

No.

In the Supreme Court of the United States

JAMES ANTOINE FAULKNER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to
The United States Court of Appeals for the
Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether discovery by the police of an outstanding arrest warrant during a concededly unconstitutional seizure of a person purges the taint of the illegal seizure, permitting the government to introduce at trial evidence obtained as a direct consequence of an arrest on the outstanding warrant?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Antoine Faulkner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 636 F.3d 1009. The district court's ruling denying petitioner's motion to suppress evidence (App., *infra*, 26a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2011, and a timely petition for rehearing was denied on April 20, 2011. On July 11, 2011, Justice Alito granted a 30-day extension of time, to and including August 18, 2011, within which to file a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

STATEMENT

It is settled law that evidence that is discovered by exploiting an illegal search or seizure generally must be excluded from a criminal trial unless subsequent events have sufficiently "attenuated" the taint of illegality. This case involves an aspect of that principle that is far from settled: whether the discovery of an outstanding arrest warrant during an un-

constitutional seizure of the defendant's person is sufficient to remove the taint of the illegal seizure and permit the government to enter evidence obtained as a direct consequence of an arrest made on the warrant during the detention. Here, the Eighth Circuit held that it is. But—as the government recently recognized in unsuccessfully seeking en banc review to address this very question in the Sixth Circuit—the Eighth Circuit's rule on this point (which is in accord with that of the Seventh Circuit) “is in direct conflict” with that of the Sixth. Pet. for Reh'g En Banc 8, *United States v. Gross*, No. 08-4051 (6th Cir. Nov. 2, 2010) (“U.S. *Gross* Pet.”). Many other federal and state appellate courts also have weighed in on one side or the other of this split.

As the government also has recognized, this issue is one “of exceptional importance.” U.S. *Gross* Pet. 8. The issue arises with great frequency—unsurprisingly, as literally millions of people in the United States have arrest warrants outstanding against them, typically for trivial offenses such as failure to appear in traffic court. And the rule applied below invites manipulation and abuse, encouraging law enforcement officers to make illegal stops in the hope that discovery of a warrant will validate the introduction at trial of any incriminating evidence that is uncovered. Further review therefore is warranted.

A. The Illegal Car Stop

On the evening of October 31, 2008, Lieutenant Steven Stange of the University of Iowa Police Department stopped petitioner as he was driving a car. App., *infra*, 26a-27a. During the stop, Lt. Stange told petitioner that he had run a red light at an intersection. Tr. of Hr'g on Mot. to Suppress 74 (“Tr.”), *United States v. Faulkner*, No. 3:08-cr-74 (S.D. Iowa July

1-2, 2009). In fact, video from Lt. Stange's police cruiser conclusively shows that petitioner had not run the light. App., *infra*, 27a.

After petitioner surrendered his license, Lt. Stange conducted a records check and learned that petitioner was wanted on an outstanding federal arrest warrant. App., *infra*, 27a. Lt. Stange called for back-up, and the police removed petitioner and two passengers from the car at gunpoint. *Ibid.* Police officers then conducted a search incident to arrest of the inside of the car. *Id.* at 28a. A drug dog was called to the scene, and after the dog "alerted" upon conducting an exterior sniff of the vehicle, Lt. Stange discovered narcotics hidden behind the car's glove compartment. *Ibid.*; Tr. 65-66. Lt. Stange informed petitioner that drugs had been found in the car and instructed another officer to read petitioner his *Miranda* rights; petitioner subsequently made incriminating statements. App., *infra*, 28a; Tr. 49-50, 57-58.

B. Proceedings Below

1. A federal grand jury indicted petitioner on drug charges.¹ Petitioner moved to suppress the evidence stemming from the car stop, including the drugs that Lt. Stange found inside the car and petitioner's subsequent incriminating statements. Petitioner principally contended that this evidence was

¹ Petitioner was charged with one count of participating in a drug conspiracy involving crack and heroin from 2006 through November 13, 2008; with one count of drug distribution on December 7, 2007; and with one count of possession with intent to distribute crack and heroin on October 31, 2008. See Second Superseding Indictment, *United States v. Davis et al.*, No. 3:08-cr-74 (S.D. Iowa July 7, 2009).

the “fruit of the poisonous tree” stemming from Lt. Stange’s illegal stop of the car.

The district court agreed with petitioner that “Lieutenant Stange lacked reasonable suspicion or probable cause to conduct a traffic stop of the vehicle driven by defendant Faulkner on October 31, 2008.” App., *infra*, 32a. The court explained that “[t]he video from Lieutenant Stange’s patrol car clearly shows that the defendant’s vehicle entered the intersection to make a left hand turn just as the traffic light was turning from green to yellow,” and that “[s]uch action is not a violation of the traffic laws.” *Ibid.* The court further noted that petitioner “completed the left turn in order to clear the intersection” and that, “[b]ased on the video from Lieutenant Stange’s patrol car, he did not have particularized, objective facts to suspect that a traffic violation had occurred.” *Ibid.* (internal quotation marks omitted).

Despite finding that the car stop was illegal, however, the district court denied petitioner’s motion to suppress. It concluded in relevant part that an “intervening circumstance—an arrest warrant for defendant Faulkner on federal drug charges—purge[d] the ‘taint’ of the original illegal stop.” App., *infra*, 37a. Following the district court’s denial of the motion to suppress and the use at trial of the evidence discovered during the stop, a jury convicted petitioner on all counts. The district court sentenced him to a term of life imprisonment.²

² Petitioner was sentenced to concurrent terms of life imprisonment on the conspiracy charge and 30 years’ imprisonment on each of the substantive drug charges. App., *infra*, 1a-2a. The sentence of life imprisonment was based on the jury’s finding that one of petitioner’s co-conspirators sold heroin to a drug us-

2. The court of appeals affirmed. App., *infra*, 1a-25a. The court did not disagree with petitioner’s observation “that without the unjustified traffic stop, the police would not have had his name and could not have arrested him on the outstanding warrant and would therefore not have discovered the drugs and would not have heard and received [his] statements about the drugs.” *Id.* at 7a. But it held that the discovery of an outstanding arrest warrant is an “intervening circumstance” that “weighs in favor of the [g]overnment” and generally permits introduction of otherwise tainted evidence. *Id.* at 8a.

The court noted that evidence obtained as the result of an illegal stop may be admissible if “the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the ‘taint’ imposed upon that evidence by the original illegality.” App., *infra*, 34a-35a (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980)). It identified three factors bearing on whether “sufficient attenuation” exists to overcome the illegality: “(1) the time elapsed between the illegality and acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.” *Id.* at 35a (citing *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975)).

Applying these three factors, the court of appeals reasoned that the discovery of an arrest warrant during an illegal detention is generally sufficient to

er who overdosed and died. App., *infra*, 23a-25a. The evidence produced by the unlawful traffic stop was admitted at trial as evidence not only of the possession-with-intent-to-distribute charge (which related specifically to the events of October 31, 2008), but also as evidence of petitioner’s pre-existing membership in the conspiracy.

purge the taint of the illegality. In the Eighth Circuit's view, when the police learn of a pending arrest warrant, the "[t]he first factor (the time elapsed) 'is less relevant because the intervening circumstance is not a voluntary act by the defendant.'" App., *infra*, 9a (quoting *United States v. Simpson*, 439 F.3d 490, 495 (8th Cir. 2006)). As to the second factor, the court reasoned that, "where the discovery of an arrest warrant constitutes the intervening circumstance, it is an even more compelling case [than when discovery of evidence results from a defendant's own voluntary act] for the conclusion that the taint of the original illegality is dissipated." *Ibid.* (internal quotation marks omitted). And because the court also found "that Lieutenant Stange's action in stopping Faulkner was not flagrant because it was such a close call as to whether Faulkner violated the law when turning left at the stoplight" (*id.* at 11a (internal quotation marks omitted)), it refused to suppress the evidence produced by the illegal stop.³ *Id.* at 11a-12a. In

³ Although the court of appeals suggested that there was nothing "to indicate that Lieutenant Stange's improper conduct was obvious" and "nothing to signal that it was anything but an honest mistake," App., *infra*, 11a, that is not what the district court found. The district court noted only that "traffic was heavy," that "there were many pedestrians in the area," and that "events transpired quickly." *Id.* at 37a. The record strongly suggests that Lt. Stange did not, in fact, believe that petitioner "had made an illegal left turn against a red light." *Id.* at 4a. When questioned under oath, Lt. Stange acknowledged that the light was not red when petitioner entered the intersection. Tr. 75-77. Rather than testifying that he made an honest mistake, Lt. Stange offered a different reason for why he chose to stop the petitioner: that it was unsafe for petitioner to have entered the intersection when other cars were in the intersection in front of him. Tr. 73-74. This new reason was not in Lt. Stange's police report. Tr. 76. Moreover, the district judge rejected it,

reaching this conclusion, the Eighth Circuit followed the Seventh Circuit's decision in *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), and its own prior ruling in *Simpson*, 439 F.3d at 495-496, which reasoned that a defendant's "outstanding arrest warrant constitutes an extraordinary intervening circumstance that purges much of the taint associated with the officers' unconstitutional conduct."

REASONS FOR GRANTING THE PETITION

The decision below contributes to growing confusion in the courts on a matter of great practical importance: how to determine "whether, granting establishment of the primary illegality, the evidence to which * * * objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963)). In answering this question, the Court has, on the one hand, "consistently rejected" the proposition that "a search unlawful at its inception may be validated by what it turns up" (*Wong Sun*, 371 U. S. at 484); on the other, it has indicated that the "fruit-of-the-poisonous-tree" doctrine does not operate mechanically to exclude all evidence "simply because it would not have come to light *but for* the illegal actions of the police." *Hudson*, 547 U.S. at 592 (quoting *Wong Sun*, 371 U.S. at 487-488).

Given this tension, the Eighth Circuit looked to three factors identified by this Court as "relevant" in determining the admissibility of illegally obtained

stating upon viewing the video that "I do not see the traffic up ahead in that stop as providing such an obvious signal that one would not continue to enter this intersection at the same time." Tr. 88-89.

evidence: (1) the “temporal proximity” of the illegality to the receipt of the evidence; (2) “the presence of intervening circumstances”; and (3) “the purpose and flagrancy of the official misconduct.” *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975); see also *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam) (citing and applying *Brown* factors). In the decision below, the Eighth Circuit held that the discovery of an outstanding warrant dispositively resolves the first two of these considerations in the government’s favor. That conclusion ordinarily will dictate the admission of illegally obtained evidence, as it did in this case.

The legal rule applied below is controversial: some courts have embraced it, while others have expressly rejected it. It addresses a matter that is important to the administration of justice: the question whether discovery of a warrant attenuates the taint of an illegal search or seizure arises often and is frequently litigated. And it has significant implications for both law enforcement and “the fundamental constitutional guarantees of sanctity of the home and inviolability of the person” (*Wong Sun*, 371 U.S. at 484): the position taken by the court below—that the discovery of an outstanding warrant may wipe the slate clean of prior illegality—creates powerful incentives for law enforcement officers to seize people without reasonable suspicion so as to check for warrants. For all of these reasons, further review of the Eighth Circuit’s decision is in order.

A. The Lower Courts Are Sharply Divided Over The Question Presented.

To begin with, there is no denying the conflict in the lower courts on the admissibility of evidence obtained as the result of an illegal detention when the defendant is found at the same time to be the subject

of an outstanding arrest warrant. The federal courts of appeals have themselves acknowledged this disagreement. See *United States v. Gross*, No. 08-4051, slip. op. 13 (6th Cir. June 15, 2011) (“Although the dissent is in accord with the Seventh Circuit, other circuits have applied the exclusionary rule despite the discovery of an outstanding arrest warrant during the course of an illegal search”), amending 624 F.3d 309 (2010); *United States v. Williams*, 615 F.3d 657, 670 (6th Cir. 2010) (“Although we have observed that the Seventh Circuit treats the discovery of a warrant as an intervening circumstance sufficient to render incriminating evidence admissible, we have never adopted its approach as the law of this circuit.”). We would expect the government to agree with us on this point: unsuccessfully seeking en banc rehearing from the Sixth Circuit’s decision in *Gross*, it declared that a “direct conflict” exists between decisions of the Sixth Circuit on the one hand, and those of the Seventh and Eighth Circuits on the other. U.S. *Gross* Pet. 8.⁴ In fact, the conflict in the lower courts is considerably more pervasive than that.

1. *Several jurisdictions consider the discovery of a warrant an intervening circumstance that purges the taint of an illegal detention.*

On one side of the conflict, one federal court of appeals and several state courts of last resort agree with the Eighth Circuit that the discovery of an out-

⁴ The government explained that “[t]he majority decision [of the Sixth Circuit in *Gross*] is in direct conflict with the Seventh Circuit’s decisions in *Green* and [*United States v.*] *Johnson*, 383 F.3d 538 (7th Cir. 2004)], as well as the Eighth Circuit’s decision in *Simpson*.” U.S. *Gross* Pet. 8. The decision below in this case followed *Simpson* and *Green*.

standing arrest warrant is an intervening circumstance that ordinarily purges the taint of an illegal detention.

The leading decision in this line of authority is the Seventh Circuit’s ruling in *Green*, a case involving the recovery of drugs and a weapon from a car following an illegal traffic stop. Applying the *Brown* factors, the court explained: “In intervening circumstance cases involving subsequent action on the defendant’s part, courts exercise great care in evaluating the later consent or confession to ensure it is truly voluntary and not the result of the earlier, and unconstitutional, police action.” *Green*, 111 F.3d at 522. By contrast, “[w]here a lawful arrest pursuant to a warrant constitutes the ‘intervening circumstance,’” it is a “more compelling case for the conclusion that the taint of the original illegality is dissipated” because in such circumstances there is no tie between the initial illegality and an incriminating act of a defendant. *Ibid.* See also *United States v. Johnson*, 383 F.3d 538, 544-546 (7th Cir. 2004) (reaffirming *Green*’s holding that an outstanding arrest warrant purges the taint of an unlawful search and seizure).

Several state courts of last resort have agreed that the discovery of an outstanding arrest warrant during the course of an illegal stop is an intervening circumstance that generally purges the taint of the illegality. For example, in *People v. Brendlin*, 195 P.3d 1074 (Cal. 2008), the Supreme Court of California—following *Green*—concluded that drug paraphernalia found on a defendant’s person following an illegal traffic stop was admissible because of the police discovered an arrest warrant; as that court saw it, “the outstanding warrant, which was discovered prior to any search of defendant’s person or of the

vehicle, sufficiently attenuated the taint of the unlawful traffic stop.” *Id.* at 1079.

The high courts of six additional States—Florida, Idaho, Kansas, Louisiana, Maryland, and Oklahoma—also have declined to exclude evidence recovered by law enforcement officers following the discovery of a pending arrest warrant in the course of an unconstitutional detention. See *State v. Frierson*, 926 So. 2d 1139, 1143-1145 (Fla. 2006); *State v. Page*, 103 P.3d 454, 458-460 (Idaho 2004); *State v. Martin*, 179 P.3d 457, 460-464 (Kan. 2008); *State v. Hill*, 725 So. 2d 1282, 1285-1288 (La. 1998); *Myers v. State*, 909 A.2d 1048, 1061-1067 (Md. 2006); *Jacobs v. State*, 128 P.3d 1085, 1097-89 (Okla. Crim. App. 2006). See also *State v. Grayson*, 336 S.W.3d 138, 147-149 (Mo. 2011) (en banc) (finding that the “[e]xistence of [a] warrant was an intervening circumstance” but excluding the evidence on the basis of the two other *Brown* factors).⁵

2. *Other jurisdictions have concluded that discovery of a warrant does not purge the taint of an illegal stop.*

Other courts, however, have rejected this rule. The Sixth, Ninth, and Tenth Circuits, as well as state courts of last resort in South Carolina, Texas, and Tennessee, have declined to hold that discovery of an outstanding warrant is an intervening circumstance that may purge the taint of an illegal seizure.

⁵ Several state intermediate appellate courts have reached similar conclusions. See *People v. Reese*, 761 N.W.2d 405, 409-413 (Mich. Ct. App. 2008); *McBath v. State*, 108 P.3d 241, 243-250 (Alaska Ct. App. 2005).

As the government has acknowledged, the Sixth Circuit expressly rejected the approach of the Seventh and Eighth Circuits. In *Gross*, that court made clear that it “ha[d] not adopted the Seventh Circuit” rule and disagreed with the notion that “the discovery of a warrant after an illegal stop is always a taint-removing intervening circumstance so long as the purpose of the stop is not because the officer believes the suspect has an outstanding warrant.” Slip op. at 13-14. In the Sixth Circuit’s view, “the discovery of [an] outstanding warrant result[ing] from means that are indistinguishable from the illegal stop” will “not dissipate the taint of [an] unlawful detention.” *Id.* at 15. The Sixth Circuit ordered evidence in *Gross* suppressed on that basis. This holding built upon the Sixth Circuit’s prior decision in *Williams*, which concluded that the discovery of an outstanding arrest warrant “is a far cry from the circumstances held adequate to purge the taint by [this] Court,” in which *voluntary* actions by the *defendant* supported a finding of attenuation. 615 F.3d at 669. The Sixth Circuit suppressed the evidence in that case, as well.

Both the Ninth and Tenth Circuits likewise have held that the discovery of an arrest warrant by law enforcement officers is not sufficient to validate prior illegal conduct. In *United States v. Lockett*, 484 F.2d 89 (9th Cir. 1973) (per curiam), police officers stopped a jaywalking pedestrian and requested his driver’s license, which he did not have. *Id.* at 90. When officers ran a warrants check for “the sole reason that [the pedestrian] lacked a driver’s license,” they found an outstanding arrest warrant, at which point they arrested him and found a package of counterfeit postal money orders in his pocket. *Ibid.* Because the officers “had no reasonable grounds to be

suspicious that there might be a warrant outstanding against [the defendant],” the Ninth Circuit held that “fruits [of the arrest] * * * were properly suppressed by the district court.” *Id.* at 91.

Similarly, in *United States v. Lopez*, 443 F.3d 1280 (10th Cir. 2006), the Tenth Circuit suppressed evidence discovered during the search of a defendant who had been detained without reasonable suspicion and found to possess contraband when arrested on an outstanding warrant. *Id.* at 1286.

Several state courts of last resort have reached the same conclusion. In *St. George v. State*, 237 S.W.3d 720, 724, 727 (Tex. Crim. App. 2007), the Texas Court of Criminal Appeals (that State’s highest court for criminal cases) affirmed the suppression of evidence discovered during execution of an arrest warrant following an illegal investigative detention, notwithstanding the State’s argument “that even if the detention was illegal, the discovery of outstanding warrants attenuated the taint of the marijuana they discovered in the search incident to arrest, so the marijuana should not be suppressed.” *Id.* at 724.

Similarly, in *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000), the Tennessee Supreme Court determined that the defendant, a pedestrian, was unlawfully seized when he was detained by a police officer for purposes of a warrant check. The court held that the discovery of a warrant did not permit introduction of marijuana found in the defendant’s possession: “the drugs found in [the defendant’s] pocket” after discovery of the arrest warrant “must be suppressed as fruit of the poisonous tree since no intervening event or other attenuating circumstance purged the taint of the initial illegal seizure.” *Id.* at 422 n.2, 428 (internal quotation marks omitted).

And in *Sikes v. State*, 448 S.E.2d 560 (S.C. 1994), the defendant “was merely a passenger in a car with paper dealer tags that had the misfortune of being in a ‘high crime area.’” *Id.* at 562. Police officers detained him for twenty minutes while they conducted a warrants check. *Ibid.* When the police learned of an outstanding warrant and arrested the defendant, they also seized drugs that the defendant discarded while in detention in a police car. *Id.* at 562-563. The South Carolina Supreme Court concluded that “[t]he detention and arrest of the [defendant] was unlawful” and “therefore, the evidence of the [defendant’s] possession of crack cocaine would have been inadmissible as fruit of the poisonous tree.” *Id.* at 563. Appellate courts in Minnesota and Illinois have reached the same conclusion.⁶

Accordingly, identically situated defendants are being treated differently in jurisdictions across the Nation on the same question of federal constitutional law. The federal circuits are split, as are the high courts of the Nation’s two most populous states (California and Texas). Indeed, in some jurisdictions the scope of Fourth Amendment protections depends on whether the defendant is prosecuted in state or federal court: in the absence of reasonable suspicion, evidence uncovered after discovery of a warrant will be suppressed by a Minnesota state court but al-

⁶ *State v. Johnson*, 645 N.W.2d 505, 511 (Minn. Ct. App. 2002); *People v. Mitchell*, 824 N.E.2d 642, 650 (Ill. App. Ct. 2005). See also *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011) (“subsequent discovery of a warrant is of minimal importance in attenuating the taint from an illegal detention upon evidence discovered during a search incident to an arrest on the warrant,” but nevertheless finding that totality of the circumstances favored admission of evidence).

lowed into evidence by a federal district court. And because the Eighth Circuit geographically abuts the Sixth and Tenth Circuits, the scope of Fourth Amendment protections may hinge on whether the defendant is stopped on the Eighth or the Sixth (or Tenth) Circuit side of the street. This Court should not tolerate such capricious variation in the application of constitutional rules.

B. This Case Presents A Recurring Question Of Great Practical Importance.

1. As the sheer number of cases that have addressed the issue demonstrates, the question presented here arises frequently and its resolution is certain to have significant practical consequences. Many millions of people have outstanding warrants, often for trivial offenses like unpaid traffic tickets. See Comment, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177, 181-183 & nn.22 & 29 (2008). And police officers routinely perform outstanding warrants checks when they encounter individuals in the widest variety of circumstances. During routine traffic stops (as in this case), field interviews, and even when dealing with jaywalkers (see, e.g., *Lockett, supra*), police officers “view a warrants check as a routine feature of almost any citizen encounter.” *Golphin v. State*, 945 So. 2d 1174, 1202 (Fla. 2006) (Pariante, J., concurring).⁷ The facts of the cases illustrate that in many

⁷ See also *Mitchell*, 824 N.E.2d at 644 (officer testified that “whenever he meets someone on the street, he runs a warrant check on that individual”); *State v. Baez*, 894 So. 2d 115, 116 (Fla. 2004) (per curiam) (policy during police-initiated encounters to “run a routine warrant check”); *State v. Topanotes*, 76 P.3d 1159, 1160 (Utah 2003) (performing a warrant check is “routine procedure” or “common practice”); *State v. Jones*, 17

of the stops that lead to warrants checks, police officers investigate passengers of cars stopped for traffic violations (*e.g.*, *McBath, supra*; *Jacob, supra*), or people walking, parked, or congregating in high crime neighborhoods or at late hours, but not engaging in activities supporting a reasonable suspicion of ongoing illegal conduct (*e.g.*, *Hummons, supra*; *Martin, supra*).

Moreover, people who are stopped without probable cause or reasonable suspicion do not realistically have the option of declining to comply with an unjustified warrants check.⁸ The decision of the court below thus creates what the Sixth Circuit described as “perverse incentives” for police officers to seize people without reasonable suspicion so as to conduct fishing expeditions for open warrants, “creat[ing] a system of post-hoc rationalization through which the Fourth Amendment’s prohibition against illegal

P.3d 359, 360 (Kan. 2001) (officer testified that “it was his standard operating procedure to obtain identification from every person in a vehicle and run a records check on the passengers”) (internal quotation marks omitted); *Magee v. State*, 759 So. 2d 464, 466 (Miss. Ct. App. 2000) (warrant checks are “routine” during police-initiated encounters with pedestrians); *Hill*, 725 So. 2d at 1288 (Lemmon, J., concurring) (describing police policy to run a “check for outstanding warrants” during consensual police-pedestrian encounters as “routine police procedure”); *Wilson v. State*, 874 P.2d 215, 222 (Wyo. 1994) (officer testified that department’s policy was to conduct national and local warrants checks of everyone police “contact” late at night).

⁸ Indeed, individuals may be legally *obligated* to surrender their identifying information. Had petitioner refused to provide his name because he believed the traffic stop to be illegal, that refusal alone may have provided grounds for arrest. See Iowa Code § 719.1; *Shepard v. Ripperger*, 57 F. App’x 270, 271 (8th Cir. 2003) (per curiam).

searches and seizures can be nullified.” *Gross*, slip op. at 14-15.

2. The need for review here is particularly acute because the decision below is wrong. Exclusion of evidence is warranted when the fruits of an unlawful search or seizure “bear a sufficiently close relationship to the underlying illegality.” *New York v. Harris*, 495 U.S. 14, 19 (1990). Where, as here, police officers stop individuals without reasonable suspicion or probable cause, the discovery of an outstanding arrest warrant during a warrants check conducted as part of that stop assuredly does not “break * * * the causal connection” (*Brown*, 422 U.S. at 603) or constitute “means sufficiently distinguishable” from the illegality to “purge[] * * * the primary taint” (*Wong Sun*, 371 U.S. at 488 (internal quotation marks omitted)). In such circumstances, where the unlawful stop leads immediately and directly to the warrants check, it is impossible to say that “the causal connection is remote.” *Hudson*, 547 U.S. at 593.

Moreover, a rule that declares discovery of an outstanding warrant essentially a *per se* source of attenuation is in considerable tension with this Court’s decision in *Brown*. There, the Court declined to conclude that *Miranda* warnings automatically purge the taint from statements made by a suspect who has been arrested illegally. The Court warned of the adverse incentive such a *per se* rule would create for law enforcement officers to make illegal stops and arrests: “Arrests made without warrant or without probable cause, for questioning or ‘investigation,’ would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings.” *Brown*, 422 U.S. at 602.

So too here. Given the difficulty of determining whether the stated reason for a particular stop was pretextual (see *Gross*, 624 F.3d at 321 & n.7), declining to treat discovery of a warrant as an automatic source of attenuation “furthers the goal of the exclusionary rule,” as it “appears to be the only way to deter the police from randomly stopping citizens for the purpose of running warrant checks.” *People v. Mitchell*, 824 N.E.2d 642, 650 (Ill. App. Ct. 2005). Otherwise, “there would be no reason for the police not to stop whomever they please to check for a warrant.” *Ibid.* Indeed, “[t]o hold that the discovery of a warrant * * * removed the taint of the illegality would be akin to holding that the substance of a confession obtained by coercion removes the taint of the coercive practices used to obtain it.” *Ibid.* A rule providing that discovery of a warrant does not purge a search of illegality therefore furthers “the sole purpose of the exclusionary rule,” which is “to deter misconduct by law enforcement.” *Davis v. United States*, 131 S. Ct. 2419, 2432 (2011).

As the Sixth Circuit noted, “[t]o hold otherwise would create a rule” under which “an officer patrolling a high crime area may, without consequence, illegally stop a group of residents” based on no more than a “hunch,” “run their names through a warrant database, and then proceed to arrest and search those individuals for whom a warrant appears.” *Gross*, slip op. at 14. “For this reason, ‘[a]llowing information obtained from a suspect about an outstanding warrant to purge the taint of an unconstitutional search or seizure would have deleterious effects’”: It would “encourage officers to seize individuals without reasonable suspicion—not merely engage them in consensual encounters—and ask them about outstanding warrants.” *Ibid.* (quoting *Williams*, 615

F.3d at 670 n.6). If that startling rule is to be the governing approach under the Fourth Amendment, it should be stated by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 10-1271

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES ANTOINE FAULKNER,

also known as Hot Rod,

Appellant.

Argued: Nov. 3, 2010

Opinion Filed: Feb. 25, 2011

Rehearing En Banc Denied: April 20, 2011

OPINION OF THE COURT

Before MELLOY, HANSEN, and BENTON,
Circuit Judges.

HANSEN, Circuit Judge.

Following a jury trial, James Antoine Faulkner was convicted of one count of conspiracy to knowingly manufacture, distribute, and possess with intent to distribute 50 grams or more of crack and heroin (count one); one count of knowingly and intentionally distributing a mixture and substance containing heroin (count two); and one count of knowingly and in-

tentionally distributing a mixture and substance containing crack cocaine (count three). The jury also found that the Government proved beyond a reasonable doubt that heroin distributed pursuant to the conspiracy in count one was a contributing factor in the death of a third party and that the death was reasonably foreseeable to Faulkner. The district court¹ sentenced Faulkner to life imprisonment on count one and 360 months' imprisonment on counts two and three, to be served concurrently. Faulkner now appeals the convictions, arguing that the district court erred by: (1) failing to suppress evidence seized pursuant to a traffic stop; (2) admitting certain testimony at trial; (3) failing to give requested jury instructions; and (4) denying Faulkner's motion for acquittal. For the following reasons, we affirm.

I.

In 2007, police began to investigate Frederick Benjamin Boyd for distributing drugs and arranged to conduct controlled purchases from him. On December 7, 2007, a confidential informant (CI) met with Boyd, and they drove to Faulkner's apartment in Iowa City, Iowa. Boyd went into Faulkner's apartment, and when he came out he informed the CI that "Hot Rod" (Faulkner) did not have any crack but did have heroin. The officers told the CI to attempt to purchase heroin from Boyd. Later that night, Boyd and the CI returned to Faulkner's apartment and Faulkner sold Boyd .14 grams of heroin. Boyd was later arrested and agreed to cooperate with the police.

¹ The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

On July 1, 2008, police executed a search warrant at Faulkner's residence at 1516 Aver Avenue in Iowa City. During the search, the police found \$3,900 in cash in Faulkner's bedroom. Faulkner was present during the search. Officer Jerry Blomgren read Faulkner his *Miranda*² rights, and Faulkner agreed to speak with him without an attorney. Faulkner admitted that he had been supplying Boyd with crack cocaine and identified several of his suppliers.

Later that year, on October 5, 2008, officers were called to 1600 Yewell Street in Iowa City, where they located the body of a dead man, Joseph Van Hoe. Van Hoe's brother Martin told police that Van Hoe had purchased heroin earlier in the day from two black men. Van Hoe's body appeared to have a fresh needle mark in one arm, and the police found two hypodermic needles with liquid on the table in front of the body. The liquid was determined to contain heroin, and a later autopsy revealed that Van Hoe had died from ethanol and heroin intoxication. During the ensuing investigation, the police were able to work their way up the chain of sales to Jennifer Debaun. On October 9, 2008, police observed Charles Watson, the man who supplied heroin to Van Hoe, purchase drugs from Debaun in Cedar Rapids, Iowa. Police arrested Watson, who confessed to delivering drugs to Van Hoe on the day of his death, and who said that he had obtained the heroin from Kurt Harrington. At the time, Harrington and Faulkner were living with Debaun.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

On October 13, 2008, working with the police, Watson arranged to purchase heroin from Harrington. Officer Blomgren took Watson to the Coral Ridge Mall in Coralville, Iowa. Watson got out of Officer Blomgren's car, eventually got into another vehicle, and met with a man who looked like Harrington and another man who Officer Blomgren testified "looked like" Faulkner, although he could not testify definitively that the man was Faulkner. Watson got out of the vehicle and returned to Officer Blomgren's vehicle, where he turned over six bags of heroin.

Approximately two weeks later, on October 28, 2008, again working with the police, Watson arranged to meet Harrington to purchase heroin at a McDonald's in Iowa City, although Harrington instead provided crack cocaine. Officer Blomgren drove Watson to the McDonald's, observed Watson get out of his car and meet with Harrington, and received four bags of crack cocaine from Watson after his meeting with Harrington.

On October 31, 2008, at around 10:00 pm, Lieutenant Steven Stange of the University of Iowa Police Department stopped a vehicle that he believed had made an illegal left turn against a red light. Unknown to the officer, the defendant Faulkner was driving the car, which was registered to Debaun,³ and Debaun and Harrington were passengers. Lieutenant Stange approached Faulkner and asked him for his driver's license. Lieutenant Stange ran Faulkner's name through the computer and discov-

³ According to testimony, Debaun and Faulkner began dating soon after they met in May 2008. By the middle of July, Faulkner and Harrington had moved in with Debaun in Cedar Rapids.

ered that a federal arrest warrant had been issued for Faulkner. When additional officers arrived at the scene, the police arrested Faulkner on the outstanding warrant, searched him, and discovered approximately \$2,600 in cash on his person. The three were placed in separate patrol cars. The police officers at the scene searched the car and found nothing. A drug dog was then called to the scene, sniffed the vehicle, and alerted officers to the presence of controlled substances by sitting down and staring at the passenger side car door. Lieutenant Stange searched the area near the glove compartment again and discovered a hiding place behind the glove compartment where he found crack and heroin hidden in a sock.

Faulkner was aware of the discovery of the hidden drugs and was removed from the patrol car. Officer Rarick began to administer *Miranda* warnings to Faulkner, but Faulkner interrupted her and asked to speak with Harrington to find out if Harrington was willing to accept responsibility for the portion of the drugs that belonged to him. Officer Rarick stopped Faulkner from talking so she could finish administering the *Miranda* warnings. She completed the *Miranda* warnings, which Faulkner waived. According to her testimony at the suppression hearing, after the *Miranda* warning but before she asked any questions, Faulkner said that he wanted to talk to Harrington “to make sure [Harrington] owned up because half the drugs belonged to [Faulkner] and half the drugs belonged to Mr. Harrington.” (Suppression Hr’g Tr. at 57.)

After his arrest and indictment, Faulkner moved to suppress the evidence recovered and the statements he made after he was stopped by police on October 31, 2008. Faulkner claimed that the traffic stop

violated his Fourth Amendment rights because the officer did not have probable cause or reasonable suspicion to stop the vehicle and that the fruit of the unjustified stop included the drugs found in the vehicle and his confession regarding those drugs. The district court denied Faulkner's motion to suppress. The court found that the police did not have probable cause or reasonable suspicion to stop Faulkner's car because there was no traffic violation, so the stop was improper. However, the district court further found that the arrest of Faulkner on the federal arrest warrant was an intervening circumstance that purged the taint of the unjustified stop and that the evidence was therefore admissible.

Faulkner appeals, arguing that: (1) the district court erred in denying his motion to suppress; (2) the district court erred in allowing Debaun's testimony over his objection; (3) the district court erred in denying his request for jury instructions on a buyer-seller relationship and multiple conspiracies; and (4) the district court erred in overruling his motion for a verdict of acquittal.

II.

A.

First, Faulkner asserts that the district court erred in denying his motion to suppress the evidence seized following the October 31 traffic stop. In reviewing a district court's ruling on a motion to suppress, "we review the district court's factual findings for clear error and review *de novo* the court's legal conclusions based on those facts." *United States v. Rodriguez-Hernandez*, 353 F.3d 632, 635 (8th Cir. 2003). "We must affirm an order denying a motion to suppress unless the decision is unsupported by sub-

stantial evidence, is based on an erroneous view of the applicable law, or in light of the entire record, we are left with a firm and definite conviction that a mistake has been made.” *Id.*

Faulkner claims that the district court erred in its analysis of the motion to suppress. He asserts that the evidence from the stop was the fruit of the poisonous tree of the unjustified traffic stop and therefore should have been suppressed. Faulkner concedes that *after* the police had his name and determined that there was an outstanding federal warrant for his arrest, they did not act improperly in arresting him on the federal warrant. (*See* Appellant’s Br. at 29 (“The Appellant does not claim that the officers could not arrest the Appellant after having determined that a federal drug warrant [existed] for his arrest.”)); *see also United States v. Green*, 111 F.3d 515, 521 (7th Cir.) (“It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant. . .”), *cert. denied*, 522 U.S. 973, 118 S. Ct. 427, 139 L. Ed. 2d 328 (1997). He argues, however, that any statements he made and the drugs found in the vehicle were inadmissible because they were the fruit of the poisonous tree of the unjustified traffic stop. Faulkner points out that without the unjustified traffic stop, the police would not have had his name and could not have arrested him on the outstanding warrant and would therefore not have discovered the drugs and would not have heard and received Faulkner’s statements about the drugs.

We have previously explained that evidence obtained as the result of an unjustified search or arrest “may be admissible if ‘the unlawful conduct has be-

come so attenuated or has been interrupted by some intervening circumstance so as to remove the “taint” imposed upon that evidence by the original illegality.” *United States v. Simpson*, 439 F.3d 490, 495 (8th Cir. 2006) (quoting *United States v. Crews*, 445 U.S. 463, 470, 100 S. Ct. 1244, 63 L.Ed.2d 537 (1980)). “When determining if sufficient attenuation exists, we must focus on three specific factors: (1) the time elapsed between the illegality and acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.” *Id.* (citing *Brown v. Illinois*, 422 U.S. 590, 603–04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)).

The discovery of the outstanding arrest warrant for Faulkner applies to the second factor, the presence of intervening circumstances, and weighs in favor of the Government. The parties most strongly disagree about the first factor (the time elapsed between the illegality and the acquisition of evidence), although they also disagree about the third factor (the purpose and flagrancy of the official misconduct).

We addressed the first factor in *Simpson*, a factually analogous case. In *Simpson*, police encountered a man whom they mistook for a different individual with an outstanding arrest warrant. After they initially encountered him but before they arrested him, one of the officers realized he was not the man they were looking for, but the officers arrested him anyway. Police identified him and discovered an outstanding warrant for his arrest. After his arrest, Simpson waived his *Miranda* rights and made certain incriminating statements. Simpson appealed the denial of his motion to suppress evidence found after

the arrest and the incriminating postarrest statements.

We assumed that the initial seizure was unjustified, and Simpson asserted that the bullets the police found and the postarrest statements he made were fruit of the poisonous tree that should be suppressed. However, we noted that there was an intervening circumstance: the discovery of Simpson's own outstanding arrest warrant. We noted that, in considering the three specific factors in determining attenuation, when the intervening circumstance is the discovery of an outstanding arrest warrant, the first factor (the time elapsed) "is less relevant because the intervening circumstance is not a voluntary act by the defendant." *Id.* at 495. We further explained that, "[w]here the discovery of an arrest warrant constitutes the intervening circumstance, 'it is an even more compelling case for the conclusion that the taint of the original illegality is dissipated.'" *Id.* (quoting *Green*, 111 F.3d at 522). The court thus held that "Simpson's outstanding arrest warrant constitute[d] an extraordinary circumstance that purge[d] much of the taint associated with the officers' unconstitutional conduct." *Id.* at 496.

Faulkner asserts that without the unjustified traffic stop, the police would never have known his name and thus would not have arrested him, relying on *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), in which the Supreme Court noted that "the more apt question in such a case [of an initially illegal police action] is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable

to be purged of the primary taint.” *Id.* at 488, 83 S.Ct. 407 (internal quotation marks omitted). Faulkner asserts that the “primary illegality” of the traffic stop necessarily makes the rest of the evidence obtained as a result of the traffic stop inadmissible because the primary taint was not purged. While of course *Wong Sun* is binding precedent, we are also bound by our own later case, *Simpson*, and its interpretation of Supreme Court precedent. *See United States v. Wright*, 22 F.3d 787, 788 (8th Cir. 1994) (“[A] panel of this Court is bound by a prior Eighth Circuit decision unless that case is overruled by the Court sitting en banc.”). Thus, we are bound by *Simpson*’s holding that when analyzing the first factor, if the discovery of an outstanding arrest warrant is the second factor’s intervening circumstance in analyzing the first factor, much of the taint of an illegal seizure is purged. At oral argument, Faulkner’s counsel effectively conceded that we are bound by *Simpson*. *Simpson* is directly on point and controls this case. Thus, upon a *Simpson* analysis, the first factor is of greatly diminished importance.

Finally, we must look to the third factor, the purpose and flagrancy of the official misconduct. In *Simpson*, we noted that the third factor “is considered the most important factor because it is directly tied to the purpose of the exclusionary rule—detering police misconduct.” *Simpson*, 439 F.3d at 496. However, the application of the rule does not serve its purpose when the police action “although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect’s protected rights.” *Id.* (internal quotation marks omitted). We look at whether the impropriety of the misconduct was obvious or whether the official knew that his conduct was improper but engaged in it anyway and

whether the misconduct was committed in the hopes that something might turn up. *See id.*

Faulkner asserts that Lieutenant Stange's act of stopping Faulkner's vehicle was purposeful and flagrant because, according to Faulkner, "the video makes it clear that [Faulkner's] vehicle entered the intersection before the light had changed from green to yellow and from that time on he was acting in a cautious manner as required by the law." (Appellant's Br. at 27–28.) Faulkner suggests that the red light violation for which he was stopped was merely an excuse or pretext to justify the stop. The district court noted that it viewed the videotape of the traffic stop twenty times and that the video showed Faulkner's vehicle entering the intersection to make a left turn just as the light was turning from green to yellow and proceeded to make the left turn safely. The district court found that Faulkner did not violate the law when turning left at the stoplight, and that therefore Lieutenant Stange acted improperly by stopping the car. However, the district court also found that Lieutenant Stange's action in stopping Faulkner was not flagrant because it was such a close call as to whether Faulkner violated the law when turning left at the stoplight. Having reviewed the video, we conclude that the district court's finding of fact was not clearly erroneous. *See Rodriguez-Hernandez*, 353 F.3d at 635. There is nothing in the video or in the facts of the case to indicate that Lieutenant Stange's improper conduct was obvious, nothing to signal that it was anything but an honest mistake, nothing to support any contention that Lieutenant Stange knew that his action in stopping Faulkner was likely unconstitutional but engaged in it nonetheless, nothing to suggest that Lieutenant Stange knew it was Faulkner who was driving the

car, and nothing to intimate that Lieutenant Stange stopped Faulkner in the hope that something might turn up. *See Simpson*, 439 F.3d at 496. Thus, the third factor weighs in favor of the Government.

Accordingly, the district court did not err in denying Faulkner's motion to suppress.⁴

B.

Second, Faulkner challenges the district court's decision to admit particular pieces of Debaun's testimony. "We review a district court's evidentiary rulings for clear abuse of discretion, reversing only when an improper evidentiary ruling affected the defendant's substantial rights or had more than a slight influence on the verdict." *United States v. Summage*, 575 F.3d 864, 877 (8th Cir. 2009) (quoting *United States v. Two Shields*, 497 F.3d 789, 792 (8th Cir. 2007)), *cert. denied*, 130 S. Ct. 1161, 175 L. Ed. 2d 988 (2010). However, if a defendant fails to make a timely objection to testimony, we review the admission of the testimony for plain error. In that instance, we will reverse only if there was an error that was plain and that affected Faulkner's substantial rights and if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (internal quotation marks and alteration omitted).

⁴ We note that the Supreme Court has recently granted certiorari in *People v. Tolentino*, 14 N.Y.3d 382, 900 N.Y.S.2d 708, 926 N.E.2d 1212, *cert. granted*, 131 S. Ct. 595, 178 L. Ed. 2d 433 (2010), to address the question of whether preexisting government documents that reveal an individual's identity but which were obtained as a result of action in violation of the Fourth Amendment are subject to the exclusionary rule

Faulkner challenges three statements Debaun made during her testimony. He made timely objections to two of the statements at trial and he failed to object to the third statement at trial. Thus, we review the two statements for a clear abuse of discretion and the third statement for plain error.

The first piece of testimony to which Faulkner objected involved Debaun delivering heroin to Watson at the request of Harrington.

Q: Did you get any money for delivering—
did [Watson] give you any money?

A: Yes.

Q: How much?

A: I believe it was \$80.

Q: Could it have been more than that?

A: Yes.

Q: What did you do with that money?

A: I left it in the apartment.

Q: Who got it?

[Faulkner's Counsel]: Objection. Lack of
foundation.

[Court]: Overruled. Answer the question, if
you know.

[Debaun]: I believe James [Faulkner] did.

Q: Why do you believe that?

A: He had called me and asked me where I
had put it and I told him where I put it.

(Trial Tr. at 569–70.)

Faulkner argues that there was no foundation for her testimony that Faulkner retrieved the money and cites Federal Rule of Evidence 602 for the proposition that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. However, Rule 701 states that a witness not testifying as an expert may offer opinion testimony so long as the testimony is “rationally based on the perception of the witness.” Fed. R. Evid. 701(a). “Personal knowledge or perceptions based on experience’ is sufficient foundation for lay opinion testimony.” *United States v. Smith*, 591 F.3d 974, 982 (8th Cir. 2010) (quoting *In re Air Crash at Little Rock Arkansas on June 1, 1999*, 291 F.3d 503, 515–16 (8th Cir.), *cert. denied*, 537 U.S. 974, 123 S. Ct. 435, 154 L. Ed. 2d 331 (2002)). Debaun’s testimony was rationally based on her perception. Debaun made it clear in her testimony that she merely “believe[d]” that Faulkner took the money and even explained why she believed that. If the jury did not find her belief credible because she did not actually see Faulkner take the money, the jury was free to disregard the testimony. Therefore, the district court did not abuse its discretion in admitting this testimony.

Faulkner also appeals the district court’s decision to admit this testimony from Debaun:

Q: What do you know about how that hiding place came to be? Wasn’t this your car?

A: Yes.

Q: And you had just owned that car you said for a few days?

A: Yes.

Q: Was that hiding place there when you bought the car?

A: I'm not understanding what—

Q: When you bought the car did you know there was a hiding place there behind the glove box or in the glove box?

A: No.

Q: But sometime in the week before Halloween you saw them using this glove box as a place to store drugs?

A: No.

Q: Tell us what you mean then.

A: I just know that from reading paperwork. I don't know from seeing it that night in that car.

(Trial Tr. at 575.) Faulkner claims that this testimony was hearsay that the district court should not have admitted, although he does not clearly explain why it was inadmissible. Because Faulkner did not object at trial, we review the admission of the testimony for plain error. Presumably, Faulkner believes that the hearsay was Debaun's testimony that she knew Faulkner and Harrington were using the hiding place to store drugs "from reading paperwork" and not "from seeing it that night in that car." The district court did not plainly err by admitting this testimony. Just prior to the testimony at issue, Debaun testified:

Q: You say the police found drugs in the car [on the night of October 31]?

A: Yes.

Q: Do you know where the drugs were found?

A: In the glove box.

Q: What do you know about that hiding place?

A: I'd seen them put drugs there before.

Q: You had seen who put drugs there before?

A: [Faulkner] and [Harrington].

Q: On different occasions?

A: Yes.

(Trial Tr. at 574.) Thus, Debaun's challenged testimony did not affect Faulkner's substantial rights based on Debaun's other testimony that she knew of the hiding place because she had seen Faulkner and Harrington hide drugs there prior to October 31. Therefore, the district court did not plainly err in admitting Debaun's unobjected to testimony.

Finally, Faulkner objected to testimony involving Debaun's knowledge of the existence of drugs in the vehicle in which she, Harrington, and Faulkner were riding when they were stopped on October 31.

Q: Whose drugs were in that Aurora October 31?

[Faulkner's counsel]: Lack of foundation. I object.

[The Court]: You can answer, if you know.

[Debaun]: Half belonged to [Faulkner] and half belonged to [Harrington].

Q: Why do you think that?

A: I know by—because I just basically know by reading it.

Q: Did you ever—

[Faulkner’s counsel]: I object and move to strike.

[The Court]: Let me figure out what she meant by that. I didn’t understand what she meant by that. Go ahead.

Q: Did [Faulkner] talk to you about whose drugs those were in the car?

A: He had said half was his and half was [Harrington’s].

Trial Tr. at 580–81.) According to Faulkner, the district court was on notice as to what Debaun meant when she testified that she only knew about the drugs in the car from “reading it” and that it should not have allowed her testimony because it came only from “reading” and not from her personal knowledge.

However, even if this testimony may have initially lacked foundation, Debaun’s nearly contemporaneous testimony established that she had personal knowledge based on Faulkner telling her that half the drugs were his and half were Harrington’s. Faulkner’s statement to Debaun is admissible as an admission by a party-opponent under Federal Rule of Evidence 801(d)(2). “Even if the district court erred in admitting the evidence, we will not reverse if the admission of the evidence was harmless.” *United States v. Parish*, 606 F.3d 480, 487 (8th Cir.) (quoting *United States v. Velazquez–Rivera*, 366 F.3d 661, 666 (8th Cir. 2004)), *cert. denied*, 131 S. Ct. 580, 178 L. Ed. 2d 423 (2010). Because the statement was

otherwise admissible based on Debaun's follow-on testimony, even if the district court erred in initially admitting it, the admission of the testimony was harmless.

C.

Third, Faulkner claims that the district court should have given the jury instructions on the buyer-seller relationship and on multiple conspiracies. We review a district court's jury instructions for abuse of discretion. *United States v. Pereyra-Gabino*, 563 F.3d 322, 328 (8th Cir. 2009). Proper jury instructions "must, 'taken as a whole adequately advise the jury of the essential elements of the offenses charged and the burden of proof required of the government.'" *Id.* (quoting *United States v. Rice*, 449 F.3d 887, 895 (8th Cir.), *cert. denied*, 549 U.S. 1040, 127 S. Ct. 601, 166 L. Ed. 2d 446 (2006)). "We will reverse a jury verdict when the errors misled the jury or had a probable effect on the jury's verdict." *Id.* (internal quotation marks and alteration omitted).

Faulkner requested, in a timely manner, an instruction that a buyer-seller relationship does not constitute a conspiracy and an instruction regarding single and multiple conspiracies. Faulkner's theories of defense were: (1) that Harrington was involved in two separate conspiracies, one of which distributed crack cocaine and one of which distributed heroin; and (2) that Faulkner's single sale of a user amount of heroin to Boyd was not enough to support a finding that he knew or agreed to be a member of a conspiracy with Harrington that sold heroin. "A defendant is entitled to an instruction explaining his defense theory if the request is timely, the proffered instruction is supported by the evidence, and the instruction correctly states the law." *United States v.*

Adams, 401 F.3d 886, 898 (8th Cir.) (quoting *United States v. Hester*, 140 F.3d 753, 757 (8th Cir. 1998)), *cert. denied*, 546 U.S. 966, 126 S. Ct. 492, 163 L. Ed. 2d 373 (2005). Here, there is no question that Faulkner's requests for the proposed instructions were timely, and the Government does not appear to dispute that the proposed instructions correctly stated the law. Thus, the issue before us is whether the instructions were supported by the evidence.

First, the proffered jury instruction (Eighth Circuit Model Jury Instruction 5.06G on single versus multiple conspiracies) was not supported by the evidence. The proposed instruction would have informed the jury that multiple conspiracies may exist with different criminal purposes, and the Government must prove that the defendant was part of one single conspiracy instead of multiple conspiracies. Faulkner asserts that Harrington was involved in two separate conspiracies, one to distribute crack cocaine and one to distribute heroin, and that Faulkner was only a part of the separate conspiracy to distribute crack cocaine. "Whether a given case involves single or multiple conspiracies depends on whether there was one overall agreement to perform various functions to achieve the objectives of the conspiracy." *United States v. Radtke*, 415 F.3d 826, 838 (8th Cir. 2005) (internal quotation marks omitted). We look at the totality of the circumstances and review this as a question of fact, drawing all inferences in favor of the jury verdict. *Id.*

Here, drawing all inferences in favor of the jury verdict, there was no evidence of multiple conspiracies that would support Faulkner's proposed instruction. There was testimony that Faulkner and Harrington were partners and sold drugs together every

day. Police found heroin and crack cocaine together in the car on the night of the October 31 traffic stop, and Faulkner admitted to Debaun that half of the drugs were his and half were Harrington's. Faulkner asked Debaun where the proceeds from the heroin Harrington sold to Watson were, and Debaun testified that she believed Faulkner took the money. The testimony supports the Government's position that there was only one conspiracy, and there was no evidence that Harrington was involved in a second conspiracy to sell only heroin apart from his conspiracy with Faulkner.

Second, the proffered jury instruction regarding the buyer-seller relationship was not supported by the evidence. The proposed instruction stated that "the mere agreement of one person to buy what another agrees to sell, standing alone, does not support a conspiracy conviction." (Add. at 18.) Faulkner asserts that the only direct evidence that Faulkner was involved in distributing heroin was when, on December 7, 2007, he sold heroin to Boyd. Faulkner asserts that he sold heroin on only that one occasion when he apparently did not have any crack cocaine.

However, the evidence does not support Faulkner's assertion that he only distributed heroin once. At trial, besides the testimony regarding the December 7 transaction, there was also testimony from Boyd that he had purchased crack cocaine from Faulkner well over 100 times and had purchased heroin from Faulkner on "five or six occasions, anywhere from a gram to a half a gram." (Trial Tr. at 161.) There was further testimony from Debaun regarding the conversation about the proceeds from the sale of heroin to Watson and that half the drugs in the car on the night of October 31 (which included

both crack cocaine and heroin) were Faulkner's. The evidence simply does not support Faulkner's proposed buyer-seller jury instruction. Accordingly, the district court did not abuse its discretion in refusing to give Faulkner's proposed jury instructions.

D.

Finally, Faulkner claims that the district court erred in denying his motion for acquittal based on insufficient evidence. Faulkner made a timely motion for acquittal at the close of the Government's evidence, which the district court denied. We review the denial of a motion for a judgment of acquittal *de novo*, with all evidence viewed in the light most favorable to the nonmoving party, the Government. *United States v. Robertson*, 606 F.3d 943, 953 (8th Cir. 2010). We will reverse only if no reasonable jury could have found Faulkner guilty beyond a reasonable doubt. See *id.*

Faulkner argues that: (1) there was not sufficient evidence to support the conspiracy conviction; and (2) there was not sufficient evidence to support a finding beyond a reasonable doubt that it was reasonably foreseeable that the heroin would cause a death.

Faulkner first argues that there was insufficient evidence to support his conspiracy conviction. Faulkner asserts that he was not a part of or aware of a conspiracy to distribute heroin. "A single conspiracy is composed of individuals sharing common purposes or objectives under one general agreement." *United States v. Donnell*, 596 F.3d 913, 923 (8th Cir.) (internal quotation marks omitted), *cert. denied*, 131 S. Ct. 309, 178 L. Ed. 2d 201 (2010). Further, "a conspiracy with multiple objectives is not the same thing as multiple conspiracies." *United States v. Santiste-*

ban, 501 F.3d 873, 882 (8th Cir. 2007) (internal quotation marks omitted).

As discussed above, there was a great deal of evidence that Faulkner was involved in a single conspiracy with Harrington to distribute drugs, both crack cocaine and heroin. Boyd testified that he purchased heroin from Faulkner five or six times and crack cocaine from Faulkner more than 100 times. On December 7, 2007, when Boyd purchased drugs from Faulkner, Faulkner had heroin for sale but not crack. Debaun testified that Faulkner and Harrington were equal partners in the drug distribution business and were together dealing drugs every day. When Debaun was involved in a drug transaction distributing heroin at the request of Harrington, Faulkner inquired about the proceeds. Both crack cocaine and heroin were found hidden in the car on October 31, and Faulkner told Debaun that half the drugs were his and half were Harrington's. Viewing the evidence in the light most favorable to the Government, there was sufficient evidence to support Faulkner's conviction for conspiracy to distribute heroin, and the district court did not err in denying his motion for acquittal. *See Robertson*, 606 F.3d at 953.

Faulkner next argues that there was insufficient evidence to support a finding beyond a reasonable doubt that it was reasonably foreseeable to Faulkner that the distributed heroin would cause a death. *See* 21 U.S.C. § 841(b)(1)(A) (setting a minimum sentence of 20 years' imprisonment and a maximum sentence of life imprisonment for distributing drugs "if death or serious bodily injury results from the use of such substance"). Faulkner asserts that even if there was evidence to tie Faulkner to the distribution of heroin, it was not sufficient to prove

beyond a reasonable doubt that death would result from the heroin distribution.

Here, Faulkner did not personally play a direct role in the manufacture or distribution of heroin that resulted in Van Hoe's death. Instead, he would be subject to the sentence enhancement based solely on Harrington's actions as a coconspirator. *See* 21 U.S.C. § 846. As a court, we have not resolved the issue of whether someone in Faulkner's position would be strictly liable for the resulting death or would be liable only if the death was reasonably foreseeable, although we have suggested that a defendant may be liable as a coconspirator only if the death was reasonably foreseeable. In *United States v. McIntosh*, 236 F.3d 968, 973 (8th Cir.), *cert. denied*, 532 U.S. 1022, 121 S. Ct. 1964, 149 L. Ed. 2d 759 (2001), we held that "when a conspiracy defendant plays a direct role in manufacturing or distributing a drug that results in death, Congress's intent under [21 U.S.C.] § 846 is clear that the defendant is strictly liable under § 841(b)(1)(A)'s enhancement scheme." Alternatively, we noted that if the defendant did not play a direct role in the manufacture or distribution of a drug that resulted in death and the enhancement was based solely on the conduct of a coconspirator, "a foreseeability analysis *may* be required in determining whether Congress intended, under § 846, that the defendant be held accountable for the conduct of a coconspirator." *Id.* at 974.

The district court, exercising commendable caution, instructed the jury to find Faulkner responsible for the death of Van Hoe only if it found beyond a reasonable doubt that the death was "reasonably fo-

reseeable . . . to Faulkner.” (R. at 84.)⁵ Faulkner asserts that there was insufficient evidence to support the jury’s finding that Van Hoe’s death was reasonably foreseeable to him. While Faulkner may not have played a direct role in manufacturing or distributing the heroin that caused Van Hoe’s death, he was part of the conspiracy that distributed the heroin. The Eleventh Circuit has stated that “[w]here a conspirator is involved in distributing drugs to addicts, some of which are even administered intravenously, it is a reasonably foreseeable consequence that one or more of those addicts may overdose and die.” *United States v. Westry*, 524 F.3d 1198, 1219 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 251, 172 L. Ed. 2d 189 (2008), and *cert. denied*, 129 S. Ct. 902, 173 L. Ed. 2d 119 (2009). The court held that “[b]ecause [decedent] died from a drug overdose from drugs distributed by a member of the conspiracy[,] . . . and the goal of the conspiracy was to distribute drugs, [decedent’s] death was reasonably foreseeable and within the scope of the conspiracy.” *Id.* at 1220. At trial, the Government offered evidence that Faulkner was part of the conspiracy whose goal was to distribute drugs, including heroin, that Faulkner himself sold heroin to others, and that Van Hoe died from a drug overdose from heroin distributed by Harrington, another member of the conspiracy. *Cf. United States v. Ragland*, 555 F.3d 706, 715 (8th Cir. 2009) (upholding the death enhancement when the defendant knowingly supplied heroin to the decedent that caused

⁵ Because the court so instructed the jury, we still need not—and do not—decide whether a defendant could be strictly liable for a coconspirator’s actions in manufacturing or distributing a drug that resulted in a death. Further, we see no error in the district court’s handling of the matter.

the decedent's death). Therefore, viewing the evidence in the light most favorable to the Government, there was sufficient evidence to support the jury's finding that Van Hoe's death was reasonably foreseeable to Faulkner. *See Robertson*, 606 F.3d at 953.

III.

Accordingly, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF IOWA

No. 3:08-cr-00074-JAJ -TJS-2

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES ANTOINE FAULKNER,
and KURT HARRINGTON,

Defendants.

Filed: July 7, 2009

ORDER

This matter comes before the court pursuant to defendant James Antione Faulkner's June 5, 2009, Motion to Suppress Evidence [Dkt. 91]. The motion was joined on June 15, 2009, by defendant Kurt Harrington [Dkt. 98]. The motion arises out of a traffic stop on October 31, 2008, in Iowa City. The defendants contend that the police did not have probable cause to stop the vehicle in which defendant Faulkner was the driver and defendant Harrington was a passenger. They further contend that upon arrest, a search incident to arrest of the passenger compartment of the vehicle violated *Arizona v. Gant*, 129 S.Ct. 1710 (2009). Next, they contend that there was

no independent probable cause to search the vehicle and that subsequent statements made by defendant Faulkner were tainted by the earlier stop and search of the vehicle.

The government contends that the police had probable cause to stop the defendants' vehicle for running a red traffic light. It contends that the defendants were then properly arrested for outstanding warrants and that a drug detection dog provided probable cause for the search of the defendants' vehicle. It contends that statements made by defendant Faulkner are admissible in that they followed appropriate *Miranda* warnings which were then waived by the defendant. The court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On October 31, 2008, at approximately 10:00 p.m., Lieutenant Stange was at the intersection of Linn Street and Burlington Avenue in Iowa City, Iowa. He was behind a green Oldsmobile Aurora automobile registered to Jennifer DeBaun. A video recording made from Lt. Stange's patrol car shows that the Aurora entered the intersection to make a left hand turn just as the traffic light was turning from green to yellow. The car was not able to complete the turn as other cars ahead became backed up in the intersection. By the time the Aurora cleared the intersection, the traffic light was red.

Upon receiving Faulkner's license and running a records check, it was determined that Faulkner was wanted on an outstanding federal drug warrant. Lieutenant Stange called for back up and, upon its arrival, the occupants of the car were ordered out at gunpoint. Faulkner, DeBaun and Harrington were

placed in patrol cars. It was quickly determined that Harrington also had an outstanding warrant for his arrest on drug charges from Johnson County.

The passenger compartment of the automobile was searched incident to the arrest of the occupants. Nothing was found. A drug dog was called to the scene. Officer Berg and his dog, Naton, arrived shortly thereafter. Naton performed an exterior sniff of the Aurora automobile. As he approached the front passenger door, Naton showed increased interest. Shortly thereafter, Naton alerted to the presence of controlled substances by sitting down and staring at the car door.¹

The police then searched the glove box of the automobile and found a significant quantity of controlled substances wrapped in plastic bags inside a sock. Defendant Faulkner was aware of the seizure of the controlled substances. He was removed from a patrol car and Officer Voller instructed Officer Rarick to administer *Miranda* warnings. Before Officer Rarick could even begin the warnings, the defendant initiated conversation asking to speak with defendant Harrington to find out if Harrington was willing to accept responsibility for that portion of the controlled substance that belonged to him. Officer Rarick stopped the defendant from talking in order to administer his *Miranda* warnings. She gave appropriate warnings which were clearly understood by the defendant and then waived.

¹ The defendant's suppression motion does not challenge the reliability of Naton. This court has previously found Naton to be a reliable dog after an extensive hearing concerning Naton's qualifications. The brief testimony at this hearing further demonstrates Naton's reliability.

Upon his removal from the police car, defendant Faulkner told the police that he was dizzy and nauseous. He leaned over and spit on the ground.² Lieutenant Stange was genuinely concerned that perhaps the defendant had swallowed some narcotics. He asked the defendant if he had ingested any crack cocaine. The defendant told him that he had not. Medical personnel were summoned to the scene. The defendant required no treatment, no medication, and gave every appearance of being physically and mentally normal.

Just a few months before this incident, the defendant was interrogated by the police after a search warrant was executed at his residence. Again, the defendant was given his Miranda warnings, which he indicated that he understood and then waived them and talked to the police. The defendant agreed to cooperate with the police and, as a result, was not taken into custody that day.

CONCLUSIONS OF LAW

Standing. “Fourth Amendment rights are personal rights that may not be asserted vicariously.” *United States v. Barragan*, 379 F.3d 524, 529 (8th Cir. 2004) (citing *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978)). During a valid traffic stop, the driver and passengers are “seized” under the Fourth Amendment. *United States v. Oliver*, 550 F.3d 734, 737 (8th Cir. 2008) (citation omitted); see also *United States v. Peralez*, 526 F.3d 1115, 1119 (8th Cir. 2008) (“A traffic stop constitutes a seizure under the Fourth Amendment.”) (citation omitted). “A passenger in a motor vehicle has standing to challenge the stop of

² He did not vomit.

that vehicle.” *United States v. Wheat*, 278 F.3d 722, 726 (8th Cir. 2001) (citation omitted). To establish standing to contest a search under the Fourth Amendment, a defendant “must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable[.]” *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) as quoted in *Barragan*, 379 F.3d at 529. “The general rule is that ‘a person has no reasonable expectation of privacy in the an automobile belonging to another.’” *United States v. Spotted Elk*, 548 F.3d 641, 657 (8th Cir. 2008) (citation omitted).

Both defendants Faulkner and Harrington undoubtedly have standing to assert their Fourth Amendment rights with regard to the seizure of the vehicle. *See United States v. Green*, 275 F.3d 694, 699 (8th Cir. 2001) (“A passenger has standing to challenge his detention because all the occupants of a stopped vehicle are subject to a Fourth Amendment seizure.”) (citation omitted). As a mere passenger without any possessory or ownership interest in the vehicle, defendant Harrington lacks standing to contest the search on Fourth Amendment grounds. *See Barragan*, 379 F.3d at 530 (“As a mere passenger, therefore, [the defendant] . . . lacks standing to challenge the search of the vehicle.”). The court finds that defendant Faulkner, as the permissive driver, has standing to assert that his Fourth Amendment rights were violated by the search of the vehicle. “The Eighth Circuit Court of Appeals has held that “to have a legitimate expectation of privacy by way of a possessory interest, defendant must have possession of the vehicle and the keys.” *United States v. Macklin*, 902 F.2d 1320, 1330 (8th Cir. 1990) (citing *United States v. Rose*, 731 F.2d 1337, 1343 (8th Cir.) *cert. denied*, 469 U.S. 931 (1984); *United States v. Wil-*

liams, 714 F.2d 777, 779 n. 1 (8th Cir. 1983). *See also United States v. Baker*, 221 F.3d 438, 442 (3rd Cir. 2000) (“Cases from other circuits suggest that whether the driver of a car has a reasonable expectation of privacy necessary to show Fourth Amendment standing is a fact-bound question dependent on the strength of his interest in the car and the nature of his control over it; ownership is not necessary.”) (listing cases). In *Rose*, the Eighth Circuit Court of Appeals upheld a district court’s finding that a defendant, who was neither the owner nor driver at the time of the stop of the vehicle, had standing because 1) he had permission to drive the car, 2) the owner had given him the keys to the vehicle, 3) he drove the vehicle two to three times per week. Here, a review of the facts demonstrates that Faulkner had a reasonable expectation of privacy in the vehicle. Faulkner regularly received DeBaun’s permission to drive the vehicle. According to DeBaun’s testimony, Faulkner drove the vehicle nearly everyday. Faulkner was driving the vehicle with DeBaun’s permission at the time of the stop. Furthermore, it was Faulkner’s actions of driving the vehicle that brought about the stop and the search by Iowa City law enforcement officers. For the reasons stated above, the court finds that the defendant Faulkner has standing to object to the search of the vehicle.

Traffic Stop. “A traffic stop is a seizure within the meaning of the Fourth Amendment and, as such, must be supported by reasonable suspicion or probable cause.” *United States v. Houston*, 548 F.3d 1151, 1153 (8th Cir. 2008) (citations omitted). Reasonable suspicion is defined as “particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed.” *Id.* (internal quotation

marks and citation omitted). “As long as an officer ‘objectively has a reasonable basis for believing that the driver breached a traffic law,’ the officer has probable cause to conduct a traffic stop.” *United States v. Coney*, 456 F.3d 850, 856 (8th Cir. 2006) (citation omitted).

The court finds that the Lieutenant Stange lacked reasonable suspicion or probable cause to conduct a traffic stop of the vehicle driven by defendant Faulkner on October 31, 2008. Iowa Code § 321.257(b) states, in part:

A “steady circular yellow” or “steady yellow arrow” light means vehicular traffic is warned that the related green movement is being terminated and vehicular traffic shall no longer proceed into the intersection and shall stop. If the stop cannot be made in safety, a vehicle may be driven cautiously through the intersection.

Iowa Code § 321.257(b). The video from Lieutenant Stange’s patrol car clearly shows that the defendant’s vehicle entered the intersection to make a left hand turn just as the traffic light was turning from green to yellow. Such action is not a violation of the traffic laws. Moreover, the law explicitly permits a driver to “drive cautiously through the intersection” when a stop cannot be made safely. Iowa Code § 321.257(b). The video demonstrates that defendant Faulkner completed the left turn in order to clear the intersection. Based on the video from Lieutenant Stange’s patrol car, he did not have “particularized, objective facts” to suspect that a traffic violation had occurred. *Coney*, 456 F.3d at 856 (citation omitted). For that reason, the court finds that the traffic stop

was not supported by reasonable suspicion or probable cause.

Search of Passenger Compartment Incident to Arrest. In *Arizona v. Gant*, the Supreme Court limited the automobile exception to the warrant requirement. 129 S.Ct. 1710 (2009). The automobile exception “authorizes officers to search a vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of criminal activity.” *United States v. Davis*, No. 08-3536, 2009 WL 1885254, at *2 (8th Cir. July 2, 2009). After *Gant*, an officer may conduct a warrantless search of a vehicle incident to arrest “only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* if it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Gant*, 129 S.Ct. at 1723 as quoted in *Davis*, 2009 WL 1885254, at *2 (emphasis in original). Here, defendants Faulkner and Harrington and Debaun were secured in patrol cars at the time of the search of the passenger compartment of the vehicle. Thus, they were not in reaching distance of the passenger compartment at the time of the search. It was not reasonable for officers to believe that the vehicle contained evidence of the offense of arrest. Thus, the search of the vehicle following the arrest of the driver and the occupants was not appropriate under *Gant*. However, the search failed to yield any evidence, so there is no evidence for the court to suppress as a result of the search.

Dog Sniff. “A dog sniff of the exterior of a vehicle does not constitute a search.” *United States v. Olivera-Mendez*, 484 F.3d 505, 511 (8th Cir. 2007) (citing *Illinois v. Caballes*, 543 U.S. 405, 408-409 (2005)); see also *United States v. Williams*, 429 F.3d

767, 772 (8th Cir. 2005). Thus, an officer does not need probable cause nor reasonable suspicion to call a drug dog to conduct a sniff of a vehicle. *Williams*, 429 F.3d at 772 (citation omitted). “Our cases establish that ‘[a] dog’s positive indication alone is enough to establish probable cause for the presence of a controlled substance if the dog is reliable.’” *Olivera-Mendez*, 484 F.3d at 512 (citation omitted).

After the defendants were secured in the patrol car pursuant to outstanding arrest warrants and the vehicle was searched incident to arrest, officers called a drug dog, Naton, to sniff the exterior of the vehicle. When positioned by the front passenger door, Naton alerted to the presence of controlled substances. The court finds that the dog sniff was appropriate because a dog sniff of the exterior of a vehicle does not constitute a search within the meaning of the Fourth Amendment. Naton’s indication as to the presence of controlled substances in the vehicle provided officers with probable cause to search the vehicle. Thus, the search of the vehicle following the dog sniff was lawful.

Outstanding Arrest Warrants. Defendant Faulkner argues that his statements following the stop should be suppressed as the “fruits” of an illegal traffic stop. The government contends that outstanding arrest warrant for defendant Faulkner constitutes an intervening circumstance that purges from the defendant’s statements the “taint” of the original illegal stop. Evidence obtained as the result of an illegal search or arrest “may be admissible if ‘the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the “taint” imposed upon that evidence by the original illegality.’” *United States v. Simpson*,

439 F.3d 490, 495 (8th Cir. 2006) (quoting *United States v. Crews*, 445 U.S. 463, 470 (1980)). The factors to consider when determining if sufficient attenuation exists are “1) the time elapsed between the illegality and the acquisition of the evidence; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct.” *Simpson*, 439 F.3d at 495 (citing *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975)).

In *Simpson*, the Eighth Circuit addressed the importance of the first factor in cases where the intervening circumstance is an arrest warrant:

In instances where the intervening circumstance is the discovery or an outstanding arrest warrant, courts have held the first factor—the time between the initial illegality and the acquisition of the evidence—is less relevant because the intervening circumstance is not a voluntary act by the defendant.

439 F.3d at 495. The shorter the period of time between the illegal stop and the statements by the defendant the more likely they were influenced by the illegal police conduct. See *United States v. Barnum*, 564 F.3d 964, 972 (8th Cir. 2009) (citation omitted). Here, defendant Faulkner did not, immediately following the illegal stop, make statements to Officer Rarick. Instead, the illegal stop occurred, officer determined that Faulkner was wanted on an outstanding drug warrant, and Faulkner made statements to Officer Rarick after police conducted two searches and a dog sniff of the vehicle. The court finds the first factor—the amount of time between the illegality and the acquisition of defendant Faulkner’s statements—weighs in favor of the government.

Next, the court must consider the nature of intervening circumstance. “Where the discovery of an arrest warrant constitutes the intervening circumstance, ‘it is an even more compelling case for the conclusion that the taint of the original illegality is dissipated.’” *Simpson*, 439 F.3d at 495-96 (quoting *United States v. Green*, 111 F.3d 515, 522 (7th Cir. 1997)). This is not a case where the defendants were detained for a prolonged period of time before the outstanding arrest warrants were discovered. Instead, the officers became aware of the outstanding warrants very shortly after the illegal stop occurred. The court finds that the second factor—the nature of the intervening circumstance—weighs in favor of the government.

Finally, the court must consider the purpose and flagrancy of the official misconduct. “The purpose and flagrancy of the official misconduct is considered the most important factor because it is directly tied to the purpose of the exclusionary rule—deterring police misconduct.” *Simpson*, 439 F.3d at 496 (citation omitted).

Courts have found purposeful and flagrant misconduct where: 1) the impropriety of the official’s misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and 2) the misconduct was investigatory in design and purpose and executed “in the hope that something might turn up.”

Simpson, 439 F.3d at 496 (citations omitted). The exclusionary rule does not serve its intended function of deterrence when the police action was erroneous but not committed with the purpose of benefitting the police at the expense of the suspect’s protected rights. *Simpson*, 439 F.3d at 496 (citation omitted).

As stated above, the court finds that the traffic stop of the defendant's vehicle was not supported by reasonable suspicion nor probable cause. However, the court finds that the stop of defendant Faulkner's vehicle is not the flagrant type misconduct envisioned by the Supreme Court to warrant application of the exclusionary rule in the presence of an intervening circumstance. The traffic was heavy and there were many pedestrians in the area. The events transpired quickly without the benefit of hindsight and resort to the records in the quiet of an office. Thus, the court finds that the third factor—the purpose and flagrancy of official misconduct—weighs in favor of the government.

Based on the *Brown* factors, the court finds that the intervening circumstance—an arrest warrant for defendant Faulkner on federal drug charges—purges the “taint” of the original illegal stop from subsequent statements made by defendant Faulkner. Thus, the court finds that the subsequent statements by defendant Faulkner are not the “fruits” of the illegal stop.

Voluntariness of Miranda Waiver. “A waiver of the Fifth Amendment privilege against self-incrimination is valid if the waiver is made voluntarily, knowingly, and intelligently.” *United States v. Gaddy*, 532 F.3d 783, 788 (8th Cir. 2008) (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). “A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *Id.* (citation and internal quotation marks omitted). Furthermore, “the suspect must have a ‘full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’” *United States v. Phillips*, 506 F.3d 685,

687 (8th Cir. 2007) (citation omitted). Age, education, and prior experience with law enforcement are factors to be considered in determining voluntariness of waiver. *United States v. Makes Room*, 49 F.3d 410, 415 (8th Cir. 1995) (citing *Colorado v. Connelly*, 479 U.S. 157, 165 (1986)). “In order to determine whether a confession was voluntary, we look to the ‘totality of the circumstances and must determine whether the individual’s will was overborne.’” *Gaddy*, 532 F.3d at 788 (citation omitted).

The court finds that defendant Faulkner knowingly, voluntarily, and intelligently waived his *Miranda* rights, and that the waiver was “the product of a free and deliberate choice rather than intimidation, coercion, or deception[.]” *Phillips*, 506 F.3d at 687 (citations omitted). The totality of the circumstances demonstrates that the defendant’s will was not overborne. He was familiar with the *Miranda* rights and how to waive them, as he had done so in a separate encounter with police a few months before the October 31, 2008, incident. The defendant initiated conversation with Officer Rarick regarding defendant Harrington’s willingness to take responsibility for the amount of drugs that belonged to him, and she had to stop him in order to administer the *Miranda* warnings. The defendant was of a sufficient age to comprehend his rights on the date of the stop. The defendant’s nauseousness and spitting on the ground did not affect his ability to make a valid waiver. See *United States v. Jiminez*, 478 F.3d 929, 933 (8th Cir. 2007) (“The fact that [the defendant] was visibly upset is not enough to override [the defendant’s] specific consent to waive her rights and speak to [a police officer].”). Furthermore, the conduct of police officers on the scene was consistent with that of a typical

traffic stop and narcotics search, and not coercive, intimidating, nor deceptive.

For the reasons stated above, the court finds that the defendant's waiver of his *Miranda* rights was valid. For the reasons stated above, the court denies the defendants' motion to suppress [Dkt. 91].

IT IS SO ORDERED.

DATED this 7th day of July, 2009.

/s/ John A. Jarvey
John A. Jarvey
United States District Judge
Southern District of Iowa

40a

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 10-1271

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES ANTOINE FAULKNER,

also known as Hot Rod,

Appellant.

Appeal from U.S. District Court for the Southern
District of Iowa—Davenport

(3:08-cr-00074-JAJ-2)

ORDER

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

April 20, 2011

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

/s/ Michael E. Gans