05-2177-cr

To Be Argued By:
JOHN A. DANAHER III

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-2177-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

KEVIN G. CARTER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

JOHN A. DANAHER III
GEOFFREY M. STONE
Assistant United States Attorneys
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The district court (Burns, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). This Court has appellate jurisdiction over the challenge to the conviction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court commit legal error in declining to suppress evidence seized in an automobile search?

2. Did the district court abuse its discretion when it admitted expert testimony and photographic evidence?

3. Viewed in the light most favorable to the Government, was there sufficient evidence of the impact of the robbery on interstate commerce?

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Preliminary Statement

Kevin G. Carter was convicted after trial of Hobbs Act robbery, carrying a firearm during a crime of violence, and being a felon in possession of a firearm. All charges resulted from Carter's role in an armed robbery at a jewelry store. Carter, and an accomplice, escaped with merchandise valued at $500,000.

On appeal, he now raises three challenges to his conviction, claiming that the district court erred in failing to suppress evidence seized from his car, in admitting expert testimony, and in concluding that there was sufficient evidence of the robbery's effect on interstate commerce. All three claims are meritless.

First, following a pretrial hearing, the district court correctly declined to suppress evidence seized from Carter's automobile. The district court correctly concluded that the seizure was valid on multiple grounds: officers conducted an inventory search, the vehicle was searched incident to arrest, and the evidence was seized pursuant to the "automobile exception" to the warrant requirement. Second, the district court properly admitted into evidence expert witness testimony and also digital photographs taken by the expert witness. The expert witness was qualified to testify as an expert, and he provided a more than sufficient basis for the admission of the photographs. Finally, the district court correctly concluded that the Government introduced sufficient evidence of the robbery's effect on interstate commerce. That evidence included the fact that every product sold by the jewelry store was produced outside of Connecticut, it took months to replace the stolen inventory, and Carter, himself, took stolen property from Connecticut to Massachusetts immediately after the robbery. For all these reasons, discussed in detail below, the defendant's conviction should be affirmed.

Statement of the Case

This is an appeal from the United States District Court for the District of Connecticut (Ellen B. Burns, J.). On May 26, 2004, the defendant was indicted in connection with the March 20, 2003, armed robbery of a jewelry store. A federal grand jury returned a three-count superseding indictment on August 31, 2004, charging the defendant with Hobbs Act robbery, in violation of 18 U.S.C. § 1951, carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).

On January 7, 2005, the district court denied the defendant's motion to suppress evidence seized from his automobile.[1]

Trial began on January 12, 2005. On January 21, 2005, the jury returned its verdict, finding Carter guilty on all three counts. On April 13, 2005, the district court denied the defendant's motion for judgment of acquittal.

Carter filed a notice of appeal on April 15, 2005, prior to the entry of judgment. On May 2, 2005, the district court sentenced the defendant to 360 months of imprisonment. The defendant filed his brief on October 17, 2005. The defendant is currently serving his sentence. He raises no challenge to his sentence on appeal.

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[1] The district court filed a written ruling on April 29, 2005, JA 1243-70, supplementing the court's oral ruling of January 7, 2005, JA 122,.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Offense Conduct

On March 20, 2003, at approximately 8:00 p.m., defendant Kevin Carter and another man entered the Harstan's Jewelry Store on South Main Street in West Hartford, Connecticut. Both men were wearing ski masks, each carried a revolver, and one of the thieves carried what appeared to be a stun gun. Joint Appendix ("JA") at 152-56; 160-61; 170-74; 210-15.

Carter and the other robber forced three employees, at gun point, to lie on the ground behind a counter. JA 158-59; 175-78. All three employees testified at trial, and all three made clear that they believed their lives were at risk during the robbery. JA 161-62; 165; 168; 177-78; 215, 218, 223. One of the employees, Jean Zell, testified that at one point one of the robbers put a tray of jewels on her back, due to the lack of available counter space. JA 161-62. Carter and his confederate left the jewelry store within approximately ten minutes. JA 162-63.

Before leaving the jewelry store, one of the thieves took wallets from two of the three employees, Michael Turgeon (the store manager) and Vito Sagbay. JA 179. In the course of the robbery, the thieves had repeatedly asked the employees about the location of video surveillance tapes. When the employees told the robbers that there were no such videotapes, the robbers indicated that they were taking the wallets so they would know where the employees lived, in the event that videotapes surfaced in

the future. JA 161, 178-79. The thieves took jewelry, including Rolex watches, diamonds, and other jewelry, with a total retail value in excess of $573,500. JA 254.

B. Events at the ATM in Springfield, Massachusetts

That same night, at approximately 10:00 p.m., two of the bank cards that had been owned by one of the robbery victims, Michael Turgeon, were used in five separate attempts to withdraw money from an automated teller machine ("ATM") at the Bank of Western Massachusetts in Springfield, Massachusetts. JA 307-12. Investigating officers obtained the ATM videotape that corresponded with the attempted transactions. JA 277-283. That videotape revealed an adult male, wearing a ski mask and a Timberland baseball hat, approaching the ATM on March 20, 2003, between 10:02 p.m. and 10:04 p.m. JA 1216A-1216V. Bank records confirmed that the man in the ski mask was attempting to use two of Michael Turgeon's bank cards. JA 308-12; Government's Exhibit ("GX") 17B. The evidence at trial confirmed that it takes approximately 30 minutes to travel from West Hartford, Connecticut, to Springfield, Massachusetts. JA 912-13.

C. Search of Carter's Vehicle and Residence

Several weeks after the Harstan's robbery in West Hartford, a jewelry store in Avon, Connecticut, was robbed by two men, both of whom were wearing ski masks and carrying firearms. That robbery was recorded on surveillance videotape, and the videotape was broadcast on local news stations. Following the broadcast, local

authorities were contacted by an anonymous caller who stated that he/she recognized one of the individuals in the robbery, despite the ski mask, as Kevin Carter, who was also known to the caller as "Black." JA 23-25; 60-62; 1244-45.

In June 2003, Windsor Police believed that Kevin Carter, who was also known to them by the street name "Black," was living at 98 Longview Drive in Windsor, Connecticut. On June 3, 2003, Windsor Police received a Failure to Appear warrant for Kevin Carter. JA 25-26. Equipped with that warrant, the Windsor Police set up surveillance at 98 Longview Drive on June 4, 2003, shortly after 7:00 a.m. JA 28-29. Within a matter of minutes, the defendant's wife, Sarah Carter, departed from the Longview Drive address. Almost two hours later, Kevin Carter also left, driving a car registered to Sarah Carter. JA 29-30.

Police officers stopped the car that Kevin Carter was operating, placed him under arrest pursuant to the Failure to Appear Warrant, and began an inventory search. JA 31-32. One of the officers found a marijuana cigarette in the ashtray of the vehicle and, thereafter, searched the remainder of the vehicle. JA 34. In the rear cargo area of the car, an officer located a Harstan's jewelry store shopping bag, made of paper. Inside that bag were three plastic bags, one inside the other, and also carrying the name "Harstan's Jewelry Store." Officers found a Waterford crystal clock inside the third plastic bag. JA 34-35; 321-24. The manager of the Harstan's jewelry store came to the Windsor Police Department where he identified the Waterford clock as one of the items that had

been stolen in the robbery on March 20, 2003. JA 185-90; 324; 346.

Based on the seizure of the clock, the police obtained a search warrant for Carter's house from a judge of the Connecticut Superior Court. JA 42-43. The officers then searched the 98 Longview Drive residence and found the following evidence: a silver colored revolver, with 20 rounds of ammunition, JA 402-03; various bank cards and business cards that belonged to victims of the Harstan's robbery, JA 359, 378-84; a business card from Canaly Buyers, a New York City diamond-district merchant, JA 326-27, 471-77; and a Timberland baseball hat. JA 347.

D. The Trial Evidence

The three robbery victims testified that both robbers had guns. Michael Turgeon described the gun that had been used as a silver colored "cowboy gun," that is, a revolver. JA 174-75; 200-01. Vito Sagbay, another employee, stated that the gun that he saw was "white." JA 214. He said that when the gun was pointed at him, he was able to see the bullets in the chamber. JA 215. Sagbay also testified that one of the robbers wore a green jacket. JA 214. Michael Turgeon testified that the gun, GX 2A, looked "exactly" like the gun that had been used in the robbery. JA 200-01

A representative from Paramount Headwear, a manufacturing company that manufactured baseball hats for the Timberland Company, testified that there were only about 3,302 Timberland baseball hats distributed in the United States that matched the hat found in the Carter

residence. JA 419-22. An FBI analyst, who testified as an expert witness at trial, identified characteristics on the Timberland baseball hat seen in the ATM videotape that corresponded to the Timberland baseball hat found in the Carter residence. JA 762-84.

Records from the Mohegan Sun casino in Montville, Connecticut, indicated that Kevin Carter appeared at the Mohegan Sun Casino at 11:32 p.m. on March 20, 2003.[2]

A Mohegan Sun Casino employee, Henry Graffeo, testified regarding records of Kevin Carter's gambling on the evening of March 20, 2003. Those cards, including GX 36B, make reference to Kevin Carter as a black male who, in the eyes of various dealers, was seen that night wearing a Timberland hat and a green jacket. JA 840-48.

Gary Kakorev, who had owned a jewelry operation in New York City between 2001 and late 2003, testified about the diamond merchant business card that had been located in the course of the June 4, 2003, search of Carter's house. GX 22. Kakorev identified the card as one that he had distributed from his business, Canaly Buyers. The back of this particular Canaly Buyers business card bore

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[2] A Windsor police officer testified that he drove the distance from the Springfield ATM to the Mohegan Sun Casino in about an hour and 13 minutes. JA 906-09. Thus, the jury could conclude that it was quite possible to travel from the Springfield ATM machine after the ATM transaction was concluded (at 10:04 p.m.) and arrive at the Mohegan Sun Casino, as did Kevin Carter, at 11:32 p.m.

the notation "10,000." Kakorev testified that he had written the figure "10,000" on the back of the card, and that it was the type of notation that he might make if someone had requested an appraisal from him, or perhaps a retail or wholesale sale estimate of a particular item. JA 476-79. Kakorev testified that he might also make such a notation if someone inquired as to how much Kakorev would pay to purchase a particular object. JA 477.

Charles Devorce, a cellmate of Carter's immediately following Carter's arrest on June 12, 2003, testified for the Government. Devorce testified that Carter had admitted to him that Carter had fenced jewels through a man who, in turn, was to fence the goods in Europe. JA 627-33.

E. Evidence of Carter's Sudden Acquisition of Cash After March 20, 2003

Through Mr. Graffeo, and Joseph Perry, a witness from the Foxwoods Casino in Ledyard, Connecticut, the Government established that Kevin Carter engaged in regular gambling at both the Foxwoods and Mohegan Sun Casinos.[3] However, those records also showed that Kevin Carter's gambling activity steadily diminished in the year 2003, at both casinos, until a point almost immediately after the robbery. After the robbery, Kevin Carter

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[3] Perry testified that, over an eleven-year period, Carter had bought chips at the Foxwoods Casino on 147 occasions, betting a total of over $70,000. JA 823-32; GX 37A. Graffeo testified that, during the two-year period prior to Carter's arrest on June 12, 2003, Carter bought chips on 188 occasions, losing more than $17,000 overall. JA 857-58.

appeared at both casinos with significant funds and proceeded to gamble with those funds, losing money overall, at both casinos. JA 830-31; 856-57. Government Exhibits 44 and 45 reflect that gambling history. A witness from the Connecticut Department of Labor testified that Kevin Carter did not appear to have any record of employment, at least insofar as the Connecticut Department of Labor was aware. JA 611-17.

Kevin Carter opened a savings account on March 29, 2003, using a $5,000 cash deposit to open the account. JA 657-63. Carter cleaned out the account between June 5 and June 10, 2003. JA 631; 657-63. The evidence established that when Carter opened the account, he did so using his son's Social Security number. JA 540-41.

F. The Effect on Interstate Commerce

All of the property sold by Harstan's Jewelry Store was manufactured outside Connecticut. Further, Harstan's Jewelry Store had numerous customers outside Connecticut. Mr. Turgeon testified that Harstan's made approximately $200,000 in annual sales to those customers. It took months for Harstan's Jewelry Store to receive an insurance check after the robbery, and so it also took months for Harstan's to restock its inventory after the robbery. JA 190-92. At least two credit cards taken in the robbery traveled in interstate commerce, and were used in attempted financial transactions, within two hours of the robbery. JA 293-313.

SUMMARY OF ARGUMENT

1. The district court correctly declined to suppress evidence seized from the defendant's car on three separate bases. First, the court found that the evidence was recovered pursuant to a valid inventory search. Second, the court found that the evidence was recovered in the course of a search incident to a lawful arrest. Third, the court concluded that evidence of contraband was in plain view in the vehicle, thus permitting a search of the entire vehicle under the "automobile exception" to the warrant requirement.

2. The district court did not abuse its discretion when it permitted testimony by an expert witness and admitted into evidence photographs prepared by that witness. The witness was properly qualified to testify about photographic evidence. In addition, the witness provided a sufficient foundation to justify the admission of the photographs. Even if the court had abused its discretion in admitting the expert testimony or the photographs, any arguable error was harmless since the exclusion of either the testimony or the photographs would not have substantially affected the outcome of the case.

3. The district court correctly concluded that, viewed in the light most favorable to the verdict, there was sufficient evidence of the robbery's effect on interstate commerce. Not only was all the stolen merchandise produced outside of Connecticut and then shipped into Connecticut, the store's inventory was not replenished until months after the robbery. In addition, the defendant himself took some stolen items across state lines immediately after the robbery and used those items in an attempt to carry out financial transactions.

ARGUMENT

I. The District Court Did Not Err in Declining to Suppress Evidence Seized in a Search of a Motor Vehicle

A. Relevant Facts

On January 7, 2005, the district court held a lengthy evidentiary hearing, and heard extended argument, on the defendant's motion to suppress evidence seized from his automobile. Following the hearing, the court denied the defendant's motion and supplemented that ruling with a 28-page written opinion filed on April 13, 2005. JA 1243-70. The Government presented testimony by Windsor Police Sergeant Christopher McKee, who supervised the arrest of the defendant. The defendant did not present testimony. JA 1244.

The district court, having heard the testimony of Sergeant McKee, made numerous findings of fact. JA 1244-49. The court found that in May 2003, following a jewelry store robbery in Avon, Connecticut, an anonymous phone caller to the Hartford Police stated that Kevin Carter, known to the caller as "Black," had carried out the Avon robbery. JA 1244-45. This tip led officers of the Hartford, Windsor, Avon and West Hartford Police Departments to focus on Carter's residence at 98 Longview Drive, in Windsor, Connecticut. Officers knew that Carter was also a suspect in a November 2002 jewelry store robbery in Vernon, Connecticut. JA 1245. A West Hartford officer, investigating the March 20, 2003, robbery at the Harstan's Jewelry Store, assisted in the investigation. *Id.*

On June 3, 2003, Windsor police received a warrant to arrest Kevin Carter, based on a failure to appear for a state court proceeding. JA 1246. Early on June 4, 2003, Windsor and Avon police[4] officers began surveillance of 98 Longview Drive in Windsor. JA 25-28, 1246. The surveillance began shortly before 7:00am. About twenty minutes later, Carter's wife drove away from the home. About two hours later, Carter drove away from the residence in a Ford Expedition sport utility vehicle. JA 29-30, 1247. Officers stopped Carter's car several blocks away from his residence. JA 31, 47.

One officer checked Carter's identity, handcuffed him, and placed him in a police cruiser. JA 1247. Since Carter was the only licensed driver of the car that had been stopped, and since he had been arrested pursuant to a lawful warrant,[5] Windsor Police policy required that Carter's vehicle be towed. JA 32. Sergeant McKee directed officers to begin an inventory search of the vehicle, pursuant to a written Windsor Police Department policy. JA 31-32; *see also* Government's Appendix ("GA") at 42. That policy requires that, after a custodial arrest of an operator of a motor vehicle, the vehicle must be towed. Before it can be towed, however, the officers must conduct a complete inventory search of the vehicle, including containers, luggage, boxes and bags in the vehicle. GA 38, JA 32-33. The officer must also complete

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[4] The Windsor Police were aware that Carter was a suspect in the jewelry store robbery in Avon, and for that reason the Avon Police were included in the Windsor investigation. JA 26-27.

[5] There has never been a challenge to the validity of the Failure to Appear warrant.

a Motor Vehicle Inventory Report. JA 1247-48. *See also* GA 43.

In the course of the inventory search, an officer immediately found a marijuana cigarette in the open ashtray in the front of the vehicle. JA 34, 68, 1247. Officers then found a pawn ticket in the front of the vehicle. JA 1247. The ticket referred to two men's rings with diamonds and a gold tennis bracelet with five diamonds. *Id*. Officers also found, in the rear cargo area of the vehicle, a black "Harstan's" bag which, itself, contained three black, plastic Harstan's bags that had been used to wrap up a Waterford crystal clock. JA 1247.

While the search was going on, the defendant was allowed to call his wife so that she could take custody of children who were in Carter's vehicle. JA 35. When she arrived, she also took custody of the vehicle that Carter had been operating, and drove it away. JA 36, 1248.

B. Governing Law and Standard of Review

An inventory search of seized property is a circumstance that is a "well-defined exception to the warrant requirement." *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 372-73 (1976) (recognizing inventory search exception in context of seized automobile). An inventory-search policy may permissibly confer authority on the searching officer to open closed containers. *Florida v. Wells*, 495 U.S. 1, 4 (1990); *United States v. Thompson*, 29 F.3d 62, 65 (2d Cir. 1994).

Alternatively, a search incident to arrest permits officers to search the area into which an arrestee might

reach in order to grab weapons or evidence. *Chimel v. California*, 395 U.S. 752, 762-63 (1969). As a contemporaneous incident of an arrest of an individual occupying an automobile, a search incident to arrest includes the authority to search the passenger compartment of an automobile, and containers therein, including "luggage, boxes, *bags*, clothing, and the like." *New York v. Belton*, 453 U.S. 454, 460-61 n.4 (1981) (emphasis added).

Finally, the "plain view" exception to the warrant requirement permits officers to seize objects whose incriminating character is immediately apparent, if the officers have a lawful right of access to the object. *See Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). Once such evidence is seized, the "automobile exception" to the warrant requirement permits officers to carry out a "probing search" of the entire vehicle, including compartments and containers in the vehicle, so long as the search is supported by probable cause. *California v. Acevedo*, 500 U.S. 565, 569-70 (1991); *see also Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

"A district court's factual findings underlying its denial of a motion to suppress are reviewed for clear error and viewed in the light most favorable to the government, while the legal issues the court addresses are reviewed de novo." *United States v. Davis*, 326 F.3d 361, 365 (2d Cir. 2003); *see also United States v. Mendez*, 315 F.3d 132, 135 (2d Cir. 2002). When, as here, the district court premised its decision on three separate grounds, this Court "may affirm the denial of the suppression motion on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did

not rely." *United States v. Tropiano*, 50 F.3d 157, 161 (2d Cir. 1995) (internal quotation marks omitted).

C. Discussion

1. The Inventory Search

The district court properly concluded that the search was permissible as an inventory search. The court recognized that an inventory search is a well-defined exception to the warrant requirement; it is not based on probable cause but is, instead, an incidental administrative step following arrest and preceding incarceration. JA 1253. It serves to protect the property while it is in police custody, it protects against claims of lost or stolen property, and it guards the police from danger. JA 1253; *see Colorado v. Bertine*, 479 U.S. 367, 372 (1987); *Mendez*, 315 F.3d at 137. JA 1253. Police conducting an inventory search may open closed containers if they do so pursuant to standardized criteria or established routine. *Wells*, 495 U.S. at 4. In this case, established police procedure required that the vehicle be towed, since no one was at the scene to take custody of the vehicle. JA 1254, 1254 n.2. Established policy required police to search the entire vehicle, including all compartments, containers, bags, boxes, and the trunk of the vehicle. JA 32-33, 1254.

The district court, adhering strictly to clear precedent of the United States Supreme Court and this Court, correctly denied the motion to suppress on the basis that the evidence was recovered in the course of a legitimate inventory search. JA 1252-55.

The defendant contends that the inventory search was a "ruse" following "the investigatory stop." Defendant's

Brief ("Def. Br.") at 17. The defendant's initial error is his assertion that the police conducted an "investigatory stop." The record is undisputed that the police stopped Carter to effect an arrest pursuant to a valid warrant. JA 27-31; 1246-47. The defendant further argues that the search was not necessary because Carter was allowed to call his wife to come and recover the vehicle. Def. Br. At 17-18. Again, however, this claim is not supported by the evidence. Officers had seen Carter's wife drive away from the residence nearly two hours before Carter departed. JA 1246-47. Carter was allowed to summon his wife so that she could take custody of her children, not the car. JA 1248. Officers had no way of knowing whether she would respond, how long it would take her to arrive, and they certainly had no way of knowing whether she would elect to take custody of the defendant's car, in view of the fact that she was operating her own car at the time she was called. JA 35-36, 47. However, she did ask for permission to take the defendant's car, and that permission was granted by the police, but at that point the inventory search was complete. JA 35.[6] The defendant complains that no

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[6] Although Sergeant McKee testified that when Sarah Carter arrived, "We had completed the search of the vehicle," JA 35, the court stated, in its ruling, that "Sarah Carter arrived on the scene as the police *were completing* the search of the vehicle." JA 1248 (emphasis added). Even if the court was of the view that the search was not "completed" when Sarah Carter arrived, the denial of the motion to suppress was nonetheless correct. The district court correctly noted, quoting *Bertine*, 479 U.S. at 375, that "when a legitimate search is under way, and when its purpose and limits have been precisely defined, nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of (continued...)

inventory report was ever prepared, Def. Br. at 18, but the written policy does not require a written inventory report unless the vehicle is towed, GA at 43. In this case, the defendant's wife was allowed to take the vehicle so it did not have to be towed, and therefore no written inventory report was required.

In summary, the district court did not find the inventory search to be a "ruse," but rather a legitimate search carried out pursuant to established police department policy. Those conclusions were based on a detailed factual record and a careful examination of those facts. On this basis, alone, the court correctly denied the motion to suppress the evidence seized from the defendant's vehicle.

2. Search Incident to Arrest

Even though the district court denied the motion to suppress based upon the "inventory search" exception to the warrant requirement, the court also found the search to be valid based upon the fact that it was a search incident to arrest. JA 1255. The "search incident to arrest" exception to the warrant requirement is the subject of *New York v. Belton*, 453 U.S. 454 (1981). *Belton* provides that when police arrest the occupant of a vehicle, they may, contemporaneously with the arrest, search the passenger compartment of the vehicle, and any containers therein, including "'closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing,

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[6] (...continued)
a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." JA 1254 n.1.

and the like.'" JA 1255-56 (quoting *Belton*, 453 U.S. at 460, 461 n.4).

The district court correctly noted that the arrestee need not be in the automobile, or even next to it, when the search is carried out. *See Thornton v. United States* , 541 U.S. 615, 124 S. Ct. 2127, 2130-31 (2004) (arrestee handcuffed and in squad car during search); *Belton*, 453 U.S. at 456 (arrestee handcuffed and standing in road during search). JA 1256.

Although the authority granted in *Belton* does not extend to a search of a trunk, the district court approved the search in this case because the defendant's vehicle did not have a trunk; instead it had a rear cargo area to which one could gain access from inside the vehicle. JA 1257. The district court relied on authority from the First, Seventh, Eighth, and Tenth Circuits for the proposition that the "passenger compartment" language in *Belton* includes the entire interior of the vehicle. JA 1257-58. *United States v. Barnes*, 374 F.3d 601, 604 (8th Cir. 2004) ("passenger compartment" includes area reachable by occupants without leaving vehicle), *cert. denied*, 125 S. Ct. 938 (2005): *United States v. Arnold*, 388 F.3d 237, 240-41 (7th Cir. 2004) (upholding seizure from trunk where armrest opened to trunk and was accessible from passenger compartment); *United States v. Poggemiller*, 375 F.3d 686, 688 (8th Cir. 2004) (upholding search of trap door compartment that led to trunk), *cert. denied*, 125 S. Ct. 1614 (2005); *United States v. Olguin-Rivera*, 168 F.3d 1203, 1205-06 (10th Cir. 1999) (concluding that entire interior of sport utility vehicle constitutes "passenger compartment"); *United States v. Doward*, 41 F.3d 789, 793-94 (1st Cir. 1994) (focus is on whether area searched can be reached without exiting the vehicle, not whether it

is likely that, in a given case, such reaching is possible); *United States v. Henning*, 906 F.2d 1392, 1396 (10th Cir. 1990) (upholding search of Chevrolet Suburban following arrest of driver); *United States v. Nunez*, 1999 WL 298628, at *2 (S.D.N.Y. May 12, 1999) (upholding search of van). JA 1257-58. In addition, *Belton* has been understood to permit the search of the rear compartment of a hatchback car or a station wagon. *United States v. Caldwell*, 97 F.3d 1063, 1067 (8th Cir. 1996).

The common thread in these cases, which address the meaning of the phrase "passenger compartment," is their focus on whether the search was of the interior of the vehicle, accessible by an occupant without either exiting the vehicle or an elaborate dismantling of the vehicle. In this case, the defendant operated a Ford Expedition, a sport utility vehicle with a cargo area and without a trunk. Thus, the marijuana in the ashtray of the front compartment and the stolen Waterford clock in the cargo area were both accessible to occupants of the vehicle without exiting the vehicle and both, therefore, were permissibly seized within the scope of *Belton*. The district court held: "Defendant was driving a Ford Expedition, a sport utility vehicle without a trunk in the traditional sense, and anything in the passenger compartment, including the cargo area, would have been accessible to the occupants of the vehicle and 'generally, even if not inevitably,' within the reach of the person arrested." JA 1259 (quoting *Belton*, 453 U.S. at 460). Consequently, the district court correctly denied the motion to suppress on this second, alternative ground. JA 1259.

The defendant does not distinguish the authority in support of the district court's ruling, i.e., cases analyzing the Supreme Court's rule regarding automobile searches.

Instead, he insists that the focus must be on whether the defendant had access to the area searched. Def. Br. at 19-20. In support of that argument, however, he relies exclusively on cases involving non-motor-vehicle searches. Def. Br. at 20. *United States v. Blue*, 78 F.3d 56, 60-61 (2d Cir. 1996) (search in an apartment); *United States v. Gorski*, 852 F.2d 692, 695 (2d Cir. 1988) (search of a bag at a bus station); *United States v. Berenguer*, 562 F.2d 206, 210 (2d Cir. 1977) (search in an apartment); *United States v. Mapp,* 476 F. 2d 67, 80-81 (2d Cir. 1973) (search of a closet in an apartment).

The Supreme Court in *Belton* addressed the special issues presented in motor vehicle searches that do not exist elsewhere. By authorizing a complete search of the passenger compartment of a motor vehicle, incident to arrest, the Supreme Court gave clear direction to police officers. 453 U.S. at 459-60; *see also Thornton*, 124 S. Ct. at 2132. That clear direction would be undercut by drawing distinctions based upon the arm length of the occupant of a given vehicle or among various sedans, sport utility vehicles, vans, or any other make or model of personal automobile.[7] In this case the search was limited to a passenger compartment in that the items were seized from an area accessible to occupants of the vehicle without either exiting the vehicle or dismantling its interior. The district court correctly denied the motion to suppress on this alternative ground.

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[7] The dissent in *Belton* read the majority opinion to permit a search incident to arrest in areas and containers the arrestee "could not possibly reach at the time of arrest." *Id.* at 466.

3. The Automobile Exception

The district court concluded that the automobile search was permissible for yet a third, alternative, reason. The court found, correctly, that a marijuana cigarette was in the ashtray at the front of the automobile, within arm's reach of the driver, and within plain view of the searching officer. JA 1260-61; 34 ("[T]he 'incriminating character' of the marijuana cigarette in the open ashtray was 'immediately apparent' to the officers . . . .") (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)). Since the incriminating character of the marijuana was immediately apparent, the officers had a right to seize it.. *Dickerson*, 508 U.S. at 375; JA 1260-61.

Pursuant to the "automobile exception" to the warrant requirement, the officers, having developed probable cause to believe that the vehicle contained evidence of a crime, had authority to search the entire vehicle. The "automobile exception" exists because a vehicle can be moved quickly out of the locality or jurisdiction in which the warrant would otherwise be sought.[8] JA 1261 (citing and quoting *California v. Acevedo*, 500 U.S. 565, 569 (1991); *Carroll v. United States*, 267 U.S. 132, 153 (1925)). Individuals, the Supreme Court has held, have a lesser expectation of privacy in their automobiles. *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (probing search of compartments and containers within automobile permissible if search is

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[8] Which, of course, occurred in this case. Sarah Carter arrived surprisingly quickly on the scene and, rather than take the children away in her own vehicle, sought and received permission to drive away using the defendant's vehicle. JA 35-36.

supported by probable cause); *United States v. Gagnon*, 373 F.3d 230, 235 (2d Cir. 2004) (probable cause supports warrantless search of every part of vehicle and its contents, including containers and packages); *United States v. Gaskin*, 364 F.3d 438, 457 (2d Cir. 2004) (fair probability that contraband will be found constitutes probable cause). JA 1261-62. The district court correctly denied the motion to suppress the automobile search on this third, alternative, ground.

In summary, the defendant acknowledges that the cargo area of sport utility vehicles is an area in which a search is generally permitted, pursuant to the "automobile exception." Def. Br. 20-21. However, he seems to argue that the "automobile exception" should be limited to areas solely within the defendant's physical reach. This suggestion is unworkable for many reasons, not the least of which is that the Supreme Court, and this Court, have already spoken on this issue and have not imposed such an arbitrary limitation. *See* JA 1261 and cases cited therein. Second, the Supreme Court tolerates searches pursuant to the automobile exception, when probable cause has been developed, because a vehicle, together with its evidence, can be easily transported. *See United States v. Ross*, 456 U.S. 798, 825 (1982) (holding that police may search every part of vehicle and containers within if officers have generalized belief that vehicle contains contraband); *see also United States v. Arias*, 923 F.2d 1387, 1390 (9th Cir. 1991) (upholding warrantless search of closed boxes found in trunk of vehicle). The analyses in the foregoing cases, unlike *New York v. Belton*, are totally unrelated to the notion that some person might have access to materials within their hypothetical reach, or even whether there was a person in the vehicle at all at the time of the search. If police identify contraband in plain view, which is

sufficient to constitute probable cause that there is evidence of a crime in the vehicle, the automobile exception authorizes a thorough search of the vehicle, regardless of whether the vehicle was occupied at the time. *Lebron*, 518 U.S. at 940; *Acevedo*, 500 U.S. at 577; *Gagnon*, 373 F.3d at 235. The district court correctly denied the motion to suppress evidence seized from the automobile on this third, alternative, basis.

II. The District Court Did Not Abuse Its Discretion in Admitting Expert Testimony and Photographs into Evidence

A. Relevant Facts

The Government introduced, at trial, a surveillance videotape recording, generated at a Bank of Western Massachusetts ATM. JA 277-78. The tape, GX 16-A, included recordings made on March 20, 2003, the day of the Harstan's robbery. JA 278-82. The tape showed a man, wearing a mask and a Timberland hat, using the ATM at 10:02 p.m. on March 20, 2003. JA 280. On June 4, 2003, police officers searched the defendant's home and found, among other items, a Timberland baseball hat. GX 19. JA 345-47.

The Government introduced testimony from James Smith, an analyst employed by the Federal Bureau of Investigation. JA 677. Smith holds a Bachelor of Arts degree in photography and a Master of Arts degree in forensic science. A sixteen-year employee of the FBI, he trained for two and a half years before assuming his position as photographic technologist. JA 678. His responsibilities include video enhancement, image manipulation detection, height comparisons for images,

and comparisons of objects in photographs with known objects. JA 678. He is a member of the American Academy of Forensic Sciences and the National Technical Investigators Association. JA 678-79.

In this case, Smith testified on the topics of reverse projection photogrammetry (calculating the actual size of objects that appear in a photograph), JA 679-80, and photographic comparison (comparing, e.g., an item of clothing seen on a surveillance tape with an item of clothing later provided to the examiner). JA 715-16. Prior to the trial in this case, Smith had been qualified as an expert, in both areas, in both state and federal courts. JA 681, 716. He had conducted reverse projection photogrammetry examinations on hundreds of occasions, JA 680, and had engaged in hundreds of photographic comparisons. JA 715-16. He had testified in court approximately twenty-five times. JA 681. The district court found Smith qualified to testify as an expert in photogrammetry, JA 682-86, and as an expert in photographic comparison. JA 716, 761-64.

The Government introduced a compact disk with a digitized portion of GX 16A, the ATM videotape. The compact disk, GX 16B, was a true and accurate copy of a portion of GX 16A, as far as Smith could determine. JA 688. However, the digitized version was used only as a demonstrative aid. It was not used by Smith to conduct his analysis. JA 693. The analysis was based, instead, on GX 16A.[9] Smith also made photographs from the original

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[9] The Government did not play 16A for the jury because it was a time-lapse tape that required specialized equipment (continued...)

ATM videotape, which were introduced as GX 32A through 32U. The photographs were admitted without objection. JA 697.

Smith began his photogrammetry analysis by traveling to the ATM in Massachusetts where he made another videotape, using the same camera, at the same angle, that resulted in the videotape generated on March 20, 2003. JA 699-701. The defendant objected to the method Smith used to confirm that the new videotape was made using the same camera and camera angle that produced the March 20, 2003, videotape. The court overruled the objection. JA 708-09.

Smith examined the ATM videotape and focused on an image of the masked person, at a point where Smith could see the top of the masked person's hat. JA 709-10. Then, having confirmed that he was using the same ATM camera and camera angle that were in place on March 20, 2003, he placed a height chart at the same location where the masked person had been photographed in front of the ATM. JA 710. In so doing, and by fading back and forth between the two videotapes, Smith determined that the person seen in the videotape was approximately five feet, nine inches tall, plus or minus one inch. JA 710-15.[10]

Smith also compared the Timberland baseball hat found in Carter's house with the images of the Timberland baseball hat seen in the ATM videotape. JA 721. To make

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[9] (...continued)
that was not readily available. JA 690-93.

[10] The Government had introduced evidence that Carter is five feet, eight inches in height. JA 453-54.

the comparison, he followed a specific protocol, one which drew upon his training in photography and which also drew upon his training in clothing manufacture. JA 718.[11] Smith's method entailed a side-by-side comparison of the object depicted in the photograph with the object itself, looking for "class characteristics" (characteristics shared by a group of objects), "identifying characteristics" (characteristics that assist in identifying a particular object, such as, e.g., a tear in a pair of blue jeans), and "unique characteristics" (characteristics that are unique to a single object, such as a vehicle identification number). JA 718-20. In making such comparisons, Smith may, depending on the circumstances presented, use a magnifying glass or a computer to zoom in on a particular characteristic. JA 720-21.

The bulk of Smith's comparison was between the seized Timberland hat and the ATM videotape, but he also made comparisons to digitized images taken from the ATM videotape. JA 724. However, he could have made his comparison without the digitized images. He made those images with a computer program that converts the analog signal from the videotape to a digital picture. JA 726. If the software program were not working correctly, that fact would be obvious. *Id.* Smith testified about the method he used to produce the digitized images, and stated that he had made such images hundreds of thousands of times. JA 728. There has never been an issue regarding the accuracy of the images he has produced. JA 728-29. In making the digitized images, Smith did nothing to alter

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[11] That training included tours of manufacturing plants, including hat manufacturing plants. JA 718.

the content of those images. JA 739. He adjusted brightness, contrast and sharpness, as one might do with a television set, but his goal was to make true and accurate copies of the images that were shown on the videotape. JA 739-40. He did not add to, or otherwise alter, the images. JA 755. He testified that adjusting brightness, contrast and sharpness does not change or alter the image. JA 756-57. He illustrated the point by stating that adjusting the brightness of a TV movie does not change the information in the movie. JA 758. The district court overruled the objection to the use of the digitized images. JA 761-62.

Smith testified that there are numerous common class and identifying characteristics to be seen when comparing the Timberland baseball hat depicted on the ATM videotape and the Timberland hat seized from the defendant's home. He illustrated those common characteristics with charts that were introduced to the jury. JA 764-85; 1216B-1216BB. A common identifying characteristic, for example, is a broken stitch in the Timberland logo that is embroidered on the hat seized from the defendant's residence. That same broken stitch can be seen on the Timberland hat depicted in the ATM videotape images. JA 769-771; JA 1216N, 1216Q-V, 1216Y.

B. Governing Law and Standard of Review

1. Expert Testimony

The decision of whether to admit expert testimony is vested in the broad discretion of the trial court. The district court has a "gatekeeping responsibility" under *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), to ensure that the proffered expert witness testimony meets the requirements of Fed. R. Evid. 702. The decision to admit expert testimony will be sustained unless "manifestly erroneous." *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004); *United States v. Tapia-Ortiz,* 23 F.3d 738, 740 (2d Cir. 1994); *see also United States v. Onumonu*, 967 F.2d 782, 786 (2d Cir. 1992) (same). The trial court has broad discretion to admit expert testimony if it finds that such testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. *United States v. Feliciano*, 223 F.3d 102, 120 (2d Cir. 2000). Expert testimony is admissible to assist the jurors in understanding an area that they, as lay persons, are likely not to understand. *United States v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985).

Photogrammetry is a well-established field of science and is a proper subject of expert testimony. *United States v. Quinn*, 18 F.3d 1461, 1464-65 (9th Cir. 1994). Further, this Court has approved the admission of testimony by an expert in photographic comparison. *United States v. Brown*, 511 F.2d 920, 924 (2d Cir. 1975) (comparison of bank surveillance photographs with photographs of defendant "clearly proper expert proof"); *see also United States v. Snow,* 552 F.2d 165, 167 (6th Cir. 1977)

(affirming admission of comparison evidence); *United States v. Alexander*, 816 F.2d 164 (5th Cir. 1987) (reversing exclusion of comparison evidence).

2. Photographic Evidence

The admission of photographic evidence is governed by Fed. R. Evid. 901, which provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). Rule 901 does not erect a particularly high hurdle. *Id.* The proponent need not rule out all possibilities inconsistent with authenticity, nor need the proponent prove beyond any doubt that the evidence is what it purports to be. *Id*. (citing *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999)). Rule 901 requirements are satisfied if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification. *Id.* The trial court has broad discretion in determining whether an item of evidence has been properly authenticated, and this Court will review its ruling only for abuse of discretion. *Id*.

C. Discussion

1. Expert Testimony

The defendant argues that the Government introduced an expert who improperly gave a height estimate of the man depicted in the ATM video. The defendant bases his objection on the fact that the expert was unable to testify

how the computer "digitized" the photographs that he used. Def. Br. at 23. The defendant refers to the witness as a "so-called" expert and claims that the Government "did not offer a scintilla of evidence" on whether the expert's methodology used to create the "digitally altered photographs" was valid. Def. Br. at 23-24.

The defendant errs, first, in claiming that the Government did not offer a "scintilla" of evidence regarding the validity of Smith's methodology. The Government established that Smith estimated the height of the man in the ATM videotape by following a specific protocol. His protocol included traveling to the actual ATM that was involved. Once there, he examined the ATM videotape and confirmed that he was using the same camera, at the same angle, that made the videotape on March 20, 2003. He placed a height chart at a location that matched the one where he could see, in the original ATM videotape, the top of the hat worn by the man in the videotape. He then compared the two videotapes to determine that the person in the videotape was approximately five feet, nine inches tall. JA 699-715.

The witness, Peter Smith, never agreed that his height estimate was based on "altered or enhanced images." The defendant did not introduce any evidence that the images Smith either created or relied on had been "altered." Since the height estimate was not based on the use of "digitally altered images," the methodology to which Smith testified provided a more than sufficient foundation to permit him to give his opinion as to the height of the man in the videotape. The district court did not abuse its discretion in admitting this testimony. *See, e.g., Quinn*, 18 F.3d at

1464-65; *United States v. Ferri*, 778 F.2d 985, 989 (3d Cir. 1985) (comparison of shoe impressions); *United States v. Rose*, 731 F.2d 1337, 1346 (8th Cir. 1984) (comparison of shoe prints); *United States v. Sellers*, 566 F.2d 884, 886 (4th Cir. 1977) (defendant's expert compared defendant's features with person in surveillance photo); *United States v. Cairns*, 434 F.2d 643, 644 (9th Cir. 1970) (FBI specialist testified as an expert, comparing bank surveillance photographs with photographs of defendant).

2. Photographic Evidence

The defendant argues that Federal Rule of Evidence 901 requires authentication of evidence as a precedent to its admission, and that Smith "had little or no comprehension of the methodology used to construct the digitally altered images; he was similarly incompetent to authenticate altered images given his lack of knowledge about how the images were created." Def. Br. At 24-25.

The defendant appears to be attacking the digital photographs that Smith made from the ATM videotape and which he used, in part, to compare the Timberland hat seen in the ATM videotape with the hat recovered from Carter's residence. Again, however, the defendant cannot -- and does not -- cite any evidence that supports his claim that the digital photographs were "digitally altered."

The defendant had an extended opportunity to conduct voir dire on this issue. Smith made clear that the digital images were adjusted for brightness, contrast, and sharpness, but he never changed or altered the content of the image. JA 739-58. Smith explained exactly how the

images were made, JA 726; he testified that he had made such images hundreds of thousands of times, JA 728; and he testified that if the software program he used did not work correctly, that fact would be immediately obvious, JA 726. The defendant has never identified how the depictions were inaccurate or how he was prejudiced by their introduction. *See United States v. Nolan*, 818 F.2d 1015, 1019 (1st Cir. 1987) (defendant offered no expert evidence at trial that images were computer generated). Carter's opportunity to make such a showing, if he had wished to do so, was unimpeded by the district court. Finally, he was free, if he had wished to do so, to argue to the jury that the photographs were somehow inaccurate.

The essence of the defendant's argument is that Smith had "little or no comprehension of the methodology used" to create the digital images, and so he was purportedly incompetent to authenticate them. Def. Br. at 25. However, there is no such requirement. One commentator has observed, in pertinent part, that

> a photograph is viewed merely as a graphic portrayal of oral testimony . . . the witness who lays the foundation need not be the photographer, nor need he know anything of the time, conditions, *or mechanisms* of the taking. Instead he need only know about the facts represented or the scene or objects photographed, and once this knowledge is shown he can say whether the photograph correctly and accurately portrays these facts.

2 MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 214, at 13 (4th ed. 1992) (emphasis added). To the

extent that Smith acknowledged having improved the brightness, contrast and sharpness of the images, JA 739-40, those adjustments do not make the images inadmissible. *See United States v. Diaz,* 176 F.3d 52, 82 (2d Cir. 1999) (admission of photograph approved after witness acknowledged omission from photograph); *United States v. Dombrowski*, 877 F.2d 520, 524-25 (7th Cir. 1989) (photograph properly admitted despite variation in lighting). The district court did not err, let alone abuse its discretion, in admitting the computer-generated photographs.

3. Harmless Error

Even assuming *arguendo* that the district court erred in admitting the expert testimony or the digital photographs, any such error would be harmless beyond a reasonable doubt. *See* Fed. R. Crim. P. 52(a); *United States v. Dukagjini*, 326 F.3d 45, 61-62 (2d Cir. 2003) (reversal is necessary only if non-constitutional error in admitting evidence had a "'substantial and injurious effect or influence in determining the jury's verdict'") (quoting *United States v. Castro*, 813 F.2d 571, 577 (2d Cir. 1987)). The subject of photographic comparison, and the height estimate given by Smith, are more readily comprehensible to a jury than other fields of forensic analysis. *Cf. United States v. Tarricone*, 21 F.3d 474, 476 (2d Cir. 1993) (documents sometimes permit analysis by jury without expert). Thus, the jury was made fully aware of the methodology used by Smith and the defendant had an extended opportunity to cross-examine Smith regarding that methodology. JA 785-816. The jury had ample

opportunity to carefully scrutinize the basis for Smith's opinions.

Finally, Smith's testimony was relevant to proving Carter's guilt, but it was by no means the critical evidence connecting him to the crime. When Carter was arrested, he was in possession of a Waterford crystal clock stolen in the robbery, which was wrapped in "Harstan's" bags. JA 34-35. A search of his residence produced credit cards that had been stolen from the jewelry store employees during the robbery, a Timberland hat, and a silver-colored revolver like the one used in the robbery. The jurors could see, without help from Smith, that the masked man in the ATM videotape wore a Timberland baseball hat; a Government witness testified that relatively few Timberland hats like the one in the ATM videotape had been sold in the United States, and records from the Mohegan Sun casino indicated that Carter wore a Timberland hat when he was at the casino a few hours after the robbery. The district court denied Carter's Motion for Judgment of Acquittal, and in so doing, marshaled the varied and significant evidence against him. JA 1219-23. In the course of that aspect of the ruling, the district court devoted but a single sentence to Smith's testimony. JA 1221. In the face of significant evidence of Carter's guilt, wholly unrelated to Smith's testimony, any error in admitting that testimony was harmless. *See Dukagjini,* 326 F.3d at 62 (focus is on the importance of the witness's testimony and the overall strength of the case); *United States v. Esieke*, 940 F.2d 29, 36 (2d Cir. 1991).

III. The District Court Correctly Concluded That The Government Introduced Sufficient Evidence of the Robbery's Effect on Interstate Commerce

A. Relevant Facts

The evidence showed an impact on interstate commerce in four different ways: 1) Harstan's purchased all of its inventory in interstate and international commerce; 2) the business sold substantial quantities of its inventory to interstate customers; 3) Carter, himself, transported at least some of the stolen property in interstate commerce immediately after the robbery; and 4) Carter told a cell mate that he believed the stolen property was to be fenced, ultimately, internationally.

Michael Turgeon, the manager of Harstan's Jewelry Store, testified regarding the impact that the robbery had on interstate commerce. In addition to the fact that Harstan's purchases all of its merchandise from interstate and international sources, it sells $200,000 worth of products to interstate customers. JA 190-92. Further, after the robbery Harstan's was unable to fully restore its inventory for months. JA 192.

There was clear evidence that bank cards stolen in the robbery were taken in interstate commerce on the night of the robbery (from Connecticut to Massachusetts, and then back to Connecticut). While in Massachusetts, two of those cards were the subject of attempted financial transactions at an ATM in Springfield. JA 293-313. As has been discussed, the Government established from the

ATM videotapes that Carter made those attempted transactions. One of the transactions attempted at the ATM on March 20, 2003, involved an electronic transmission from Springfield, Massachusetts, to a bank authorization center in Omaha, Nebraska. JA 582-88. The foregoing evidence confirms that at least some of the contents of the wallets belonging to two Harstan's employees, stolen during the robbery on March 20, 2003, were transported within two hours in interstate commerce. Finally, Charles Devorce testified that Carter confessed to him that Carter had a connection who, Carter believed, fenced the stolen jewelry in Europe. JA 629, 633. The defendant did not challenge Devorce's testimony. JA 634.

B. Governing Law and Standard of Review

Carter argues to this Court, as he did unsuccessfully to the trial court on his motion for a judgment of acquittal, JA 1237-41, that the evidence was legally insufficient to prove that the robbery affected interstate commerce. A reasonable and rational trier of fact could -- and did -- find the evidence legally sufficient to prove that Carter is guilty of violating 18 U.S.C. § 1951. Further, that evidence makes clear that Judge Burns correctly denied Carter's motion for judgment of acquittal. JA 1217-42.

It is firmly established that, in challenging the sufficiency of the evidence to support his conviction, a defendant bears a very heavy burden. *See, e.g.*, *United States v. Zhou*, 428 F.3d 361, 369 (2d Cir. 2005); *United States v. Bicaksiz*, 194 F.3d 390, 398 (2d Cir. 1999); *United States v. Puzzo*, 928 F.2d 1356, 1361 (2d Cir. 1991). In reviewing such a challenge, this Court must

draw every inference in the Government's favor. *See, e.g., United States v. Santos,* 425 F.3d 86, 96 (2d Cir. 2005); *United States v. Tubol*, 191 F.3d 88, 97 (2d Cir. 1999) (court "must 'view the evidence, whether direct or circumstantial, in the light most favorable to the government, crediting every inference that could have been drawn in its favor.'") (quoting *United States v. Maher*, 108 F.3d 1513, 1530 (2d Cir.1997) (internal quotation marks and citation omitted); *United States v. Rahman*, 189 F.3d 88, 122 (2d Cir. 1999); *Puzzo*, 928 F.2d at 1361.

Further, this Court "must affirm defendant's conviction if, 'viewing all the evidence in the light most favorable to the prosecution, [it] find[s] that '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Bala*, 236 F.3d 87, 93 (2d Cir. 2000) (quoting *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997) (citations omitted) (emphasis in original). Pieces of evidence must be viewed in conjunction and not in isolation. *See, e.g.*, *Zhou*, 428 F.3d at 369-70; *Tubol*, 191 F.3d at 97; *United States v. Podlog*, 35 F.3d 699, 705 (2d Cir. 1994); *United States v. Matthews*, 20 F.3d 538, 548 (2d Cir. 1994). While a conviction will not be upheld on "a leap of faith, not logic, and [without] evidentiary basis[,]" *United States v. Pickney*, 85 F.3d 4, 7 (2d Cir. 1996), this Court will "defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998); *see also Zhou*, 428 F.3d at 370. These principles apply whether the evidence being reviewed is direct or circumstantial. *See Glasser v. United*

States, 315 U.S. 60, 80 (1942); *United States v. Valenti,* 60 F.3d 941, 945 (2d Cir. 1995). Finally, the issue of the weight of the evidence is a matter for argument to the jury, not for a post-verdict challenge to the sufficiency of the evidence. *See Matthews*, 20 F.3d at 548.

C. Discussion

Section 1951 provides, in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of an article or commodity in commerce, by robbery, or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section [is guilty of a crime].

The defendant contends that the Government offered "no evidence" of unlawful obstruction of interstate commerce and "no evidence" of a potential effect on interstate commerce. Def. Br. at 28.

Following the Supreme Court's lead, this Court and the other courts of appeals have uniformly interpreted the Hobbs Act to reach the activities of even the smallest local enterprises. *See*, *e.g.*, *United States v. Jones*, 30 F.3d 276, 285 (2d Cir. 1994) (local drug business); *United States v. Calder*, 641 F.2d 76, 78 (1981) (restaurant selling products from New Jersey and Canadian beverages); *United States v. Gambino*, 566 F.2d 414, 418-19 (2d Cir. 1977) (private garbage collection in the Bronx); *United States v. Augello*, 451 F.2d 1167, 1169-70 (2d Cir. 1971) ("Happy Burger"

drive-in restaurant in Brooklyn with meat purchased in New Jersey).

Congress' use of the "any way or degree" language reinforces the conclusion that it meant the Hobbs Act to encompass all activity, no matter how small, that falls within the ambit of constitutionally permissible regulation. As the Supreme Court has held, Congress' use of the phrase "affecting interstate commerce," demonstrates its intent "to exercise its full power under the Commerce Clause . . . ." *Russell v. United States*, 471 U.S. 858, 859 (1985); s*ee also NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam) (by using phrase "affecting commerce," Congress intended to exercise "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause") (emphasis omitted).

This Court specifically held, in *Jones*, 30 F.3d at 285, that the Hobbs Act applies when assets are depleted, "thus affecting [the] ability to purchase a commodity that travels in interstate commerce." *See also United States v. Wilkerson*, 361 F.3d 717, 729-31 (2d Cir. 2004) (two robbery victims, who were held up in a basement of a building, had operated an informal landscaping business; $400 that had been taken from them met interstate commerce nexus because, even though men had planned to use the money to buy landscaping supplies from an in-state retailer, that retailer purchased its goods from out-of-state wholesalers); *United States v. Elias,* 285 F.3d 183, 185, 188-89 (2d Cir. 2002) (interstate nexus requirement satisfied, in case involving $1,400 theft from grocery store, because victim store sold beer that had been brewed in Mexico and the Dominican Republic, and also sold fruit

that had been grown in Florida and California); *United States v. Mapp*, 170 F.3d 328, 336 n.13 (2d Cir. 1999) (jurisdictional nexus satisfied when assets of delicatessen were stolen and delicatessen had sold goods that had been manufactured in Colorado, Wisconsin, and Holland).

Although robberies "are not within the scope of the Hobbs Act absent a nexus with interstate (or foreign) commerce, the Act 'speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce.'" *United States v. Arena*, 180 F.3d 380, 389 (2d Cir. 1999) (quoting *Stirone v. United States*, 361 U.S. 212, 215 (1960)); *see also Evans v. United States*, 504 U.S. 255, 263 n.12 (1992). Since the Act prohibits the specified conduct if it affects commerce "in any way or degree," 18 U.S.C. § 1951(a), this Court has repeatedly held that the burden of proving such a nexus is "de minimis." *United States v. Shareef*, 190 F.3d 71, 74 (2d Cir. 1999); *Arena*, 180 F.2d at 389; *United States v. Farrish*, 122 F.3d 146, 148 (2d Cir. 1997); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997).

In *Shareef*, a defendant was convicted of extortion and attempted extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951. On appeal, he contended that the Government failed to prove the interstate commerce element of the Hobbs Act offense. 190 F.3d at 73. This Court affirmed the well-understood proposition that the burden of proving a Hobbs Act nexus is de minimis. *Id.* at 75. Quoting *Arena*, 180 F.3d at 389, the *Shareef* Court noted that "[e]ven a potential or subtle effect on commerce will suffice." *Id.*; *see also Jund v. Town of Hempstead*,

941 F.2d 1271, 1285 (2d Cir. 1991) ("any interference with or effect upon interstate commerce, whether slight, subtle or even potential . . . is sufficient to uphold a prosecution under the Hobbs Act."). Even if the effect on interstate commerce is not immediate or direct or significant, but instead is postponed, indirect or slight, it is *sufficient* to sustain a conviction. *See Jones*, 30 F.3d at 284-85.

In a Ninth Circuit decision, *United States v. Nelson*, 137 F.3d 1094 (9th Cir. 1998), the court held that the robbery of two jewelry stores had at least a de minimis effect on interstate commerce. The court noted that the stores actively engaged in interstate commerce at the time of the robberies. They obtained ninety percent of their merchandise from out-of-state suppliers, and were owned by a company incorporated in Delaware, with a parent company in Canada. *Id.* at 1102. Here, the victim jewelry store purchased *all* of its inventory from out-of-state suppliers; required months to replenish its inventory; and had substantial annual business with out-of-state customers.

The superseding indictment charged, in the Hobbs Act robbery count, that the defendant obstructed, delayed and affected commerce by unlawfully taking property that included "wallets" as well as jewelry. Superseding Indictment, Count One, paragraph 2. JA 16-17. *See United States v. Silverio*, 335 F.3d 183, 184-86 (2d Cir. 2003) (per curiam) (defendants, convicted of Hobbs Act robbery, had taken money and jewelry from the home of a doctor who had a "worldwide celebrity clientele" and the robbery targeted the assets of his business); *United States v. Perrotta*, 313 F.3d 33, 38 (2d Cir. 2002) (noting that

jurisdictional nexus can be satisfied by showing that victim was targeted because of her status as an employee at a company engaged in interstate commerce) (citing *United States v. Diaz*, 248 F.3d 1065, 1089 (11th Cir. 2001)). The evidence is clear that the contents of at least one victim's wallet traveled interstate immediately after the robbery. JA 293-313.

Finally, cell mate Charles Devorce testified that Carter believed that the stolen goods were to be fenced internationally. The jury was entitled to credit this admission by Carter, and this provides yet another basis for concluding that the robbery affected interstate commerce. In *United States v. Fabian*, 312 F.3d 550 (2d Cir. 2002), this Court found that when a defendant *believed* that he was stealing drug proceeds which had traveled from Florida, and that they had therefore been "in the stream of interstate commerce," the Government had made a sufficient showing with respect to the interstate commerce nexus of the Hobbs Act. *Id.* at 556. Here, Carter expressed a similar belief that his robbery proceeds would enter the stream of foreign commerce, and so his case is therefore within the bounds of the interstate commerce theory approved in *Fabian*.

Because the evidence, viewed in a light most favorable to the Government, was clearly sufficient for a reasonable juror to fairly conclude that the Government established that a minimal effect on interstate commerce did occur, or at least probably would have occurred, the defendant's claim must be rejected.

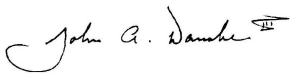
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

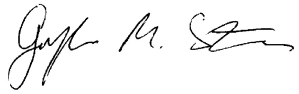
Dated: December 6, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



JOHN A. DANAHER III
ASSISTANT U.S. ATTORNEY

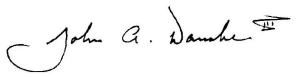


GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

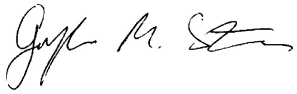
William J. Nardini
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,276 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



JOHN A. DANAHER III
ASSISTANT U.S. ATTORNEY



GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 1951

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

> **(1)** The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> **(2)** The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

> **(3)** The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Fed. R. Evid. 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

> **(1) Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.
>
> **(2) Nonexpert opinion on handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
>
> **(3) Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record,

report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.