, do not apply to the circumstances present in his case.

In *State v. Gonzalez*, 235 S.W.3d 20 (Mo. App. S.D. 2007), the defendant, who did not have a driver's license but only a "Mexico I.D.," was driving a car displaying Arizona plates, but that was not registered to him. *Id.* at 25. After the defendant was pulled over for speeding, he told the officer he was going to St. Louis to meet friends; when separately asked what their destination was, the passenger said he was supposed to call some friends on a pay phone. *Id.* The appellate court did not find this incriminating because the answers were not necessarily inconsistent or incriminatory. *Id.* at 31. The officer asked for consent to search the car, which was given by Defendant, and he found that the carpet underneath the backseat had been pulled away and was loose. *Id.* at 25. The officer lifted up the backseat and found two large plastic bundles of marijuana in hollowed out recesses of the foam in the seat. *Id.* A later search revealed that marijuana had also been hidden in a speaker box in the trunk and in the rear quarter panels. *Id.* at 25-26. No personal items were located in the trunk and the record did not

show that there was any odor emanating from the 40 pounds of marijuana concealed in the car's recesses. *Id.* at 26, 28-29. The court held that the evidence was insufficient to prove the defendant's knowledge or possession of the drugs because the record showed only that he was driving a car in which marijuana was found completely concealed about the vehicle. *Id.* at 32.

In *Ingram*, the defendant was pulled over while driving a car that she did not own and in which there was another passenger. *Ingram*, 249 S.W.3d at 894. The defendant and the passenger were removed from the car and arrested for outstanding warrants. *Id.* While one officer was securing the defendant following her arrest, another officer looked inside the car with a flashlight and found a small pebble-sized rock of crack cocaine in the driver's seat. *Id.* The Western District held that the evidence was insufficient to prove that the defendant jointly possessed the crack cocaine because no evidence showed that the crack cocaine was under the defendant while she was sitting in the car and the defendant did not "exhibit any marked nervousness or ma[k]e any incriminating statements." *Id.* at 896. Moreover, the "drugs were not in plain sight when [the defendant] was in the car or commingled with [the defendant]'s personal possessions." *Id.*

In *Mercado*, the defendant was a passenger in a van that was stopped for a traffic offense. *Mercado*, 887 S.W.2d at 689. The driver gave consent for a search of the van and the officer found marijuana concealed behind panels

in the back of the van. *Id.* at 689-90. The court found that the evidence was insufficient to show that the defendant constructively possessed the drugs because he was simply a passenger in the van and had helped the owner in driving it. *Id.* at 691. The court also noted that the marijuana was concealed behind panels screwed into the wall of the van and no discernable odor was present. *Id.*

The Southern District later explained and distinguished the holdings in *Gonzalez*, *Ingram*, and *Mercado* in a case in which it found that the evidence was sufficient to prove possession of controlled substances. *See State v. Watson*, 290 S.W.3d 103 (Mo. App. S.D. 2009). The *Watson* court explained that in *Gonzalez* the evidence was insufficient to show the defendant's possession of the marijuana because "the marijuana found by police was not in plain view; [but] was instead hidden in the backseat underneath the carpet and in the wall panels; there were other occupants of the vehicle; and there were no other incriminating circumstances" tying the defendant to the drugs. *Id.* at 107 n.5. It also described *Ingram* as a case in which "there was no constructive possession where a rock of cocaine was located in the defendant's seat after he [sic] had been removed from the vehicle; there were other passengers in the vehicle; and there were no additional incriminating circumstances." *Id.* Finally, it described *Mercado* as case in which there was "insufficient evidence to prove the defendant knowingly and consciously

possessed marijuana where there was no evidence presented that the defendant, who was a passenger in the vehicle, had access to the areas behind the wall and door panels where the marijuana was found; there was no proof presented that the contraband belonged to the defendant; there was no proof he was in close proximity to the contraband; and there was no proof of other incriminating evidence.” *Id.*

Defendant also relies on *State v. West*, 559 S.W.2d 282 (Mo. App. St.L.D. 1977), in which the court found that the evidence was insufficient to prove possession of controlled substances found in a small box in the trunk of an unoccupied, parked car owned by the defendant. *Id.* at 284-85. The court noted that no evidence was presented that the defendant “had ever touched the box” or had even “entered the trunk”; she never made declarations indicating knowledge of the drugs; and she did not have exclusive control of the car since others had access to it. *Id.* at 285. The Southern District later explained why the court in *West* found the evidence insufficient to prove that the defendant possessed the controlled substance:

There was evidence [the defendant] had owned the automobile only about three weeks and her brother and her boyfriend both drove it. The brother testified he put a tire in the trunk two days before the search and did not see the box. There was no testimony that the accused had ever opened the trunk. The Eastern District of this Court

pointed out there was no evidence the accused had exclusive control of the automobile and held that something more than mere ownership of a vehicle in which a controlled substance is discovered is required to support a conviction for possessing the substance.

*State v. Stolzman*, 799 S.W.2d 927, 932 (Mo. App. S.D. 1990).

Finally, in *State v. Driskell*, 167 S.W.3d 267 (Mo. App. W.D. 2005), the evidence showed that the defendant was arrested at a gas station on an outstanding while he sat in a car that he jointly owned with another person who was not present when the defendant was arrested, though another person who was a passenger in the vehicle was standing outside the car washing the windows when the defendant was arrested. *Id.* at 268. A later search of the vehicle revealed the presence of about 3½ grams of methamphetamine and 3½ grams of marijuana in the center console between the driver and passenger seats. *Id.* The court held that the evidence was insufficient to prove the defendant's knowledge and control over the drugs in the console because the car's passenger and absent joint owner also had access to the console area and no additional evidence tied the defendant to the drugs. *Id.* at 269-70. The facts of Defendant's case are readily distinguishable from what occurred in *Driskell*. In addition, the record contains substantial evidence beyond Defendant's mere presence in the car

he rented from which the jury could find that he jointly possessed the PCP in the trunk.

The trial court did not err in overruling Defendant's motion for judgment of acquittal under the facts of this case.

## **II (motion to suppress—duration of stop).**

**The trial court did not err in overruling Defendant’s motion to suppress evidence of the 10 gallons of PCP found in Defendant’s trunk because the detention for the traffic stop was not unduly prolonged and evidence of reasonable suspicion to believe that Defendant was engaged in criminal activity apart from the traffic offense was developed while the officer was still investigating the traffic stop.**

**Alternatively, even if the detention continued beyond the time needed to complete the traffic investigation, sufficient reasonable suspicion was apparent during the course of investigating the traffic stop that other criminal activity was occurring to warrant further detention of Defendant and have his car sniffed by a drug dog.**

Defendant does not contend that the arresting officer lacked probable cause for the initial traffic stop. Instead, his argument focuses on the length of the initial traffic stop, which he describes as a “prolonged detention” in which the trooper lacked reasonable suspicion to believe any criminal activity beyond the traffic offense itself was occurring. Defendant’s argument, however, conflates two distinct principles of Fourth Amendment law applicable to traffic stops. The first principle, on which Defendant relies,

provides that a motorist's Fourth Amendment rights are violated when an officer does not have reasonable suspicion to suspect any criminal activity beyond the traffic offense itself, but then unduly prolongs the traffic stop beyond the time needed to complete the traffic investigation in an effort to develop reasonable suspicion. This principle does not apply in Defendant's case because more than enough reasonable suspicion was developed during the course of investigating the traffic stop to believe that criminal activity was occurring beyond the traffic offense itself. Because the facts giving rise to this reasonable suspicion were developed while Defendant was lawfully detained for the traffic offense, no violation of Defendant's Fourth Amendment rights occurred when the officer continued the detention to investigate the other criminal activity by questioning Defendant and his passenger and by summoning a drug dog.

**A. The record regarding the traffic stop.**

Defendant filed a boiler-plate motion to suppress evidence, (L.F. 24-25), and in suggestions accompanying the motion he argued that his Fourth Amendment rights were violated by his "prolonged detention without reasonable suspicion of criminal activity" that exceeded "the time reasonably required to complete a ticket." (L.F. 29-30). The records from the motion-to-

suppress hearing and trial showed the following facts pertaining to the traffic stop that led to the search of Defendant's vehicle:

At 10:53 a.m. on Tuesday, November 25, 2003, a Missouri Highway Patrol trooper saw Defendant's car, a 2004 Grand Marquis with California plates, following a tractor-trailer too closely (less than 40 feet for over one-half mile) on eastbound I-70 near Concordia. (Tr. 7-11, 409-14, 430-31; State's Ex. 33). After the trooper pulled in behind Defendant's vehicle, Defendant, who had been driving 65 m.p.h., tapped his brakes—though he didn't need to—and slowed his car to 55 m.p.h., well below the speed limit. (Tr. 13-14, 16, 411; State's Ex. 33). In the trooper's experience, people who drive well below the speed limit are seeking to avoid contact with law enforcement. (Tr. 14-15). The trooper activated his emergency lights and pulled Defendant over for following too closely. (Tr. 101, 414; State's Ex. 33).

At 10:54 a.m., the trooper approached the car and observed gift bags and newly-purchased items in the back seat, but saw no luggage or other traveling materials. (Tr. 16, 417; State's Ex. 33). The trooper determined that Defendant was driving a rental car and told Defendant, who produced a Washington, D.C. driver's license, he was being stopped for following too closely. (Tr. 418). Defendant was asked to sit in the patrol car, while his passenger, Oris Butler, remained in the vehicle. (Tr. 19-20, 25, 418, 422-23; State's Ex. 33). While the trooper entered information into his computer and

ran checks on Defendant's license, he engaged in conversation with Defendant.<sup>3</sup> (Tr. 20, 421; State's Ex. 33). The computer check was delayed by questions regarding Defendant's full name, his social security number, and the format of his out-of-state driver's license. (Tr. 421; State's Ex. 33).

Defendant said that he was returning from Nevada to his home in Washington, D.C. (Tr. 22, 420; State's Ex. 33). He also said that he and his passenger had bought one-way airfare and flown from Washington, D.C. to

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<sup>3</sup> The trooper testified that information must be entered into the computer even if only a warning is issued because all warnings were computer generated. (Tr. 20). This required information included the officer's troop and numbered zone, badge number, the date and time, the interstate, the county code, the driver or passenger's full name and date of birth, whether the contact involves a traffic stop, the car's registration, and the warning category or whether a summons was issued. (Tr. 20-21). Racial profiling data must also be entered into the computer for each stop. (Tr. 20-21). *See* § 590.650.2, RSMo Cum. Supp. 2009 (detailing the ten categories of information that must be recorded every time an officer stops a motor vehicle). In fact, the trooper had not finished entering this information for Defendant's traffic stop until after Defendant and his passenger were arrested for possessing 10 gallons of PCP. (Tr. 100-01).

Las Vegas on the previous Saturday (November 22) for a one-day gambling trip. (Tr. 23-25, 27-29, 419-20, 422, 540; State's Ex. 33). Defendant said that they had not brought any luggage and had decided to rent a car and drive back home after losing money. (Tr. 23, 25-26, 29-30, 47, 422, 466; State's Ex. 33). Defendant also explained that they had stayed in cheaper hotels away from the places where they gambled. (Tr. 28; State's Ex. 33). In many instances, the trooper had to repeat his questions to get a response. (Tr. 28; State's Ex. 33).

At 11:07 a.m. (thirteen minutes after the initial stop) the trooper left Defendant in the patrol car and went to Defendant's car to retrieve the rental agreement and to speak with Defendant's passenger (Tr. 31-32, 424; State's Ex. 33). The passenger, who had a Maryland driver's license, told the trooper that he and Defendant had left for Las Vegas on Friday (November 21)—the day before Defendant said they had left. (Tr. 31-32, 34, 431; State's Ex. 33). He confirmed that they had not brought any luggage. (Tr. 31-32, 47; State's Ex. 33). The passenger's story differed from Defendant's on the reason why they rented the car. (Tr. 32, 90-91). Defendant had said they did not have money to fly, but the passenger said that they had got "hung up" in Las Vegas and rented the car to see the country. (Tr. 32, 48).

The trooper returned to his patrol car and as he began checking the passenger's information, he asked Defendant whether his passenger had ever

been arrested. (State's Ex. 33). Defendant said that he had not been arrested in the past four or five years. (Tr. 29, 423-24; State's Ex. 33). While the trooper ran a records check on the passenger, Defendant began asking why he had been stopped. (Tr. 38; State's Ex. 33). Defendant became more argumentative and made large hand gestures while he talked. (State's Ex. 33). Defendant denied that he or his passenger had anything illegal in the car. (Tr. 39-40; State's Ex. 33). A records check on the passenger revealed several drug-related arrests. (Tr. 36, 48-49, 571).

The rental agreement showed that Defendant had rented the vehicle at McCarron International Airport in Las Vegas on Friday, November 21—the day before Defendant said he had left on his trip—and that it was to be returned to Ronald Reagan Washington National Airport on Monday, November 24—the day before the traffic stop.<sup>4</sup> (Tr. 444-45, 517, 521; State's Ex. 23). The estimated charges for the rental were \$397.74, but Defendant's

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<sup>4</sup> On the "Date/Time Out/Location" box on the form it shows the airport code LAS, which is for McCarron International in Las Vegas. (State's Ex. 23).

The "Date Due/Location" box shows the airport code DCA, which is for Reagan National in Washington, D.C. (State's Ex. 33). The trooper testified without objection that the car was rented by Defendant in Las Vegas and the vehicle was to be returned at a "D.C. Airport." (Tr. 444-45).

credit card had been charged \$477. (445-46; State's Ex. 23). The rental agreement showed Defendant's passenger (Oris Butler) as an additional driver. (Tr. 444-45; State's Ex. 23).

The trooper, a thirteen-year patrol veteran and full-time criminal-interdiction officer since 1998, supervised the drug-interdiction unit for his area and had made more than 1000 drug-interdiction arrests. (Tr. 6, 385-86,397). He had also received over 200 hours of special training on drug interdiction and trained other officers in the area of drug interdiction. (Tr. 6, 386, 399). He had studied drug-trafficking patterns and knew that I-70 was used as a drug corridor for moving illegal drugs from drug-source states in the west, including California, to the east and that most significant drug seizures occur on eastbound I-70. (Tr. 6-7, 387-89, 391-92).

The general trend had been for drug traffickers to use rented vehicles, especially luxury cars, to transport drugs to avoid the forfeiture of their personal vehicles. (Tr. 389-90, 422). The trooper testified that the characteristics of this traffic stop were similar to other stops that had led to drug seizures. (Tr.7). Flying to a destination by one-way airfare and returning home by another method, especially a one-way car rental, is indicative of criminal activity. (Tr. 33, 45-46, 448-49). Same-sex vehicle occupants traveling together can be suspicious. (Tr. 69, 561, 604-05). Also, traveling without luggage is suspicious and a "large" indicator in drug-

interdiction cases. (Tr. 47, 88, 422, 568-69). Suspicion is also aroused when the driver and passenger tell inconsistent stories about travel plans. (Tr. 33, 48, 90-91). In drug-interdiction cases it is common for traffic offenders to repeatedly ask why they are being stopped despite having already been told. (Tr. 433).

With his suspicions now aroused, at 11:13 a.m. (nineteen minutes after the initial traffic stop) the trooper asked Defendant for permission to search the car. (Tr. 36-37; State's Ex. 33). Defendant's demeanor changed and he became argumentative. (Tr. 33-37, 49; State's Ex. 33). At first, Defendant objected to a search and suggested that a warrant be obtained. (State's Ex. 33). After the trooper said that he would just call a drug dog to sniff the car, Defendant told him that he should just do what he needed to do. (State's Ex. 33). Defendant repeatedly obstructed the trooper's efforts to summon the drug dog by continuously interrupting him as he attempted to use the radio. (Tr. 50-52, 439-40; State's Ex. 33). Defendant then mentioned for the first time that he needed leave because his mother was sick. (Tr. 438; State's Ex. 33). At 11:19 a.m., the trooper was finally able to radio the canine unit. (State's Ex. 33).

While they waited for the canine unit to arrive, the trooper explained to Defendant why he wanted to search the car. (State's Ex. 33). After he mentioned the inconsistency between Defendant's and his passenger's stories,

Defendant said “correction” and told the trooper that he and his passenger had flown to Las Vegas on Friday. (State’s Ex. 33).

At 11:38 a.m., nineteen minutes after being called and forty-four minutes after the initial traffic stop, the drug dog arrived. (Tr. 60, 344; State’s Ex. 33). After the dog alerted on the rear of the vehicle, Defendant remarked that he did not have a problem with the troopers going through the vehicle because he did not have anything in it, except for some pictures he had bought. (State’s Ex. 33). The trooper searched the trunk and found the suitcase containing the PCP. (Tr. 60-61, 355, 465, 467, 476, 480).

The trial court overruled Defendant’s motion to suppress, (L.F. 20), and before the first witness testified at trial, Defendant renewed his objection that Defendant’s detention and all that followed was “illegal,” (Tr. 322).

#### **B. Standard of review.**

This Court reviews a trial court’s ruling on a motion to suppress in the light most favorable to the ruling and defers to the trial court’s determinations of credibility. *State v. Schroeder*, 330 S.W.3d 468, 472 (Mo. banc 2011). The facts and any reasonable inferences from them are to be stated most favorably to the order challenged on appeal. *State v. Blankenship*, 830 S.W.2d 1, 14 (Mo. banc 1992). “Evidence and inferences contrary to the order are to be disregarded.” *State v. Hutchinson*, 796 S.W.2d

100, 104 (Mo. App. S.D. 1990). “The inquiry is limited to whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous.” *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009). In making this determination, a reviewing court “will consider evidence presented at a pre-trial hearing as well as any additional evidence presented at trial.” *Id.* Determining “[w]hether conduct violates the Fourth Amendment is an issue of law that this Court reviews de novo,” *Schroeder*, 330 S.W.3d at 472.

**C. The Fourth Amendment permits police to detain a person to investigate a reasonable suspicion that criminal activity may be occurring.**

**1. The law regarding investigatory “*Terry*” stops.**

“The Fourth Amendment prohibits ‘unreasonable searches and seizures’ by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest.” *United States v. Arvizu*, 534 U.S. 266, 273 (2002). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court “established the legitimacy of an investigatory stop ‘in situations where [the police] may lack probable cause for an arrest.’” *Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009) (quoting *Terry*, 392 U.S. at 24) (alteration in original). “Because the balance between the public interest and

the individual's right to personal security . . . tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity 'may be afoot[.]'" *Arvizu*, 534 U.S. at 273 (internal quotation marks and citations omitted). *See also United States v. Cortez*, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").

Consequently, "a police officer may make an investigatory stop of a person, in the absence of probable cause, when the officer has a reasonable suspicion that the person is engaged in criminal activity." *Hawkins*, 137 S.W.3d 549, 557 (Mo. App. W.D. 2004). "For such a stop to be permissible under the Fourth Amendment, it must be based on reasonable suspicion supported by articulable facts that the person stopped is engaged in criminal activity." *Id.* (internal quotation marks omitted).

In making "reasonable-suspicion determinations," reviewing courts "must look at the 'totality of circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Arvizu*, 534 U.S. at 273 (quoting *Cortez*, 449 U.S. at 417-18). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative

information available to them that ‘might well elude an untrained person.’” *Id.* (quoting *Cortez*, 449 U.S. at 418). “Although an officer’s reliance on a mere ‘hunch’ is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard[.]” *Id.* at 274 (internal citation omitted).

While “the concept of reasonable suspicion is somewhat abstract,” the United States Supreme Court has “deliberately avoided reducing it to ‘a neat set of legal rules.’” *Arvizu*, 534 U.S. at 274 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). Even if each of the series of acts relied on by police in forming reasonable suspicion are “perhaps innocent in itself,” they can be viewed together to form reasonable suspicion to warrant further investigation. *Id.* (quoting *Terry v. Ohio*, 392 U.S. at 22). “A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct.” *Id.* at 277. *See also United States v. Sokolow*, 490 U.S. 1, 9 (1989) (holding that while “[a]ny one of [the] factors” establishing reasonable suspicion may “not by itself [be] proof of any illegal conduct and” may be “quite consistent with innocent travel,” they can “amount to reasonable suspicion” when “taken together”).

The United States Supreme Court has expressly rejected the adoption of any “hard-and-fast time limit for a permissible *Terry* stop.” *United States*

*v. Sharpe*, 470 U.S. 675, 686 (1985). “Much as a ‘bright line’ rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.” *Id.* at 685. In *United States v. Place*, 464 U.S. 696 (1985), the Court “question[ed] the wisdom of a rigid time limitation” because “[s]uch a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation.” *Id.* at 709 n.10. Instead, in “assessing whether a detention is too long in duration to be justified as an investigative stop,” courts “examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.” *Sharpe*, 470 U.S. at 686. “A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.” *Id.* “A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.” *Id.* at 686-87.

## 2. Fourth-Amendment law pertaining to traffic stops.

“[I]n a traffic-stop setting, the first *Terry* [*v. Ohio*] condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation.” *Arizona v. Johnson*, 129 S. Ct. at 784. After a motorist has been lawfully detained for a traffic violation, the police may order the driver and any passengers to get out of the vehicle without violating the Fourth Amendment. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (driver); *Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (passengers). An officer’s “inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” *Arizona v. Johnson*, 129 S. Ct. at 788. *See also State v. Woolfolk*, 3 S.W.3d 823, 828 (Mo. App. W.D. 1999) (holding that while “police may detain a person for a routine traffic stop,” they cannot indefinitely detain the traffic offender). “The detention may only last for the time necessary for the officer to conduct a reasonable investigation of the traffic violation.” *Woolfolk*, 3 S.W.3d at 828. As long as the detention is not unnecessarily prolonged, police may generally ask questions of the detained individuals even in the absence of reasonable suspicion because “mere police questioning does not constitute a seizure.”

*Muehler v. Mena*, 544 U.S. at 101 (quoting *Florida v. Bostick*, 501 U.S. at 434).

“A routine traffic stop is a permissible Fourth Amendment seizure for the time necessary to reasonably investigate the traffic violation.” *Graham*, 294 S.W.3d at 63. “Such investigation may include (1) requesting a driver’s license, registration, and proof of insurance; (2) asking the driver to sit in the patrol car; (3) questioning the driver about his purpose and destination; (4) running a computer check on the driver and his vehicle; and (5) issuing a warning or citation.” *Id.*; see also *State v. Ross*, 254 S.W.3d 267, 273 (Mo. App. E.D. 2008) (“A reasonable investigation of a traffic violation may include asking for the driver’s license and registration, requesting the driver to sit in the patrol car, and asking the driver about his destination and purpose.”). A traffic stop cannot be considered concluded while the officer is still running a records check. See *State v. Watkins*, 73 S.W.3d 881, 883-84 (Mo. App. E.D. 2002).

Even after the investigation of the traffic stop has concluded, an officer is not required to release the detained person if that officer has reasonable suspicion that the person detained is involved in criminal activity. See *State v. Waldrup*, 331 S.W.3d 668, 674 (Mo. banc 2011) (holding that under *Terry v. Ohio*, “officers may detain travelers involved in a routine traffic stop for matters unrelated to the traffic violation if they have reasonable and

articulable grounds for suspicion of illegal activity”) (internal quotation marks omitted); *State v. Graham*, 294 S.W.3d 61, 63 (Mo. App. S.D. 2009); see also *Woods*, 284 S.W.3d at 635; *Woolfolk*, 3 S.W.3d at 828-29 (noting that once the traffic-stop investigation has been completed, “the officer must allow the driver to proceed without further questioning unless ‘specific, articulable facts create an objectively reasonable suspicion that the individual is involved in criminal activity’”); *United States v. Lyons*, 486 F.3d 367, 371 (8<sup>th</sup> Cir. 2007) (holding that “[i]f, during a traffic stop, an officer develops a reasonable, articulable suspicion that a vehicle is carrying contraband, he has justification for a greater intrusion unrelated to the traffic offense.”); *United States v. Allegree*, 175 F.3d 648, 650 (8<sup>th</sup> Cir. 1999) (holding that if “an officer’s suspicions are aroused in the course of” investigating a traffic stop, “the officer is entitled to expand the scope of the stop to ask questions unrelated to the original traffic offense”).

**D. Defendant’s detention did not violate the Fourth Amendment.**

Defendant’s argument mistakenly focuses on whether his detention was prolonged beyond what was necessary to investigate the traffic offense. Although Defendant was initially detained for the traffic offense of following too closely, reasonable suspicion developed during the course of the trooper’s investigation of the traffic offense to suspect that Defendant was engaged in

other criminal activity; namely, the trafficking of illegal drugs. This reasonable suspicion warranted the trooper's further detention of Defendant so that he could investigate this suspicion by questioning Defendant and summoning a drug dog to sniff Defendant's vehicle. The time elapsed from the initial traffic stop until the drug dog alerted on Defendant's vehicle (50 minutes) was not unreasonable under the circumstances of this case and did not convert an otherwise lawful seizure to investigate the traffic offense and possible drug trafficking into an unconstitutionally prolonged detention.

The information forming the basis for the trooper's reasonable suspicion that Defendant was engaged in criminal activity beyond the traffic offense itself, possibly drug trafficking, was developed even before the trooper had completed his investigation of the traffic offense. The trooper was still entering information into the computer and completing a records check on Defendant when he left his patrol car to retrieve the rental agreement from Defendant's glove box. This occurred only 13 minutes after Defendant had been stopped. Retrieval of the rental agreement to insure that the vehicle was properly rented to Defendant was a legitimate part of the traffic investigation. The trooper's entering of information concerning Defendant's passenger and performing a records check on him should also be considered part of the traffic investigation. And this occurred immediately after the trooper returned to his patrol car after retrieving the rental agreement.

When the trooper asked Defendant for consent to search the vehicle, which occurred only 19 minutes after the initial stop, Defendant had been, and remained, lawfully detained as part of the investigation of the traffic offense.

Even if the 19-minute detention to investigate the traffic stop was “unduly prolonged,” the record shows that from the beginning of the traffic stop and throughout its duration there was revealed a series of numerous specific, articulable facts that provided the trooper with reasonable suspicion to believe that Defendant was involved in criminal activity. This justified Defendant’s further detention so that those suspicions could be investigated.

The facts and circumstances that justified Defendant’s continued detention to investigate the suspicion of criminal activity beyond the traffic offense included:

- Defendant’s tapping his brakes without reason and driving well below the speed limit
- Defendant’s driving a luxury rental car with two same-sex occupants
- The rental car was registered in California, a drug-source state
- Defendant was traveling eastbound on I-70, a known drug corridor

- Defendant and his passenger told inconsistent stories about when they arrived in Las Vegas and the reasons behind the one-way car rental
- Travel arrangements that included a one-way flight to Las Vegas and return to Washington D.C. by one-way car rental
- Defendant's claim that he and his passenger flew out to Las Vegas to gamble for one day was inconsistent with his claim of staying in cheap hotels
- Traveling for multiple days, including driving across the country, without luggage
- The rental agreement showing both that the car was rented the day before Defendant said he arrived in Las Vegas and that the car was overdue to be returned in Washington, D.C.
- The rental of the car apparently taking place as soon as Defendant arrived in Las Vegas, which was inconsistent with his claim that the decision to rent a car and drive back, rather than fly, occurred after he suffered gambling losses
- A records check on Defendant's passenger revealed multiple drug-related arrests

- The nervousness and belligerence shown by Defendant during the stop.

Taken together these circumstances provided reasonable suspicion for the trooper to detain Defendant apart from the investigation of the traffic offense. Reasonable suspicion still existed even though some of these circumstances considered alone could be innocently explained.

Here, reasonable suspicion that criminal activity was occurring beyond the traffic offense itself was being developed at each turn during the traffic stop. The trooper asked for consent to search within 19 minutes of the initial detention. The facts and circumstances constituting reasonable suspicion that other criminal activity was occurring were revealed to the trooper while he was still investigating the traffic stop, which included his collecting and recording required information, running checks on Defendant and his passenger, and retrieving the rental agreement.

Nineteen minutes after the initial stop, which occurred on a rural section of I-70 in Livingston County, the trooper asked Defendant for consent to search the vehicle, which Defendant refused. Another 6 minutes elapsed before the actual request could be made because Defendant insisted that he be given an explanation why the trooper wanted to search the car and was belligerent and obstructing to the point of interfering with the trooper's

ability to use the radio to call the drug dog. (State's Ex. 33). The dog arrived 19 minutes after being called and, after being allowed to run around and acclimate himself to the cold weather after the long ride in the patrol car, alerted on Defendant's vehicle within 6 minutes after arrival. (State's Ex. 33).

The total time from the initial traffic stop until the drug dog arrived was 44 minutes, and the drug dog alerted on Defendant's vehicle 6 minutes later for a total time of detention of 50 minutes, which included travel time for the drug dog to arrive. Considering the facts and circumstances peculiar to this case, the duration of Defendant's detention to investigate the traffic offense and the reasonable suspicion to believe other criminal activity, possibly drug trafficking, were occurring was not constitutionally significant under the Fourth Amendment and certainly did not rise to the level of an unconstitutionally prolonged detention in light of the "substantial indicators of drug activity." *Woods*, 284 S.W.3d at 637-38 (collecting cases on the duration of traffic stops and wait for canine units that were held not to be unreasonable).<sup>5</sup> *United States v. Mayo*, 394 F.3d 1271, 1274 (9<sup>th</sup> Cir. 2005)

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<sup>5</sup> The cases cited by the court in *Woods* included: "*State v. Logan*, 914 S.W.2d 806, 809 (Mo. App. 1995) (finding length of detention reasonable where canine unit arrived thirty-two minutes after being summoned); . . . *United*

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*States v. Payne*, 534 F.3d 948, 951–52 (8th Cir. 2008) (finding a traffic stop of thirty-nine minutes reasonable where the detaining officer did not exceed the proper scope of the traffic stop and conducted each step of the investigation without undue delay); *Lyons*, 486 F.3d at 372–73 (finding a twenty-five minute wait for a canine unit and a thirty-one minute total detention reasonable where there was no evidence the officers were dilatory in their investigation or that there was any unnecessary delay); *United States v. Donnelly*, 475 F.3d 946, 951, 954 (8th Cir. 2007) (holding that a fifty-nine minute detention to wait for a drug dog was reasonable where the officer requested the dog immediately after developing reasonable suspicion); *United States v. Sanchez*, 417 F.3d 971, 975 (8th Cir. 2005) (finding a forty-five minute detention reasonable where the officers acted diligently to minimize the detention period); . . . *United States v. White*, 42 F.3d 457, 460 (8th Cir. 1994) (determining that it was reasonable for an officer to detain a truck for eighty minutes while awaiting the arrival of a drug dog where the officer acted diligently to obtain the dog, and the delay was caused only by the remote location of the closest available dog); *United States v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994) (finding a detention of one hour reasonable where the detaining officer acted diligently to verify his suspicions as quickly as possible)”).

(holding that a period of detention of up to 40 minutes “was permissibly extended because new grounds for suspicion of criminal activity continued to unfold”); *United States v. Lee*, 317 F.3d 26, 31 (1<sup>st</sup> Cir. 2003) (holding that a continued detention was reasonable when “the passage of time brought with it new knowledge . . . that escalated the level of suspicion”).

In *State v. Miller*, 798 So.2d 947 (La. 2001), the court held that the 53-minute detention to investigate suspected drug trafficking after a traffic stop was not unreasonable because “its duration reasonably correlated with the escalating level of suspicion as the officers pursued a means of investigation likely to confirm or dispel the trooper’s suspicions without unnecessary delay.” *Id.* at 950. In *Miller*, the defendant was stopped after a trooper saw her rental car cross over the fog line on the highway. *Id.* at 948. The routine questioning as part of the trooper’s investigation of the traffic offense “rapidly unfolded into a broader inquiry” because of the defendant’s “extreme nervousness” and “shaking almost uncontrollably”; her admission that she had taken several caffeine tablets so she could drive through the night to Atlanta from Houston notwithstanding the fact that her employer had purchased a round-trip plane ticket to fly between these two cities on a business trip; and the discovery that the principal driver listed on the rental agreement, whom the defendant described as her “cousin,” had been arrested for possession of 50 to 2,000 pounds of marijuana.” *Id.* at 948-49. After

respondent refused consent to search, the officer radioed for the first available drug dog, which arrived approximately half an hour later. *Id.* at 949. The dog alerted on the trunk of the defendant's car and a subsequent search revealed a duffle bag containing a large package of marijuana. *Id.*

The 19-minute wait for the drug dog was also not unreasonable on a rural interstate highway, and many courts have held that delays in the arrival of the drug dog that were much longer than what occurred in this case did not result in an unconstitutionally prolonged detention. *United States v. Orsolini*, 300 F.3d 724 (6<sup>th</sup> Cir. 2002) (35 minutes); *United States v. Hardy*, 855 F.2d 753 (11<sup>th</sup> Cir. 1988) (37 minutes); *State v. Aderholdt*, 545 N.W.2d 559, 564 (Iowa 1996) (50 minutes).

In addition, the record suggests that the trooper might have asked for consent to search sooner than 19 minutes after the initial traffic stop if not for the delay in the investigation caused by Defendant's failure to answer some questions without the officer having to repeat them, the difficulties the trooper had in running a computer check based on discrepancies in Defendant's driver's license information, Defendant's evasive, belligerent attitude—especially after the trooper asked for consent to search, and the inconsistent stories Defendant and his passenger told the trooper. *See United States v. Simmons*, 172 F.3d 775 (11 Cir. 1999) (extra time consumed by warrant check justified by confusion regarding the defendant's

information); *Cady v. Sheahan*, 467 F.3d 1057 (7<sup>th</sup> Cir. 2006) (delay attributable to the defendant's evasive actions); *United States v. McCarthy*, 77 F.3d 522 (1<sup>st</sup> Cir. 1996) (delay attributable to the defendant's evasive and defiant answers); *Hardy*, 855 F.2d at 753 (delay attributable to inconsistent stories given by suspects).

Defendant suggests that the trooper's questions to Defendant, which he describes as a "fishing expedition," created an unlawful detention because they were not "germane to the traffic stop." App. Br. 40-41. But the United States Supreme Court has "held repeatedly that mere police questioning does not constitute a seizure." *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). In *Muehler*, the court held that the questioning of a person detained during the execution of a search warrant about that person's immigration status—a matter unrelated to the search—did not constitute a "seizure" under the Fourth Amendment and that police "did not need reasonable suspicion" to ask such questions. *Id.* at 100-01. *See also Johnson*, 129 S. Ct. at 788 ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.").

In *State v. Cox*, 248 S.W.3d 1 (Mo. App. W.D. 2008), the defendant claimed that an officer's questions about whether there was alcohol or drugs

in the car exceeded the scope of a traffic stop for too darkly tinted windows. The court noted, however, that it was a “well-established principle of law” that a “law enforcement official may, at any time during a routine traffic stop, ask a citizen if he has contraband on his person or in his car and may ask for permission to search.” *Id.* at 5. The court also cited with approval a federal case holding that questions that may detect crime, but which create little inconvenience, may be asked consistent with the Fourth Amendment without making an otherwise valid detention unreasonable:

Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. They do not signal or facilitate oppressive police tactics that may burden the public—for all suspects (even the guilty ones) may protect themselves fully by declining to answer. Nor do the questions forcibly invade any privacy interest or extract information without the suspects’ consent.

*Id.* at 5-6 (quoting *United States v. Childs*, 277 F.3d 947, 954 (7th Cir.2002)).

In Defendant’s case, the trooper was not simply asking questions unrelated to the traffic offense on the chance that reasonable suspicion might be uncovered. Rather, the trooper already had reasonable suspicion to suspect criminal activity beyond the traffic offense and his questions to Defendant were part of his investigation into those reasonable suspicions.

Defendant cites to no case suggesting that the Fourth Amendment dictates how an officer conducts an investigation, as long as he or she attempts to diligently and quickly confirm or dispel the suspicion. In this case, the trooper chose to interrogate Defendant, who, by his answers, could have quickly dispelled the trooper's suspicions. Instead, Defendant's responses prompted additional suspicion and more inquiry until the trooper determined that he had enough reasonable suspicion to request consent for a search, and after that request was refused, he quickly summoned a drug dog to sniff Defendant's car. No Fourth Amendment violation occurred under the facts and circumstances pertaining to Defendant's case.

**E. The cases on which Defendant relies are inapposite because the trooper had reasonable suspicion to detain Defendant beyond the traffic offense itself.**

Defendant relies on *Illinois v. Caballes*, 543 U.S. 405 (2005), for the proposition that a "seizure that is justified *solely* by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id.* at 407 (emphasis added). Although Defendant's initial seizure was justified by the traffic offense he committed, his continued detention, as explained above, was justified so the trooper could investigate his reasonable suspicion that

Defendant was engaged in criminal activity, i.e. drug trafficking, beyond the traffic offense itself. Thus, *Caballes* is inapposite and does not advance Defendant's argument.

Defendant's reliance on both *State v. Maginnis*, and *State v. Sund*, 215 S.W.3d 719 (Mo. banc 2007), is also misplaced because in neither *Maginnis* nor *Sund* did the officers have reasonable suspicion to further detain the defendants, yet they continued to do so beyond the time necessary to investigate the traffic offense. Here, on the other hand, the trooper developed during the course of the lawful detention for the traffic offense reasonable suspicion to believe Defendant was engaged in criminal activity (drug trafficking) apart from the traffic offense.

In *Maginnis*, the court held that the officer violated the defendant's Fourth Amendment rights by further detaining him for the sole purpose of interrogating him on matters unrelated to the traffic violation for which he had been stopped. *Maginnis*, 150 S.W.3d at 121. According to the court, even with this "substantial interrogation," the officer developed no reasonable suspicion to justify the detention. *Id.* at 121-22. The court also criticized the officer for not running computer checks on the defendant's license until after his unrelated questioning had ended four minutes into the stop. *Id.*

In Defendant's case, on the other hand, the officer was running the computer checks and entering information into his computer while he asked

questions that were related to the traffic investigation and the nature of Defendant's trip. There was apparently no evidence presented in *Maginnis* regarding the substantial information that an officer must enter into a computer during a traffic stop. Nothing in the record suggests that Defendant's case involved a "fishing expedition," which was how the *Maginnis* court described the questioning that occurred there. *Id.* at 122 *Maginnis* should be read as holding that a Fourth Amendment violation occurs when an officer's questions unduly prolong the detention to investigate the traffic offense. To the extent that *Maginnis* holds that the Fourth Amendment is violated simply because an officer asks questions unrelated to the traffic-offense investigation, it is inconsistent with the Supreme Court's opinion in *Arizona v. Johnson*, discussed above, and should not be followed. Finally, the circumstances supporting a finding of reasonable suspicion present in this case were so overwhelming that *Maginnis* simply does not apply here. *See Cox*, 248 S.W.3d at 6 and *Woods*, 284 S.W.3d at 638 (distinguishing *Maginnis* on the facts of those cases).

In *Sund*, after the officer completed his investigation of the traffic offense and returned the defendant's license to her, he asked for consent to search and told the defendant that if she did not consent, she would have to wait for 40 minutes until a drug dog arrived. *Sund*, 215 S.W.3d at 722-23. The officer admitted that he had no reasonable suspicion of criminal activity

that would have justified a continued detention or a search of the defendant's vehicle. *Id.* at 723. This Court held that this constituted an illegal detention under the Fourth Amendment. *Id.*

Defendant's reliance on *State v. Granado*, 148 S.W.3d 309 (Mo. banc 2004), is also misplaced. In *Granado*, like *Sund*, after the officer concluded the traffic stop and told the defendant he was free to leave, he continued his detention of the defendant and asked for consent to search without any reasonable suspicion that criminal activity apart from the traffic offense itself was occurring. *Granado*, 148 S.W.3d at 311-12. Also like in *Sund*, the officer admitted that he did not have any reasonable suspicion to believe the defendant was engaged in other criminal activity when he concluded the traffic stop. *Id.* at 312.

Similarly, in *State v. King*, 157 S.W.3d 656 (Mo. App. W.D. 2005), another case on which Defendant relies, the officer developed reasonable suspicion after the traffic stop had concluded, and the facts on which this reasonable suspicion were based consisted of nervousness and leg twitching, which the court found was insufficient to justify a further detention of the defendant. *Id.* at 663-64. *See also State v. Kovach*, 839 S.W.2d 303 (Mo. App. S.D. 1992) (holding that the facts observed by the trooper, which consisted of nervousness and other innocuous observations, did not provide reasonable

suspicion to further detain the defendant after a traffic stop).<sup>6</sup> The trooper in Defendant's case had substantially more facts supporting a finding of reasonable suspicion than the officer in *King*.

Finally, in *United States v. Beck*, 140 F.3d 1129 (8<sup>th</sup> Cir 1998), another case on which Defendant relies, the court held that it was only after the officer concluded the traffic stop that he asked for consent to search and threatened to detain the defendant so a drug dog could be summoned if he did not consent. *Id.* at 1135-36. This makes the holding in *Beck* nearly identical with this Court's holdings in *Sund* and *Granado*, and none of these cases applies to Defendant's situation. The *Beck* court's consideration of whether reasonable suspicion existed to further detain the defendant was, by the court's own admission, unnecessary to its resolution of the case and is dicta. *Id.* at 1136. *See also United States v. Booker*, 269 F.3d 930 (8<sup>th</sup> Cir. 2001) (holding that the officer developed reasonable suspicion during the course of the traffic stop to believe criminal activity was occurring and

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<sup>6</sup> It also appears that the court in *Kovach* considered each fact supporting a finding of reasonable suspicion in isolation when analyzing the reasonable-suspicion issue, *Id.* at 313, which was criticized by the dissent in that case, *Id.* at 313-14, and is an improper analysis under *Arvizu* and *Sokolow* as noted above.

distinguishing *Beck* on the ground that the officer in *Beck* illegally detained the defendant after the traffic stop had been completed). In addition, the *Beck* court employed an improper methodology in determining whether the officer had reasonable suspicion to further detain the defendant after the traffic stop had been completed because it considered in isolation each factor upon which reasonable suspicion was based, a methodology that is contrary to the Supreme Court's holdings in *Arvizu* and *Sokolow* as noted above.

The trial court did not clearly err in overruling Defendant's motion to suppress evidence of the PCP found in his trunk.

**F. The exclusionary rule should not apply in this case.**

Although the record quite clearly shows that the trooper had reasonable suspicion to detain Defendant for suspected drug trafficking, to the extent that this Court finds a constitutional violation, the exclusionary rule should not apply because nothing in the record shows that the trooper knew or should have known that the manner in which he conducted his investigation violated the Fourth Amendment.

"The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 129 S. Ct. 625, 700 (2009). "Indeed, exclusion has always been our last resort, not our first

impulse . . . .” *Id.* “[T]he exclusionary rule is not an individual right and applies only where it “result[s] in appreciable deterrence.” *Id.* The Court has “repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.” *Id.* Instead, the focus is “on the efficacy of the rule in deterring Fourth Amendment violations in the future.” *Id.* Moreover, “the benefits of deterrence must outweigh the costs.” *Id.* The Court explained why the exclusionary rule should not be applied in a matter-of-fact fashion:

The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free-something that “offends basic concepts of the criminal justice system.” “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.”

*Id.* at 701.

To make 10 gallons of PCP disappear by applying the exclusionary rule in this case is to exalt form over substance and to ignore the analysis that must be applied before its application is considered. This case does not involve the type of flagrant police misconduct that the exclusionary rule was designed to address:

[E]vidence should be suppressed “only if it can be said that the law enforcement officer had knowledge, or may properly be charged with

knowledge, that the search was unconstitutional under the Fourth Amendment.”

*Id.* That requirement was certainly not satisfied under the facts of this case. Even if it were found that the trooper unduly prolonged his investigation before summoning the drug dog, the violation would be measured by only scant minutes. This hardly justifies application of the exclusionary rule.

**III (motion to suppress— no *Miranda* warnings).**

**The trial court did not clearly err in overruling Defendant’s motion to suppress statements he made during the course of the traffic stop on the ground that the trooper failed to give him the *Miranda* warnings immediately after the traffic stop occurred because *Miranda* warnings are not required before police may question a motorist detained for a traffic violation.<sup>7</sup>**

Defendant filed with the trial court a boiler-plate motion to suppress any incriminating statements he made. (L.F. 16-17). Although each party filed written suggestions after the suppression hearing, nowhere in Defendant’s suggestions does he argue that the trooper’s failure to give Defendant the *Miranda* warnings immediately after being stopped warranted the suppression of Defendant’s statements. (Tr. 106-08; L.F. 26-36). Before the first witness testified at trial, Defendant objected on the ground that after Defendant was “detained and in custody immediately after being stopped, [he] was not *Mirandized* at that point.” (Tr. 322). The record shows that Defendant was not given the *Miranda* warnings until after his car had been searched and the suitcase containing the PCP had been discovered. (Tr. 96;

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<sup>7</sup> The standard of review for this claim is set out in Point II.

State's Ex. 33). After this discovery, both Defendant and his passenger were given *Miranda* warnings. (Tr. 96, 468-69; State's Ex. 33).

In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the United States Supreme Court held that the roadside questioning of a motorist detained for a traffic violation does not constitute custodial interrogation under *Miranda v. Arizona*, 384 U.S. 436 (1966). *Berkemer*, 468 U.S. at 439-42. *See also Pennsylvania v. Bruder*, 488 U.S. 9, 11 (1988). The *Berkemer* Court compared traffic stops to *Terry* stops in analyzing whether a person detained for a traffic offense is "in custody" for *Miranda* purposes. *Berkemer*, 468 U.S. at 439-40. The nonthreatening nature of such stops explained why the Court had not previously held that *Miranda* warnings are required when a suspect is detained for a *Terry* stop:

The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*.

*Id.* at 440. *See also Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 187 (2004) (acknowledging the statement in *Berkemer* that "*Terry* stops have not been subject to *Miranda*"). In *State v. Keeth*, 203 S.W.3d 718 (Mo.

App. S.D. 2006), the court noted that “the *Miranda* warnings do not need to be given during routine roadside questioning of a motorist pursuant to a routine traffic stop” because “routine traffic stops are more analogous to a ‘*Terry* stop’ than a formal arrest. *Id.* at 725.

Several Missouri cases have applied the holding in *Berkemer* to situations in which a motorist initially detained for a traffic offense was later convicted of felony possession of illegal drugs based on statements or evidence obtained during the traffic stop despite not having received *Miranda* warnings. In each of these cases, the courts have held that *Miranda* warnings were not required before the police asked investigatory questions during the course of a traffic stop because such questioning did not constitute a “custodial interrogation.” *See State v. Brown*, 814 S.W.2d 304, 308-09 (Mo. App. S.D. 1991); *State v. Sanad*, 769 S.W.2d 436, 439-40 (Mo. App. W.D. 1989); *State v. Pena*, 784 S.W.2d 883, 885 (Mo. App. W.D. 1990) (abrogated on other grounds by *State v. Davis*, 126 S.W.3d 398, 405 (Mo. App. W.D. 2004)); *State v. Neal*, 682 S.W.2d 860, 860 (Mo. App. E.D. 1984).

Here, the officer was not required to give Defendant *Miranda* warnings after detaining him for a traffic violation. Moreover, no *Miranda* warnings were required to the extent Defendant was being detained while the officer investigated the circumstances giving rise to reasonable suspicion that Defendant may be engaged in criminal activity. The courts have not

extended *Miranda* to apply to these so-called *Terry* stops. Defendant was given the *Miranda* warnings when probable cause developed that he was guilty of a drug offense after the officers discovered the suitcase filled with PCP in his trunk. Before this discovery occurred and Defendant was formally arrested, *Miranda* warnings were not required.

Defendant's reliance on *State v. Wilson*, 169 S.W.3d 870 (Mo. App. W.D. 2005), and *State v. Hosto-Worthy*, 877 S.W.2d 150 (Mo. App. E.D. 1994), is misplaced. First, both *Wilson* and *Hosto-Worthy* involve state appeals from a trial court's ruling suppressing statements made without *Miranda* warnings. Here, the trial court overruled Defendant's motion to suppress. Second, the police in *Wilson* asked several incriminating questions without giving *Miranda* warnings after finding a bag containing marijuana in the searched vehicle. *Wilson*, 169 S.W.3d at 873-79. In this case, the police gave Defendant the *Miranda* warnings after they found the suitcase containing PCP. The *Hosto-Worthy* case does not even involve a traffic stop. The defendant in that case was subjected to a prolonged interrogation in her home regarding child-abuse allegations after she became the focus of the investigation. *Hosto-Worthy*, 877 S.W.2d at 151-53.

The trial court did not clearly err in overruling Defendant's motion to suppress and in admitting into evidence the statements he made to the trooper during the traffic stop.

**IV (evidence—refusal of consent to search).**

**The trial court did not abuse its discretion in admitting evidence that Defendant refused consent to search his vehicle because that evidence was relevant to give a complete and coherent picture of the events that transpired after consent was denied in that it explained Defendant's behavior in obstructing the arresting officer while he attempted to use the radio to summon a drug dog. Defendant was not prejudiced because this evidence was not offered, nor relied on in argument, as evidence of Defendant's guilt.**

**A. The facts relating to this claim.**

Just before trial began, Defendant's counsel informed the trial court that portions of the traffic-stop recording showing Defendant refusing to consent to a search of the vehicle should not be shown to the jury. (Tr. 129-31). He argued that it was improper for the State to rely on the constitutional right to refuse a consent to search as evidence of guilt. (Tr. 130). The prosecutor responded that the encounter between the officer and Defendant regarding the search issue and Defendant's anxious, obstructive behavior would not be understood unless the entire recording was played. (Tr. 131-32). He said that Defendant's heightened level of anxiety in anticipation of a search by a drug dog was probative of Defendant's guilt and

provided necessary context to the remainder of the recording. (Tr. 131-32). The court instructed Defendant's counsel to make any objections to this testimony during trial. (Tr. 132).

During trial, the arresting officer testified on direct examination that he was not permitted an opportunity to search Defendant's vehicle:

Q. Okay. And were you permitted an opportunity to search?

A. No.

(Tr. 434). Defendant objected on the ground that Defendant's exercise of his Fourth Amendment right not to consent to a search should be excluded from evidence. (Tr. 434-35). During a bench conference, the prosecutor responded that the refusal of consent to search explained Defendant's behavior after he was informed a drug dog would be called:

[The Prosecutor]: Judge, I believe the videotape is going to show and confirm that I believe, and I believe this witness will confirm, which is that first of all he consents and then he refuses consent and then he allows them to call the drug dog. They go back and forth about it. He tells him just to go get, get the dog, get him here. And the conversation when he tries to go ahead and call for the dog he keeps interrupting him when he tries to even make the call for the dog. The totality of the circumstances cannot be

separated with respect to all of the things that happened because of the anxiety he notes when he makes that simple request.

The Court: Is there—

[Defendant's Counsel]: Judge, I object to that as well.

The Court: I understand. Is there any case law or other authority that you have says that the exercise of fourth amendment rights should be kept from the jury?

[The Prosecutor]: Not that I have on that point, your honor.

The Court: I'm going [to] overrule the objection at the present time. If you have something on that I'd be interested in reading it.

(Tr. 435-36). The officer then testified that he asked Defendant for consent to search, which was denied:

Q. (By [The Prosecutor]:) What did you decide to do at that point?

A. After I'd asked consent and he denied that?

Q. Yes.

A. To call for a canine, but that wasn't able to take place immediately.

(Tr. 436).

Before the tape recording of the traffic stop (State's Ex. 33) was played for the jury, Defendant's counsel objected because it showed Defendant refusing consent to search the vehicle. (Tr. 493-94).

After closing arguments, the court told the attorneys that it was willing to give a no-adverse-inference instruction to the jury regarding Defendant's refusal to consent to search. (Tr. 798). The text of that instruction was: "A person has the right to refuse consent to search. No presumption of guilt or inference of any kind may be drawn from the fact that the defendant refused a consent to search." (Tr. 802). Defendant's counsel objected to that instruction, and the court did not read it to the jury. (Tr. 798-99, 802-03).

### **B. Standard of review.**

To the extent that Defendant is asserting that his constitutional rights were violated by admission of evidence showing that he refused to give consent for a search, that claim is not preserved for appellate review. Neither the motions to suppress nor the suggestions in support filed by Defendant raise a constitutional challenge to evidence of Defendant's refusal of consent to search. (L.F. 16-17, 24-36). "The rule has long been established that to preserve constitutional questions for review on appeal, the constitutional issue must be raised in the trial court at the earliest opportunity, consistent with good pleading and orderly procedure." *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008). "This rule is necessary to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue." *Id.*

Defendant did not raise this issue until the eve of trial; consequently, it is waived.

Thus, this issue is simply one regarding the admission of evidence, and the standard of review is abuse of discretion. The trial court is vested with broad discretion to admit and exclude evidence at trial, and error will be found only if this discretion was clearly abused. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo. banc 1997). On direct appeal, this Court reviews the trial court “for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial.” *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

“In a criminal proceeding, questions of relevance are left to the discretion of the trial court and its ruling will be disturbed only if an abuse of discretion is shown.” *State v. Santillan*, 1 S.W.3d 572, 578 (Mo. App. E.D. 1999). A trial court will be found to have abused its discretion only when a ruling is “clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

**C. The trial court did not abuse its discretion.**

Defendant complains that the trial court should not have admitted any evidence showing that Defendant refused consent for a search. But evidence regarding the exchange between Defendant and the trooper was not admitted to show that Defendant was guilty of any offense, but to explain Defendant's behavior when the trooper informed him that he would ask a drug dog to sniff the car.

After the officer asked Defendant for permission to search the car, Defendant's demeanor changed and he became argumentative. (State's Ex. 33). At first, Defendant objected to a search and suggested that a warrant be obtained. (State's Ex. 33). After the officer said that he would just call a dog to sniff the car for drugs, Defendant told him that he should just do what he needed to do. (State's Ex. 33). Defendant repeatedly interrupted the officer as he attempted to use the radio to call for the drug dog. (Tr. 439-40; State's Ex. 33). Defendant then mentioned for the first time that he needed to be on his way because his mother was sick and may be hospitalized. (Tr. 438; State's Ex. 33). Defendant also asked the officer to get his cigarettes so he could smoke, but when the officer went to retrieve them, the passenger told him that Defendant didn't smoke. (Tr. 440-41; State's Ex. 33).

Without knowing about the request to search the vehicle and the trooper's intention to call a drug dog to sniff the car rather than obtaining a search warrant, the jury would not have properly understood the significance of Defendant's behavior immediately after the request to search was made. Under Missouri law, the "prosecutor is entitled 'to present a complete and coherent picture of the events that transpired.'" *State v. Campbell*, 143 S.W.3d 695, 701 (Mo. App. W.D. 2004) (quoting *State v. Harris*, 870 S.W.2d 798, 810 (Mo. banc 1994)). The evidence here was offered solely for that purpose. It was not relied on by the State as evidence of Defendant's guilt.

In at least one Missouri case, the court stated that a defendant's "refusal to give consent to search cannot be used to infer wrongful activity." *See State v. West*, 21 S.W.3d 59, 66 (Mo. App. W.D. 2000). As support for this proposition, the *West* court cited *State v. Slavin*, 944 S.W.2d 314, 319 (Mo. App. W.D. 1997). But the *Slavin* opinion contains the much narrower assertion that "a refusal to consent to a search may not be used as support for the requisite reasonable suspicion to support the search." *Id.* at 319. The *Slavin* court then concluded that the defendant's refusal to consent to a search was "irrelevant" in determining whether reasonable suspicion existed to believe that the defendant was engaged in criminal activity to justify further detention of him after a traffic stop. *Id.* This statement is consistent with United States Supreme Court decisions holding that a suspect's refusal

to cooperate cannot by itself constitute reasonable suspicion to detain that person. *See Florida v. Bostick*, 501 U.S. at 437. *See also United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (holding that “[t]he failure to consent to a search cannot form any part of the basis for reasonable suspicion”). In one other Missouri case, the court refused to conduct plain-error review of the defendant’s claim that the trial court both improperly admitted evidence of the defendant’s refusal to consent to a search and improperly allowed the prosecutor to argue that this constituted evidence of guilt. *See State v. Mickle*, 164 S.W.3d 33, 58-60 (Mo. App. W.D. 2005).

Some state and federal courts have held that it is improper to admit evidence that a defendant refused consent to a search as proof of the defendant’s guilt.<sup>8</sup> But this does not mean that all evidence of a defendant’s refusal to consent to a search is prohibited. For example, in *United States v. Dozal*, 173 F.3d 787 (10<sup>th</sup> Cir. 1999), the defendant claimed that his constitutional rights were violated by admission of evidence showing that he refused to consent to a search of his property. *Id.* at 793. Although the court

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<sup>8</sup> *See State v. Palenkas*, 933 P.2d 1269 (Ariz. App. 1996); *United States v. Thame*, 846 F.2d 200, 206 (3<sup>rd</sup> Cir. 1988); *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979); *Longshore v. State*, 924 A.2d 1129, 1159 (Md. 2007); *Reeves v. State*, 969 S.W.2d 471, 493-95 (Tex. Ct. App. 1998).

noted that evidence of a refusal to consent to a search may not be used to find reasonable suspicion under the Fourth Amendment and could not be admitted to impute guilty knowledge to the defendant, it was nevertheless admissible to establish the defendant's dominion and control over the premises where drugs were found. *Id.* at 794. *See also United States v. McNatt*, 931 F.2d 251, 256-58 (4th Cir. 1991); *Coulthard v. Commonwealth*, 230 S.W.3d 572, 582-84 (Ky. 2007).

Defendant argues that a suspect's refusal of consent to search is akin to a suspect remaining silent after being given the *Miranda* warnings. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings," violates the Due Process Clause. *Doyle*, 426 U.S. at 619. *See also State v. Mahan*, 971 S.W.2d 307, 314 (Mo. banc 1998). In *Doyle*, the issue involved "cross-examination of a person who 'does remain silent' after police inform him that he is legally entitled to do so." *Anderson v. Charles*, 447 U.S. 404, 407 n.2 (1980). *Doyle* and its progeny are cases in which "the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Fletcher v. Weir*, 455 U.S. 603, 606 (1982).

These cases teach that it is the silence induced by the implicit assurance surrounding the *Miranda* warnings that precludes the admission

at trial of evidence showing a defendant's silence in response to these warnings. When the defendant is not induced into silence as a consequence of those warnings, the Constitution does not prohibit the government from offering evidence as to what the defendant said after waiving his right to remain silent. No similar assurances accompany a request for consent to search by police since no warnings are required when police make such a request. *State v. Metz*, 43 S.W.3d 374, 382-83 (Mo. App. W.D. 2001).

Therefore, no implicit assurances are made to the suspect when a request for consent to search is made.

Defendant's reliance on *Doyle* for the proposition that his response to the search request was inadmissible is equally unavailing. *Doyle* holds only "that the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings" violates the Due Process Clause. *Doyle*, 426 U.S. at 619. As explained in Point III, Defendant was neither under arrest nor "in custody" during the traffic stop until after the suitcase was discovered. Until then the trooper was under no duty to give *Miranda* warnings.

Even if this evidence was improperly admitted, reversal is not required. In determining whether the improper admission of evidence is harmless error, the reviewing court employs the "outcome-determinative" test. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000). Improperly admitted evidence

is outcome-determinative when it has “an effect on the jury’s deliberations to the point that it contributed to the result reached.” *Id.* at 151. In other words, a finding of outcome-determinative prejudice occurs when “the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence.” *State v. Black*, 50 S.W.3d 778, 786 (Mo. banc 2001).

Considering the wealth of evidence (outlined in Point I) demonstrating Defendant’s knowledge and possession of the drugs located in the trunk of his rental car, it strains logic to suggest that the jury would have acquitted Defendant if it had not heard evidence of his refusal to consent to a search offered solely to explain his and the officer’s subsequent conduct after consent to search was refused. Defendant’s claim is also weakened by the fact that he expressly rejected the court’s invitation to instruct the jury that it could not consider Defendant’s refusal to consent to a search as evidence of his guilt. *Compare State v. McCaw*, 753 S.W.2d 57, 59 (Mo. App. E.D. 1988) (refusing to find that the trial court plainly erred in failing to declare a mistrial after the erroneous admission of evidence because “[a]ny error in failing to take other curative measures was invited by counsel’s own conduct in rejecting the trial court’s proposals” for curative relief).

The trial court did not err in admitting evidence of Defendant's refusal to consent to a search solely for the purpose of explaining the subsequent conduct of both Defendant and the trooper in this case.

**V (evidence—DEA commendation).**

**The trial court did not err in permitting the trooper to testify that he received a DEA commendation for making the largest PCP seizure in the United States because this evidence was not hearsay in that whether a commendation was given to the officer was something about which he had first-hand knowledge. Moreover, evidence of the commendation was relevant because it informed the jury that the amount of PCP discovered was relatively large, which showed not only Defendant's awareness of it, but also that it was an amount consistent with sale or distribution and not for personal use. Finally, Defendant cannot show prejudice because similar evidence was admitted without objection.**

**A. The record regarding this claim.**

During the arresting officer's direct examination, the prosecutor attempted to elicit testimony that the amount of PCP found in Defendant's trunk was inconsistent with an amount one might possess for personal use:

Q. Based on your knowledge and experience as an officer and your ten years as a narcotics officer, does this appear to be an amount of PCP consistent with personal use?

[Defendant's Counsel]: Objection again, your Honor, I don't believe the witness is qualified to give that response.

The Court: Overruled.

A. To date, 11-25 '03, this don't [sic] compare with other seizures because this was the largest Meth seizure—

[Defendant's Counsel]: Your Honor, that's not the response, or that's not the question, I don't believe.

The Court: Answer the question.

Q. Is it a normal possessory amount of PCP in your experience?

A. No.

Q. Did you receive any commendations from any agencies for this seizure?

A. Yes.

Q. From whom?

A. From the Drug Enforcement Administration.

Q. What was that commendation?

[Defendant's Counsel]: I object, the question calls for hearsay.

The Court: overruled.

Q. What was that commendation for?

A. For the largest seizure, drug interdiction seizure of PCP in the United States up until 2003.

(Tr. 546-47).

**B. Standard of review.**

The standard of review for a trial court's ruling on the admission of evidence is for an abuse of discretion, as described in Point IV.

**C. The trial court did not err in overruling Defendant's objection.**

"A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). But "[t]estimony from a witness based upon his or her personal knowledge is not hearsay where it is direct testimony as to facts about which the witness possesses personal knowledge." *State v. Neely*, 979 S.W.2d 552, 563 (Mo. App. S.D. 1998). *See also State v. McKinney*, 718 S.W.2d 583, 587 (Mo. App. E.D. 1986) (holding that a police officer's testimony describing the defendant's previous arrests for promoting pornography was not hearsay when it was based on the officer's personal observations and knowledge). Here, it was within the trooper's personal knowledge whether he received a commendation from the DEA and what it was for. Thus, the fact that he received an award did not constitute inadmissible hearsay.

When the testimony is viewed in context, the record shows that the State did not offer this testimony to prove that the seizure in this case was, in

fact, the largest PCP seizure in the United States at that time, but to demonstrate to the jury that the amount of PCP seized was not for personal use, but was an amount consistent with sale or distribution. Proof of intent to sell or distribute an illegal drug is necessary to establish that first-degree trafficking occurred. *See* Point I. In addition, the finding of a large amount of drugs in the vehicle is relevant to show the defendant's knowledge and control over the drugs in question. *See Woods*, 284 S.W.3d at 640.

Even if hearsay evidence is improperly admitted during a jury trial, a conviction will not be reversed unless the defendant shows "that he suffered undue prejudice as a result of the error." *State v. Haddock*, 24 S.W.3d 192, 196 (Mo. App. W.D. 2000). "Any error in admitting evidence is not considered prejudicial when similar evidence is properly admitted elsewhere in the case or has otherwise come into evidence without objection." *State v. Crump*, 986 S.W.2d 180, 188 (Mo. App. E.D. 1999). "Generally, a party cannot complain about the admission of testimony over his objection, where evidence of the same tenor is admitted without objection." *State v. Sloan*, 998 S.W.2d 142, 145 (Mo. App. E.D. 1999) (quoting *State v. Griffin*, 876 S.W.2d 43, 45 (Mo. App. E.D. 1994)). Similar evidence regarding the amount of PCP seized in this case was admitted without objection elsewhere during Defendant's trial.

The drug chemist who tested the liquid samples in this case had been employed in the Highway Patrol's drug lab for nine years and had performed

drug analysis in over 2500 cases. (Tr. 651, 653, 655). Although it had been over four years since she had tested the samples, the chemist testified that one of the reasons this case stood out to her was because of the volume of liquid involved. (Tr. 661). She said that this was the most PCP she had ever seen. (Tr. 672). She also testified that since one dosage unit of PCP is approximately one milliliter, which is the amount normally applied to a marijuana or tobacco cigarette that is then smoked to ingest the PCP, the amount of PCP liquid recovered in this case was equivalent to 37,850 doses. (Tr. 678-79).

In addition, the admission of this evidence was harmless because the evidence about the DEA commendation cannot be considered “outcome determinative” according to the test employed in *Barriner* and *Black* as described in Point IV. The record was replete with evidence of Defendant’s guilt, and even if the disputed evidence had not been admitted, the jury would have still found Defendant guilty.

## **VI (verdict director).**

**The trial court did not plainly err in submitting Instruction No. 6, the verdict director for first-degree trafficking.**

### **A. The record regarding this claim.**

In the amended information charging Defendant with first-degree trafficking for attempting to sell or distribute the PCP, the State alleged that Defendant acted either alone or with his passenger, Oris Butler, in possessing the PCP and that this was substantial step toward committing first-degree trafficking. (L.F.58).

During the instruction conference, Defendant's counsel stated that while he believed that the instructions conformed to the MAI, they were nevertheless still confusing to the jury on the "definitions of possession." (Tr. 737-38). The court submitted to the jury Instruction No. 6, the verdict director for first-degree trafficking. (L.F. 95-96).

### **B. Standard of review.**

This claim is not preserved for appellate review because the objection made at trial differs from the claim asserted on appeal. At trial, Defendant said that the instruction complied with the MAI-CR 3d pattern instructions, but complained about the definition of possession. On appeal, Defendant now asserts that a phrase ("knowing of the substance's content and character")

contained in the MAI-CR 3d pattern verdict director was omitted from the instruction given to the jury. This Court may find that Defendant waived his right to appellate review by failing to object at trial that the instruction did not completely conform to the MAI-CR 3d pattern instruction. Consequently, this Court is not required to give plain-error review to this claim, especially since Defendant failed to comply with Rule 28.03, which requires “specific objections to the instructions” and that “[n]o party may assign as error the giving or failure to give instructions . . . unless the party objects . . . stating distinctly the matter objected to and the grounds of the objection.”

An appellate court should be especially reluctant to grant plain-error relief on instructional issues when counsel has failed to comply with Rule 28.03. This Court may find that Defendant waived the right for review, and decline to give plain-error review, because of his failure to comply with Rule 28.03. *See State v. Wurtzberger*, 40 S.W.3d 893, 898 (Mo. banc 2001); *State v. Martindale*, 945 S.W.2d 669, 673 (Mo. App. E.D. 1997).

If this Court should grant plain-error review, Defendant has a tremendous burden to show that he suffered manifest injustice.

“Instructional error seldom rises to the level of plain error.” *State v. Wright*, 30 S.W.3d 906, 912 (Mo. App. E.D. 2000); *State v. Holman*, 965 S.W.2d 464, 470 (Mo. App. W.D. 1998). For instructional error to be plain error, the defendant must show more than mere prejudice; he must “establish that the

trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." *Wright*, 30 S.W.3d at 912.

This Court will reverse on a claim of instructional error "only if there is error in submitting an instruction and prejudice to the defendant." *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). It is within the trial court's discretion to decide whether a tendered jury instruction should be submitted. *State v. Johnson*, 244 S.W.3d 144, 150 (Mo. banc 2008).

**C. The trial court did not plainly err in giving this instruction.**

The verdict director in this case was patterned after MAI-CR 3d 325.10.2 (first-degree trafficking) as modified by MAI-CR 3d 304.04 (aiding and abetting). The definition of "possession" complied with the definition contained in MAI-CR 3d 325.02. Although the instruction complied in all other respects to the pattern instruction under MAI-CR3d 325.10.2, the phrase "knowing of the substance's content and character," which is included in the pattern instruction, was omitted from Instruction No. 6:

A person commits the crime of trafficking in the first degree of a controlled substance if he knowingly distributes, delivers, or sells 90 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP), a controlled substance.

(L.F. 77). The pattern instruction contains this phrase, which should have appeared at the end of the paragraph. *See* MAI-CR 3d 325.10.2.

Defendant did not complain at trial that the verdict director failed to comply with MAI-CR 3d. If he had, the trial court would have undoubtedly added the phrase he now claims was omitted. Instead, Defendant argued that the definition of possession was confusing. Defendant cannot demonstrate that the omission of the disputed language so misdirected the jury that it contributed to the verdict. Considering that 10 gallons of PCP, which was stored in containers with duct-taped lids and wrapped in towels, was found in a suitcase in the trunk of Defendant's rental car, it cannot be seriously argued that the jury had any doubt about Defendant's awareness of the "substance's content and character." This is not a case in which the amount of drugs involved were so small that a reasonable argument could be made that the Defendant did not know it was present. *Compare Ingram*, 249 S.W.3d at 892 (holding that the record contained insufficient evidence to prove the defendant possessed a small rock of crack cocaine found on the driver's seat on which the defendant was sitting).

Also, the verdict director set out the elements of first-degree trafficking and posited that Defendant or his passenger (Oris Butler) possessed the PCP and attempted to distribute or sell it. In paragraph Fourth of that instruction, the jury was told that to find Defendant guilty it must find that

he acted alone or together with his passenger with the purpose of promoting or furthering the commission of first-degree trafficking. The jury was also instructed that to act purposely a person must have the conscious desire to engage in conduct or cause a result. It strains logic to believe that the jury would have found Defendant guilty of this offense if it believed that Defendant was not aware of the PCP in the trunk or was ignorant of its “content and character.” In fact, the manner in which the instruction is written practically precludes the jury from doing so, even without the phrase that Defendant now claims was omitted.

The trial court did not plainly err in submitting the verdict director to the jury and Defendant has failed to carry his burden of proving that he suffered manifest injustice.

## CONCLUSION

The circuit court did not commit reversible error. Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 20,077 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that a copy of this brief was sent through the Missouri eFiling System on October 26, 2011, to:

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