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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

No. 2:09-cr-00094 MCE

v.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

JOSE SALVADOR SANCHEZ-PALOMINO
and FRANCISCO JAVIER VELASCO,
Defendants.

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Defendants Jose Salvador Sanchez-Palomino and Francisco Javier Velasco ("Defendants") are charged with (1) conspiracy to possess with intent to distribute five kilograms or more of cocaine, and (2) possession with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 846 and 841(a)(1), respectively. Defendants filed a Motion to Dismiss the Indictment or Suppress Evidence Based on Equal Protection and Due Process Violations (ECF Nos. 59 and 60) and requested an evidentiary hearing on the matters.

1 This case arises from an incident on February 12, 2009.
2 Defendants were traveling northbound on Interstate 5 ("I-5") when
3 Shasta County Sheriff Deputies John Kropholler and Christopher
4 McQuillan stopped their vehicle for allegedly speeding in
5 violation of California Vehicle Code § 22349(a). The officers
6 subsequently searched portions of the vehicle and found thirteen
7 kilograms of cocaine hidden in the rear bumper.

8 Defendants argue that Officers Kropholler and McQuillan
9 "almost exclusively stop Hispanic drivers," and then detain the
10 drivers and passengers while voraciously searching and
11 dismantling parts of the vehicle. Defendants maintain that this
12 selective enforcement of the vehicle code violates their rights
13 under the Fourth and Fourteenth Amendments to the United States
14 Constitution (hereinafter, the "Fourth Amendment" and the
15 "Fourteenth Amendment," respectively). In contrast, the United
16 States of America (the "Government") argues that Defendants were
17 pulled over initially for speeding alone, and their race played
18 no part in the officers' decision to stop and search their
19 vehicle.

20 The matter was called for an evidentiary hearing beginning
21 September 13, 2010. Evidence was presented on the pleadings and
22 during seven days of testimony from numerous witnesses, and the
23 Court heard final arguments from both sides on day eight. Based
24 upon the totality of the circumstances and weighing the
25 credibility and veracity of each witness, the Court makes the
26 following Findings of Fact and Conclusions of Law.

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FINDINGS OF FACT

NSI Cal-MMET DHE

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4 1. Officers Kropholler and McQuillan are Shasta County
5 Sheriff department officers assigned to the North State
6 Initiative California Multi-Jurisdictional Methamphetamine Team
7 ("NSI Cal-MMET"). NSI Cal-MMET was originally created in 2002 to
8 curb the production and distribution of methamphetamine drugs in
9 several northern California counties.

10 2. In 2007, the counties of Shasta, Tehama, Butte, Glenn,
11 and Colusa entered into a memorandum of understanding to
12 collectively fight drug trafficking. The program has evolved
13 over time, and the task force currently focuses on catching all
14 types of drug traffickers along the I-5 corridor that runs
15 through the above counties.

16 3. Officers Kropholler and McQuillan are full-time
17 employees of NSI Cal-MMET's Domestic Highway Enforcement team
18 ("DHE"), who patrol I-5 mostly in the Shasta County region
19 between the Oasis Road and Bridge Bay Road exits. Currently,
20 each officer is assigned to a heavily-marked police-outfitted
21 Chevrolet Tahoe. Prior to late 2009, Officers McQuillan and
22 Kropholler generally patrolled the same area in one vehicle.

23 4. Other officers from the Shasta County Sheriff's
24 department regularly assist Officers Kropholler and McQuillan,
25 and work overtime as part of NSI Cal-MMET DHE. An overtime
26 officer is with the officers eight out of every ten stops.

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1 5. Because Officers Kropholler and McQuillan often patrol
2 the same area along I-5 in Shasta County, they stop to assist
3 each other if they notice a search or stop in progress for
4 "safety reasons."

5 6. NSI Cal-MMET DHE conducts a high volume of traffic stops
6 to look for criminal indicators of smuggling. The task force
7 mostly patrols in this area because the shoulder areas of I-5 are
8 widest there within the county, making traffic stops there safer
9 for the officers.

10 7. In addition to standard police vehicle equipment such as
11 the California Law Enforcement Telecommunications System
12 ("CLETS"), Officer McQuillan's police vehicle is equipped with an
13 in-car DVD system to record stops, document them for
14 prosecutions, and assist in officer safety. The vehicle also has
15 an Automated License Plate Registration System that, in
16 conjunction with CLETS, can cross-check a vehicle's license plate
17 with the California Department of Justice database for stolen
18 license plates or vehicles. Officer McQuillan has a four-way
19 Doppler radar that can calibrate the speeds of up to four
20 vehicles at once. Officer McQuillan uses these tools as
21 additional means to initiate traffic stops.

22 8. The primary mission of NSI Cal-MMET DHE is not to issue
23 traffic citations. The officers use the California Vehicle Code
24 "as a tool" to pull a vehicle over and search for drugs. Traffic
25 citations are issued at times, but usually only when there is a
26 "flagrant violation" of traffic laws, and "the risk to public
27 safety is great."

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1 Mexican Drug Cartels

2 9. I-5 traverses three states, including numerous
3 California counties, from Mexico to Canada, and a main artery for
4 drugs to flow throughout the west coast and Canada. In the five-
5 county region the task force mainly supports, the majority of
6 cocaine and heroin comes from Mexico and originates from Mexican
7 drug cartels.

8 10. NSI Cal-MMET DHE focuses particularly on mid- to high-
9 level drug smugglers, ninety-nine percent of whom originate from
10 Mexico. A mid- to high-level drug smuggler is characterized as
11 someone who is attempting to traffic more than five kilograms of
12 drugs. Though only roughly fifty percent of methamphetamine and
13 marijuana is manufactured in Mexico, much of the mid- to high-
14 level smuggling of all drugs in the United States is managed by
15 Mexican drug cartels.

16 11. Mexican drug cartels commonly choose to employ people
17 of Mexican descent, and prefer to work with individuals who have
18 a familial relationship to the leadership of the cartel.

19 12. There was conflicting evidence presented, both on the
20 pleadings and during the hearing, as to the proper baseline of
21 the Hispanic population on this particular stretch of I-5.
22 Defendants proffered evidence of the population of Shasta County,
23 as well as California Highway Patrol accident data to attempt to
24 quantify the Hispanic traffic along I-5.¹

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27 ¹ This portion of Defendants' argument would not be well
28 taken if, for example, the stops were conducted in San Diego,
Sacramento, or San Joaquin counties where the racial demographics
are vastly diverse compared to Shasta County.

1 The Government's expert, Mark Carretia, testified at the hearing
2 that neither statistical baseline properly reflects the racial
3 composition of the traffic flowing along the northern portion of
4 I-5. The Court finds that the statistical data proffered by
5 Defendants is not a sufficient baseline or indicator of the
6 population of Hispanic traffic along this stretch of I-5.

7 13. Mexican drug cartel operations along I-5 appear to
8 favor using import sedans such as Nissans, Toyotas, and Hondas.
9 Cars of this nature have many sidewall compartments that are
10 void, perfect for smuggling contraband. Passengers and drivers
11 of vehicles smuggling contraband do not usually have access to
12 the hidden compartments containing illegal items, and rely on
13 their contacts at the origin and destination of the vehicle to
14 load and unload the smuggled items.

15
16 Officer McQuillan

17 14. Officer McQuillan has been employed by the Shasta
18 County Sheriff's Office since 1999. He has over sixteen years of
19 police experience, and over twelve years of criminal interdiction
20 experience on highways and interstates across California. He has
21 worked as a narcotics investigator since 2005. Additionally,
22 Officer McQuillan handles asset forfeiture processing for Cal-
23 MMET and the Shasta County Sheriff's Office.

24 15. Before becoming a police officer, Officer McQuillan
25 installed auto alarms on Nissans, Subarus, and Chevrolets for a
26 car dealership in Redding, California. He testified under oath
27 that he has "worked on literally thousands of vehicles."

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1 16. Officer McQuillan has completed a number of training
2 courses, including a course on racial profiling/diversity
3 training, basic narcotics investigations, and specialized
4 training courses on drug interdiction, vehicle hiding
5 compartments, and the specifics of drug cartels.

6 17. In addition to his other duties, Officer McQuillan is
7 also currently assigned as a terrorist liaison officer with the
8 Department of Homeland Security. In this position, he shares
9 anti-terrorism information and daily updates on national
10 terrorist threats and security awareness issues with the Shasta
11 County Sheriff's Office.

12 18. Officer McQuillan has participated in at least fifty
13 undercover purchases of controlled substances, and was the
14 undercover agent purchasing controlled substances on three
15 occasions. While working in highway interdiction, Officer
16 McQuillan has investigated at least two hundred cases where
17 controlled substances were seized from vehicles traveling on I-5.

18 19. Officer McQuillan has two sustained findings of
19 misconduct with the Shasta County Sheriff's Office in 2002; one
20 involving a delinquent gas station charge account that went to
21 small claims court, and another for using a county-owned laptop
22 for personal use, and failing to return the laptop in a timely
23 fashion.

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1 Officer Kropholler

2 20. Officer Kropholler has been employed by the Shasta
3 County Sheriff's Office since 1994, and has been assigned to NSI
4 Cal-MMET DHE since 2007. He is also certified as a canine
5 handler and trainer.

6 21. Officer Kropholler has completed over one thousand
7 hours of training as part of his law enforcement duties. He has
8 logged over 150 hours alone in training on counter-smuggling,
9 smuggling, and interdiction.

10 22. Officer Kropholler has two disciplinary issues in his
11 police file; in 1997, he was suspended from duties for thirty
12 days for falsifying his employment application (there appeared to
13 be a discrepancy regarding the means by which one of his previous
14 employments was terminated) in violation of Shasta County's
15 policy on dishonesty. In 2003, Officer Kropholler received a
16 letter of reprimand from the Sheriff's Office for taking an
17 unauthorized break from his duties outside of his patrol area.

18

19 Use of Canine

20 23. Officer Kropholler has a canine, Maximus, that
21 routinely travels with the DHE and assists in locating drugs and
22 other contraband in stopped vehicles. NSI Cal-MMET DHE protocol
23 requires that every effort be made to have a canine present
24 during a traffic stop. Officer Kropholler stated that, to his
25 knowledge, a warrant is not necessary to walk Maximus around a
26 vehicle under suspicion of smuggling.

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1 24. Maximus is trained specifically on highway interdiction
2 and alerts to the presence and location of drugs. The canine has
3 participated in over 780 vehicle searches. Officer Kropholler is
4 careful not to overuse Maximus, to prevent him from being
5 "tricked" or otherwise decreasing his effectiveness. When he is
6 used, Maximus almost always searches a car outside first, then
7 proceeds inside the vehicle while he is on a leash six feet in
8 length. Officer Kropholler operates the dog from the passenger
9 side of a vehicle for safety purposes.

10 25. Maximus is specifically trained with Officer Kropholler
11 to alert to the presence of methamphetamine, cocaine, marijuana,
12 and heroin. Maximus alerts Officer Kropholler to the presence of
13 drugs by pawing the area, and altering his body language in a way
14 that Officer Kropholler is trained to notice and interpret.

15 26. Maximus is trained, and Officer Kropholler is trained
16 to identify, various alerts, but there are inherent flaws in
17 canine drug interdiction. The canine can "miss," which indicates
18 Maximus alerts to an area, but no contraband or drugs are
19 subsequently found in that area. This is distinct from a "false
20 positive," where Maximus correctly alerts to a smell or presence
21 of odor, but nothing is seized, and likely the odor indicates
22 contraband previously resided in that area.

23 27. Although Maximus may have been evaluated and trained
24 appropriately, his evaluator had a fiduciary relationship with
25 the canine, in violation of industry standard protocol. Canine
26 training expert William Schroeder has personally witnessed over
27 800 canine searches, and has never seen a canine alert one
28 hundred percent correctly in the field.

1 Though Officer Kropholler asserted that Maximus alerts one
2 hundred percent correctly in the field, the Court finds that
3 Maximus likely does not alert correctly one hundred percent of
4 the time.

5
6 Warning Citations

7 28. In October 2009, NSI Cal-MMET DHE officers began using
8 warning citations to record demographic information of the stops
9 they initiated. The citation is designed to alert the "innocent
10 motoring public" that they have been caught violating the
11 California Vehicle Code, but "in the interest of public
12 education," the officers are only issuing a warning.

13 29. In addition to issuing the warning citation, the
14 officers will also explain to the driver, either directly or
15 indirectly through questioning, that the primary mission of the
16 stop is to look for weapons, drugs, or contraband. This process
17 is designed to place the innocent motoring public at ease in
18 knowing they will not be ticketed.

19 30. Officers Kropholler and McQuillan developed and
20 designed the warning citation, including what they felt was
21 pertinent information to collect from a detained driver. Officer
22 Shawn Pardazi, a trainer for the National Drug Interdiction
23 Assistance Program, assisted the officers with drafting the
24 warning citations.

25 31. The officers are not required to issue the warning
26 citations every time they pull a vehicle over, but it is highly
27 encouraged, and they attempt to issue a warning citation on every
28 stop that does not result in a traffic citation.

1 32. The warning citation is filled out by one of the
2 officers who collects information from a driver including, but
3 not limited to, name, address, date of birth, driver's license
4 number, and race. The citation also documents the time, date,
5 and day of the week the stop was performed.

6 33. Another section of the warning citation provides boxes
7 for an officer to check based on the type of conduct that
8 proceeds after the initial stop. For example, there is a box to
9 check if consent is given for a search of the vehicle. The
10 citation also documents what type of search is conducted, whether
11 a search canine is used, if probable cause is present, whether
12 contraband is found, etc.

13 34. There was conflicting testimony regarding the terms
14 under which the canine box of the warning citation is checked.
15 Officer McQuillan testified that if the canine does no alert to
16 the presence of drugs or contraband, then the canine search box
17 is not checked. Officer Kropholler, on the other hand, stated
18 that if the canine box is checked, that means Maximus was used
19 either as a tool, or as part of a probable cause search,
20 regardless of whether contraband was ultimately discovered. The
21 Court finds that regardless of whether the box on the warning
22 citation was checked, Maximus was used as both a tool and as part
23 of a probable cause search in the instant case.

24 35. The warning citations are signed by both the issuing
25 officer and the driver of the vehicle. The driver signs to
26 acknowledge that they have received a written warning for
27 committing a California Vehicle Code violation.

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1 36. The race of the driver is recorded on the warning
2 citation to prevent officers from being accused of racial
3 profiling. Officer McQuillan either assumes the race of the
4 driver, or "plainly ask[s] them what race they go by." If
5 Officer McQuillan does not ask the driver their race, he assumes
6 their race "based off of a lot of different factors as to what
7 they're telling" him. One factor that influences Officer
8 McQuillan's assumption about the race of the driver is whether
9 the driver speaks with an accent. Since both officers often rely
10 on self-reporting and guesswork, the driver's race as indicated
11 on the warning citation can be inaccurate. For example, some
12 Hispanic drivers were listed as white or Caucasian, and some
13 white drivers were listed as Hispanic.

14 37. Between October 2009 and May 10, 2010, Officers
15 Kropholler and McQuillan issued 384 warning citations, mostly
16 along the same stretch of I-5 in Shasta County. Officer
17 McQuillan testified that, to his knowledge, approximately forty-
18 four percent of these warning citations were issued to drivers
19 where Hispanic was indicated as the driver's race on the warning
20 citation.² Some warning citations may be missing or not counted
21 in the final tally, as the Shasta County Sheriff's Office
22 recently located additional citations not originally turned over
23 as part of this investigation. Sporadically, the warning
24 citations are issued as part of the driver's arrest for smuggling
25 contraband. In that situation, the warning citation is attached
26 to a written police report.

27
28 ² Approximately 30 of the 384 citations were issued to women.

1 38. On at least two occasions, Officer McQuillan conducted
2 a search of a vehicle and failed to properly acknowledge the
3 search on the signed warning citation he issued to the driver of
4 the searched vehicle. On at least six occasions, a NSI Cal-MMET
5 DHE officer failed to record the race of the driver on warning
6 citations issued between October 2009 and May 10, 2010.

7 39. The Court finds that since Officers McQuillan and
8 Kropholler do not consistently issue warning citations, their
9 statistics are inaccurate and they have under-reported the actual
10 number of stops conducted. Further, the officers' procedure
11 issuing warning citations to arrested smugglers is not
12 consistent, and therefore there is an inaccurate count as to how
13 many of the warning citations correspond to the officers locating
14 and seizing contraband from a vehicle.

15
16 Criminal Indicators

17 40. The primary way NSI Cal-MMET DHE determines which
18 vehicles to investigate is by relying on their extensive police
19 training and field work to actively look for indicators of
20 criminal behavior. There are at least thirty items or
21 observations that, when taken in the totality of the situation,
22 suggest that a driver or vehicle passenger is engaged in criminal
23 behavior.

24 41. Once Officer McQuillan observes several indicators
25 exhibited by the driver and/or passengers in a vehicle, he gauges
26 them "against the innocent motoring public to know what the
27 common baseline is for the traffic pattern of that area."

28 ///

1 42. Indicators of criminal smuggling can include the
2 following: (1) only one vehicle key, or few keys, on a key ring;
3 (2) the strong odor of a "masking agent" or air freshener
4 emanating from a vehicle; (3) extreme nervousness; (4) presence
5 of "narco saints" or other display of Catholic artifacts tied to
6 Mexican drug cartels; (5) discrepancies between traveling
7 partners as to the origin or destination of the vehicle; (6) no
8 one in the vehicle owns the car or has the car registered in
9 their name; and (7) a newly purchased or rental car.

10 43. Officer McQuillan testified that he cannot tell whether
11 a car is owned by a third party before he stops the vehicle.
12 Seven out of ten times he can tell whether a car is rented from
13 his vantage point either stopped or traveling along I-5. The
14 Court finds that few, if any, of these criminal indicators can be
15 spotted by the officers before a vehicle is pulled over.

16 44. While looking for criminal indicators, Officer
17 McQuillan does not stop cars on the highway without some kind of
18 probable cause that a law has been violated, or a "reasonable
19 suspicion" that a law has been violated.

20
21 Traffic Stops

22 45. Officer McQuillan and Officer Kropholler usually sit in
23 the police vehicle(s) parked perpendicular to I-5 and facing
24 northbound traffic. The vehicles are marked and placed in such a
25 way as to elicit "an adrenaline dump" from a smuggler. An
26 adrenaline dump, as testified to by Officer McQuillan, is an
27 immediate, noticeable, and abrupt change in behavior by the
28 driver that indicates the driver has observed a police vehicle

1 and is exhibiting outward signs of nervousness or fear.
2 The driver immediately attempts to conform his or her behavior
3 with the law. Examples of a noticeable adrenaline dump are a
4 marked change in vehicle speed, changes in the driver's demeanor,
5 car occupants failing to make eye contact with the police
6 vehicle, and other factors. The officers also scan traffic for
7 behaviors inconsistent with the "innocent motoring public."

8 46. More than the reaction of the passengers, when Officer
9 McQuillan is observing, he is looking for a vehicle's reaction to
10 his presence near the car. He specifically evaluates "what the
11 vehicle is doing in relationship to the innocent motoring public
12 that surrounds it." Examples of suspicious vehicle behavior
13 include sudden slowing, changing lanes, and closely following a
14 truck for no apparent reason.

15 47. If Officer McQuillan observes a vehicle violating the
16 California Vehicle Code, or has other reasonable suspicion that
17 the vehicle's occupants are engaging in criminal behavior, then
18 he makes an initial decision to stop that particular vehicle. At
19 that point, he will run an inquiry on the license plate.

20 48. On at least one occasion, Officer McQuillan was in his
21 vehicle perpendicular to I-5, and noticed that a driver was
22 wearing a white shirt and was not wearing his seatbelt. In that
23 situation, he stopped the driver at approximately 1:15 a.m., in
24 the dark. Officer McQuillan also testified that he can observe
25 from his vantage point drivers holding cell phones up to their
26 ears.

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1 Though both officers testified that they cannot determine a
2 driver's race or ethnicity while observing moving vehicles, based
3 on the above examples, the Court finds that it is possible the
4 officers can make a conjecture or assumption about a driver's
5 race before a vehicle is pulled over.

6 49. As Officer McQuillan moves from his perpendicular
7 location and into merging traffic, he pulls up near the vehicle
8 he has decided to stop, and looks for other indicators of
9 criminal behavior and/or violations of the vehicle code.

10 Examples of what Officer McQuillan looks for include the number
11 of occupants in the vehicle, any occupants not wearing seatbelts,
12 a driver talking on a cell phone, or some object or mechanism
13 obstructing the driver's view; any activity that purportedly
14 violates the California Vehicle Code.

15 50. Generally, when an officer is positioned along this
16 corridor of I-5, most of the traffic flows at a speed of around
17 65-70 miles per hour. In addition to speeding vehicles, if a car
18 is traveling significantly below the speed limit, Officer
19 McQuillan may stop those drivers. Often, there are many cars at
20 any given time disobeying the posted speed limit.

21 51. Once he has ascertained enough information to obtain
22 probable cause, Officer McQuillan will pull his police vehicle
23 behind the vehicle in question and "conduct a stop," or pull the
24 vehicle over. If he is alone, Officer McQuillan will approach
25 the vehicle from the passenger side, indicate to the driver the
26 reason for the stop, and continue to watch for indicators of
27 criminal behavior. If both officers are present during the stop,
28 they will both approach the vehicle for "safety reasons."

1 52. Officer McQuillan will often engage in conversation with
2 the occupants of the vehicle and ask for identification. He uses
3 CLETS or other means of police communication, to run an
4 individual's name for warrants, criminal background information,
5 and/or information about the vehicle. Officer Kropholler, when he
6 first approaches a stopped vehicle, identifies himself, explains
7 the reason for the stop, and attempts to engage in some casual
8 conversation by asking an "icebreaker" or some innocuous question.

9 53. During the stop, both officers are continually scanning
10 and analyzing the situation for evidence of criminal behavior.
11 If indicators of criminal behavior are prevalent, or other
12 reasonable suspicions are present, then Officer McQuillan will
13 ask the driver for consent to search the vehicle. If the
14 occupants exit the vehicle at Officer McQuillan's request, he
15 often will do a "Terry pat-down," or ask the occupants if they
16 have any weapons and if he may search the occupants' person.

17 54. If a driver refuses consent to search the vehicle, then
18 it is possible that Officer Kropholler would walk the canine
19 around the vehicle's perimeter to search for contraband and drugs
20 anyway. If the driver of a vehicle does not speak English well,
21 or if language is a barrier to communicate, then consent is not
22 an option. Instead, Officers McQuillan or Kropholler will walk a
23 canine dog around the perimeter of a vehicle to obtain probable
24 cause to search the vehicle.

25 55. If consent is given, or if the canine alerts to the
26 presence of contraband, Officer McQuillan and/or his team will
27 conduct a thorough, systematic search of the vehicle from front
28 to back, bottom to top.

1 These searches often take place on the shoulder of I-5. In some
2 circumstances, Officer McQuillan will move the search to another
3 location for the safety of himself and the parties involved.

4 56. When Officer McQuillan requests consent to search a
5 driver's vehicle, there is no requirement that he advise the
6 driver of any details or the potential extent of the search.
7 While he does not "arbitrarily tear people's cars apart," if
8 Officer McQuillan notices a part of the car that has been
9 "tooled," or appears to be handled inconsistent with vehicle
10 factory standards, that is an indicator there may be contraband
11 in or near that area, and the team will search that portion of
12 the vehicle.

13 57. These searches can include the dismantling of vehicle
14 bumpers, doors, roof, airbag compartments, and any other place
15 where the canine alerts or where the officers suspect contraband
16 may be hidden. At least one witness testified that he saw
17 something that resembled a camera inserted into the muffler of a
18 vehicle as part of a search conduct by Officers McQuillan and
19 Kropholler. Though the officers deny using any such tool, the
20 Court finds that it is possible the officers use various tools
21 and other resources to conduct a vigorous search of a vehicle,
22 including a comprehensive inspection of a vehicle's muffler.

23 58. Searches of this kind have lasted up to, and in excess
24 of, two hours. During that period, the occupants of the vehicle
25 being searched are not free to leave. Instead, the occupants
26 must wait either in the back of a police vehicle, or near the
27 side of I-5 if the vehicle has not been moved to another
28 location.

1 59. Officer McQuillan does not use race as a factor in
2 conducting any portion of these traffic stops. Specifically,
3 Officer McQuillan stated it would be "counterproductive" for him
4 to target Hispanic drivers, as the drug trafficking trade is
5 "evolving," and cartels are constantly altering their tactics and
6 strategies to evade police.

7 60. Officers McQuillan and Kropholler have repeatedly
8 detained, searched, disrespected, and ill-advised Hispanic males
9 of their rights during traffic stops along I-5.

10
11 The Stop in Question

12 61. Officers Kropholler and McQuillan were patrolling I-5
13 in Shasta County in the afternoon of February 12, 2009. There is
14 conflicting testimony as to the weather conditions that
15 afternoon. Defendants contend the weather was not rainy, but
16 clear. The officers recalled the driving conditions to be rainy,
17 wet, and slick. The Court finds that based upon the officers'
18 experience, and the totality of all the evidence presented during
19 the hearing, that there was evidence of moisture on the road and
20 the vehicle which indicates that there had been rain on the
21 particular portion of I-5 where the Defendants' vehicle was
22 stopped.

23 62. As the officers were traveling northbound on I-5, they
24 both testified that they noticed a gold Nissan Maxima that
25 appeared to be speeding. There is conflicting evidence regarding
26 the Maxima's speed at approximately 1:30 p.m.

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1 Officers McQuillan and Kropholler testified that they paced the
2 vehicle as traveling approximately 82 miles per hour in 65 miles
3 per hour zone. Defendant Velasco testified he was driving the
4 Maxima, that it was on cruise control, and that the cruise
5 control was set at 65 miles per hour. Both officers have
6 extensive experience in highway interdiction, and Officer
7 McQuillan precisely explained that he was driving northbound on
8 I-5 in his police-issued vehicle when he noticed a gold Nissan
9 Maxima pulling ahead of traffic in front of him. The Maxima was
10 moving "significantly faster than the other cars in traffic."
11 The officers quickly caught up to the vehicle, and paced it at
12 approximately 82 miles per hour. The Maxima's speed posed a
13 safety risk to the motoring public. Therefore, the officers
14 executed a traffic stop. By contrast, all Defendant Velasco
15 stated was that he knew he was traveling 65 miles per hour
16 because his cruise control was on in the Maxima. Defendant
17 Velasco failed to lay the foundation for his familiarity with the
18 vehicle's speedometer, the accuracy of the cruise control, or any
19 other specific information that corroborates his testimony.
20 Therefore, the Court finds that at approximately 1:30 p.m. on
21 February 12, 2009, the gold Maxima was traveling at 82 miles per
22 hour.³

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25
26 ³ There is conflicting testimony regarding the accuracy of
27 the officers' report as to the actual time they first spotted
28 Defendants' vehicle, versus when they placed the sirens on and
pursued Defendants' vehicle. The Court makes no finding of fact
on this issue.

1 63. Officer Kropholler could not tell the race of the
2 vehicle's occupants at the time of the stop. Once the Maxima
3 stopped, Officer McQuillan approached the driver's side of the
4 vehicle, while Officer Kropholler simultaneously approached the
5 passenger side.

6 64. Officer Kropholler made verbal contact with Defendant
7 Sanchez-Palomino on the passenger side of the vehicle. Upon
8 approach, he immediately smelled the "overwhelming odor" of air
9 freshener. He also saw various food wrappers, energy drinks, and
10 clothing strewn about the vehicle. The Maxima had a "lived-in"
11 look, indicating that someone had been spending a lot of time in
12 the car.

13 65. During the stop, Officer Kropholler believed that
14 Defendant Sanchez-Palomino understood some, and spoke enough
15 English to properly communicate.⁴ Officer McQuillan acknowledged
16 that, in observing the interaction between Officer Kropholler and
17 Defendant Sanchez-Palomino, there was a "language barrier."⁵
18 However, Officer Kropholler was able to question Defendant
19 Sanchez-Palomino about the nature of the trip and other basic
20 information.

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23
24 ⁴ While Defendant Sanchez-Palomino testified at the hearing,
25 his entire testimony was subsequently stricken, and therefore not
26 considered for purposes of issuing the Court's Findings of Fact
and Conclusions of Law. See Transcript of Record at 8-13, United
States v. Sanchez-Palomino, 2:09-cr-00094 (ECF No. 115).

27 ⁵ Federal investigator Charles Gillespie testified that
28 Defendant Sanchez-Palomino has significant trouble speaking and
understanding English, was never formally educated in English,
and must use Spanish to communicate.

1 Defendant Sanchez-Palomino appeared to be extremely nervous but
2 provided Officer Kropholler with identification. During the
3 stop, Officer Kropholler asked Defendant Sanchez-Palomino if he
4 spoke English, and he replied "a little," and consistently
5 answered "appropriately" the questions Officer Kropholler asked.
6 Defendant Sanchez-Palomino was also able to explain that he was
7 traveling from San Diego, California to Yakima, Washington to
8 visit family. When Officer Kropholler asked Defendant Sanchez-
9 Palomino to step out of the Maxima, he stepped out of the vehicle
10 "without any hesitation," and responded "sure" when Officer
11 Kropholler asked him if he was willing to consent to a search of
12 his person. Defendant Sanchez-Palomino placed his arms out as if
13 to consent to a search. During this search, Officer Kropholler
14 located a bolt and socket in Defendant Sanchez-Palomino's pants
15 pocket.

16 66. At some point during the stop, but before Maximus
17 searched the vehicle, the officers conferred and determined that
18 the driver and passenger had given conflicting information
19 regarding the nature of their trip, the trip's origin and
20 destination, and that Defendant Velasco appeared confused as to
21 Defendant Sanchez-Palomino's name. Officer McQuillan requested
22 identification from Defendant Velasco, and returned to his police
23 vehicle to run his name through the police database.⁶

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27 ⁶ There was conflicting evidence presented as to whether
28 Defendant Velasco's name was ever run through CLETS, or otherwise
investigated by Officer McQuillan. The Court makes no finding of
fact on this issue.

1 67. Officer Kropholler felt Maximus would be useful to aid
2 in the officers' investigation because (1) he smelled the strong
3 odor of air freshener; (2) the vehicle appeared to be "lived-in;"
4 (3) Defendant Sanchez-Palomino was extremely nervous;
5 (4) Defendants gave the officers conflicting statements as to
6 their origin and destination and purpose of the trip; and
7 (5) upon searching Defendant Sanchez-Palomino, Officer Kropholler
8 located a bolt and socket upon his person. The bolt and socket
9 are common tools used to manipulate car parts.

10 68. Even without the bolt and socket, Officer Kropholler's
11 suspicions were raised about the vehicle and its occupants, and
12 he probably would have brought Maximus out to search the vehicle
13 anyway.

14 69. Officer Kropholler brought Maximus out of his holding
15 pen in the police vehicle and led him towards Defendants'
16 vehicle. Maximus alerted to the rear middle bumper outside the
17 vehicle, and the rear seat area inside. In addition to Maximus'
18 alert, Officer Kropholler testified that he could tell the
19 factory-installed materials in the Maxima had been either removed
20 or tampered with.

21 70. Officer McQuillan removed the carpet from the trunk
22 area near the rear bumper and noticed a missing bolt from the
23 plastic bumper cover. The search revealed a hidden compartment
24 built behind the bumper. The officers removed the door to the
25 hidden compartment and immediately identified what appeared to be
26 kilo-sized bricks of white powder.

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1 71. Using a Narc II field screening test, Officer McQuillan
2 identified the substance in the bricks as cocaine.

3 72. Officer Kropholler estimated that the Maxima was
4 stopped approximately five and a half minutes from the beginning
5 of the stop to the time the officers located the approximately
6 thirteen kilograms of cocaine hidden in the Maxima.

7 73. Officers Kropholler and McQuillan later matched the
8 bolt in Defendant Sanchez-Palomino's pants to the missing bolt
9 from the plastic bumper cover.

10
11 **CONCLUSIONS OF LAW**

12
13 Given the foregoing Findings of Fact, and for the reasons
14 stated below, the Court concludes that there is insufficient
15 evidence of a constitutional violation to merit suppression or
16 dismissal of the charges against Defendants.

17
18 **A. Fourth Amendment**

19
20 Defendants posit that their Fourth Amendment rights were
21 violated when Officers Kropholler and McQuillan searched their
22 vehicle without a warrant and without consent. Defendant
23 Sanchez-Palomino specifically argues that since he lacks the
24 ability to communicate and understand English, the search of his
25 person was illegal. Defendants contend that even if the search
26 was valid, the stop was impermissibly prolonged in violation of
27 their Fourth Amendment rights.

28 ///

1 The Government instead argues that (1) Defendant Sanchez-
2 Palomino consented to the search and pat-down; (2) even if he did
3 not consent, the doctrine of inevitable discovery doctrines
4 vitiates suppression; and (3) the traffic stop was not unduly
5 prolonged.

6
7 **1. Probable Cause to Search**
8

9 A search and seizure conducted without a warrant is "per se
10 unreasonable under the Fourth Amendment - subject only to a few
11 specifically established and well delineated exceptions." United
12 States v. Hawkins, 249 F.3d 867, 872 (9th Cir. 2001) (quoting
13 Minnesota v. Dickerson, 508 U.S. 366, 372 (1993)). The burden is
14 on the government to persuade the court that a search is
15 constitutionally permissible. Hawkins, 249 F.3d at 872. Police
16 officers may conduct brief investigatory stops of vehicles if
17 their actions are "supported by reasonable suspicion" that
18 criminal activity "may be afoot." United States v. Arvizu,
19 534 U.S. 266, 273 (2002) (internal citations omitted).

20 Probable cause to search exists when "police officers have
21 facts and circumstances within their knowledge sufficient to
22 warrant a reasonable belief that the suspect had committed or was
23 committing a crime." United States v. Noster, 590 F.3d 629, 633
24 (9th Cir. 2009) (internal citations omitted). The trier of fact
25 must examine the "totality of circumstances" in each case to
26 decide whether "the detaining officer has a particularized and
27 objective basis for suspecting legal wrongdoing." Arvizu,
28 534 U.S. at 273.

1 In the instant case, Defendants were traveling at 82 miles
2 per hour in excess of the posted speed limit, which is a
3 violation of the California Vehicle Code. Officers Kropholler
4 and McQuillan were able to determine Defendants' speed by relying
5 on their vast highway interdiction and police experience, and
6 also by pacing the vehicle in their own police truck to determine
7 the Maxima's speed. Based upon this information, the officers
8 had reason to believe that Defendant Velasco, the driver, was
9 committing a crime long before they ever actually pulled the
10 vehicle over. Therefore, as a matter of law, the Court concludes
11 that Officers Kropholler and McQuillan had probable cause to
12 stop, or seize, the vehicle without a warrant.

13
14 **2. Consent to Search Defendant Sanchez-Palomino's**
15 **Person**

16 When the government asserts that consent was given by a
17 defendant to perform a search, the Fourth Amendment requires it
18 to "demonstrate that the consent was in fact voluntarily given,
19 and not the result of duress or coercion, express or implied."
20 Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). See also
21 United States v. Drayton, 536 U.S. 194, 201 (2002) ("Even when
22 law enforcement officers have no basis for suspecting a
23 particular individual, they may pose questions, ask for
24 identification, and request consent to search.").

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1 In considering whether consent was voluntarily given during
2 a stop, a court may consider any, or all, of five factors:
3 (1) whether a defendant is in custody; (2) whether the arresting
4 officers had their guns drawn; (3) whether the defendants were
5 Mirandized; (4) whether defendant was "notified that he had a
6 right not to consent; and (5) whether the defendant had been told
7 that a search warrant could be obtained." United States v.
8 Vongxay, 594 F.3d 1111, 1119-20 (9th Cir. 2010). The government
9 bears the burden of establishing consent was freely and
10 voluntarily given. Id. at 1119. The voluntariness of consent is
11 a "question of fact to be determined from all the surrounding
12 circumstances." Id. When the circumstances specifically involve
13 foreign nationals, a court must determine whether consent was
14 voluntary in light of any language barrier. United States v.
15 Amano, 229 F.3d 801, 805 (9th Cir. 2000).⁷ Again, the factors
16 for consideration are permissive, as the court "in all cases must
17 examine the totality of the circumstances." Id.

18 The Court concludes that it is clear from Defendant Sanchez-
19 Palomino's actions and words that he understood enough English to
20 communicate effectively during the stop, and that his consent was
21 not coerced or misunderstood by Officer Kropholler.

22 ///

24 ⁷ Specifically, Amano encourages the Court to assess the
25 voluntariness of consent by examining, "among other things,
26 whether the defendant signed a written waiver;" if the
27 defendant's rights were read in their native language; whether
28 the defendant appeared to understand them; whether the defendant
"had the assistance of a translator; whether defendant's rights
were explained painstakingly; and whether the defendant had
experience with the American criminal justice system." See
Amano, 229 F.3d at 804-05.

1 Defendant Sanchez-Palomino knew he was being interrogated by an
2 officer of the law, and his knowledge of police procedure
3 indicated that he chose to cooperate with Officer Kropholler.
4 Defendant Sanchez-Palomino was not in custody or restrained. He
5 had not yet been arrested, and as such, Miranda warnings would
6 have been premature.

7 Even assuming he did not fully understand Officer
8 Kropholler's words, Defendant Sanchez-Palomino, unprovoked and in
9 what both parties agree appeared to be an extremely nervous
10 state, provided Officer Kropholler with identification, got out
11 of the vehicle, and placed his hands in a fashion to indicate he
12 consented to the search of his person. Defendant Sanchez-
13 Palomino never indicated, with words or gestures, that he
14 objected to Officer Kropholler's conduct or otherwise intended
15 not to cooperate, nor did he in any way attempt to alert the
16 officers to his limited English proficiency. He never stated in
17 Spanish that he did not understand English, nor did he enlist the
18 assistance of his traveling companion Defendant Velasco, who
19 appeared to have a better command of English than Defendant
20 Sanchez-Palomino. Examining the totality of the circumstances,
21 the Court concludes as a matter of law that Defendant Sanchez-
22 Palomino understood the nature of the situation enough to
23 generally follow Officer Kropholler's commands and freely consent
24 to a search of his person.⁸

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26
27 ⁸ Defense argues, and the Court agrees, that since the
28 Government failed to previously argue inevitable discovery of the
bolt and socket, the argument is waived. However, the point is
moot, given the Court's decision that the search was valid.

3. Prolonging the Traffic Stop

1
2
3 Defense contends the stop was unreasonably prolonged because
4 the purported purpose of the stop was to issue a warning
5 citation, not to look for drugs. The "touchstone of the Fourth
6 Amendment is reasonableness." United States v. Turvin, 517 F.3d
7 1097, 1101 (9th Cir. 2008) (quoting Florida v. Jimeno, 500 U.S.
8 248, 250 (1991)). To examine the reasonableness of the length of
9 a traffic stop, a court examines the "totality of the
10 circumstances surrounding the stop." Turvin, 517 F.3d at 1101
11 (internal citations omitted). Particularly when officers have
12 "probable cause to know of a traffic violation," any questions
13 asked or procedures conducted by police, as long as they are
14 within reason and "create little or no inconvenience," are
15 constitutionally reasonable under the law. Id. at 1103 (internal
16 citations omitted).

17 Specifically, the use of a "well-trained narcotics-detection
18 dog" to search for hidden contraband "during a lawful traffic
19 stop" does "not rise to the level of a constitutionally
20 cognizable infringement." Illinois v. Caballes, 543 U.S. 405,
21 409 (2005). Such a sniff "reveals no information other than the
22 location of a substance that no individual has any right to
23 possess." Id. at 410. Any shift from a lawful traffic stop to a
24 drug investigation is legitimate police conduct under the Fourth
25 Amendment. Id. at 408; Muehler v. Mena, 544 U.S. 93, 101 (2005).

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1 In the instant case, the stop was not unreasonably
2 prolonged. After pulling the Maxima over, Officers Kropholler
3 and McQuillan asked Defendants routine questions and verified
4 their identities. After suspicions were raised that Defendants'
5 stories were not aligned, and given the disheveled appearance of
6 the vehicle, Officer Kropholler determined that Maximus could
7 assist the officers in determining whether drugs were present in
8 the vehicle. He retrieved Maximus from the police vehicle, and
9 walked him around Defendants' Maxima. Using Maximus as a tool
10 did not prolong the stop in any way, nor did it create any
11 unreasonable circumstance for Defendants. After Maximus alerted
12 to the rear bumper and inside the rear of the vehicle, Officers
13 McQuillan and Kropholler searched the trunk near the rear bumper
14 and located the cocaine in a secret compartment. This entire
15 exercise lasted approximately five and a half minutes.

16 Again, examining the totality of the circumstances, nothing
17 indicates to the Court that the stop was unreasonably prolonged or
18 unconstitutional. While the stop was originally made for
19 purported violations of California's vehicle code, once the
20 officers approached the Maxima and asked Defendants a few routine
21 questions, their extensive police training and experience
22 indicated there may be drugs or other contraband present. Their
23 reasonable suspicion turned the stop from a routine traffic stop
24 into search for drugs. Case law is clear that Officers Kropholler
25 and McQuillan did not need reasonable suspicion to engage in
26 investigations "unrelated to the purpose of [the] initially lawful
27 stop." Turvin, 517 F.3d at 1103. Therefore, the Court concludes
28 as a matter of law that the stop was not unnecessarily prolonged.

1 **B. Fourteenth Amendment**

2
3 The equal protection “component of the Due Process Clause of
4 the Fifth Amendment” ensures that selective enforcement of the
5 laws is not based on “an unjustifiable standard such as race,
6 religion, or other arbitrary classification.” United States v.
7 Armstrong, 517 U.S. 456, 464 (1996) (internal citations omitted).
8 A defendant may demonstrate that “the administration of a
9 criminal law is directed so exclusively” at a particular class
10 that the government’s administration of the law “amounts to a
11 practical denial of equal protection of the law.” Id. at 464-65
12 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)). The
13 burden is upon the defendant to dispel the presumption that the
14 government’s actions are constitutionally permissible.
15 Armstrong, 517 U.S. at 465.

16 Traditional equal protection analysis applies, in that a
17 defendant must demonstrate the policy has a discriminatory effect
18 and was motivated by a discriminatory purpose. Id.; Rosenbaum v.
19 City and County of San Francisco, 484 F.3d 1142, 1152-53 (9th
20 Cir. 2007). To prove a discriminatory effect, the claimant must
21 show that similarly situated individuals evaded similar
22 treatment. Id. (citing Armstrong, 517 U.S. at 465.).
23 As a threshold matter, a similarly situated class must be
24 established to compare a defendant’s unconstitutional treatment.
25 Rosenbaum, 484 F.3d at 1153. Then, the court examines what
26 evidences constitutes “some evidence tending to show the
27 existence” of a discriminatory effect. Armstrong, 517 U.S. at
28 469.

1 To show discriminatory purpose, a defendant must show that
2 an officer "selected or reaffirmed a particular course of action
3 at least in part" because of the adverse effect on an
4 "identifiable group." Rosenbaum, 484 F.3d at 1153 (quoting
5 United States v. Wayte, 470 U.S. 598, 610 (1985)). In addition,
6 a defendant must show that law enforcement's misconduct is part
7 of a "policy, plan, or pervasive pattern." Rosenbaum, 484 F.3d
8 at 1153. Some conscious selective enforcement is "not in itself
9 a federal constitutional violation" as long as it is not
10 "deliberately based upon an unjustifiable standard." United
11 States v. Kidder, 869 F.2d 1328, 1335 (9th Cir. 1989).⁹

12 Defendants argue that NSI Cal-MMET DHE uses pretextual stops
13 based on traffic violations to investigate vehicles for evidence
14 of drug smuggling. According to Defendants, the officers are
15 targeting Hispanic males, stopping them almost twice as often as
16 white drivers, in violation of the Fourteenth Amendment. The
17 Government, on the other hand, insists that the stop of
18 Defendants' vehicle had nothing to do with the fact that the
19 driver and passenger were Mexican, and there is neither a
20 discriminatory purpose nor a discriminatory effect to NSI Cal-
21 MMET DHE's interdiction strategies.

22 ///

24 ⁹ Defendants argue that precedent established in United
25 States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000),
26 prevents "Hispanic appearance" from being considered when
27 officers are investigating smuggling as it pertains to the
28 Fourteenth Amendment. This is an incorrect statement of the
holding. The Ninth Circuit stated that Hispanic appearance may
not be considered "as a relevant factor where particularized or
individualized suspicion" is required for Fourth Amendment
purposes. Id. at 1135.

1 Despite their efforts, Defendants have failed to establish
2 there is a discriminatory effect to the officers' traffic stops
3 and any subsequent vehicle searches. There has been no evidence
4 submitted by Defendants that indicates similarly situated
5 individuals, namely Caucasians, are not being stopped for
6 violating the traffic code on I-5 in Shasta County. Defendants
7 have attempted to use both Shasta County population data, and I-5
8 collision data to establish an appropriate "baseline," or
9 statistical comparator by which the Hispanic male traffic in the
10 area could be compared.

11 Both statistical evaluators fail. The racial demographics
12 of Shasta County play no role in assessing whether the number of
13 Hispanic male stops on the highway is high, since the local
14 demographics are hardly indicative of the interstate traffic
15 along such a popular highway artery as I-5, let alone the number
16 of people of all colors speeding on the road. Similarly, any
17 statistical evidence culled from traffic collision data, or even
18 the warning citation data itself¹⁰, fails to demonstrate that
19 while Hispanic males are being stopped and searched on this
20 stretch of I-5, Caucasian males similarly situated are either in
21 violation of the traffic code, stopped, and then not searched, or
22 are altogether avoiding law enforcement interaction.

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25
26 ¹⁰ At the February 14, 2011 Evidentiary Hearing, Defendants'
27 asserted that they believe any statistics borne from data
28 compiled from the warning citations are faulty because the
warning citations are not uniformly issued and the actual number
of stops is inherently under-reported. See also Def. Opening
Brief, ECF No. 118, at 20. The Court agrees. See supra.

1 Though many Hispanic male witnesses testified to being
2 inappropriately and excessively searched, no evidence was
3 provided that Caucasian males have not been subject to the same
4 treatment.

5 Defendants also cannot demonstrate as a matter of law that
6 Officers Kropholler and McQuillan are specifically stopping
7 Hispanic drivers because they are in fact Hispanic. In his
8 brief, Defendant Sanchez-Palomino states that the officers are
9 making pre-textual traffic stops because "Hispanic male drivers
10 are more likely to be high-level smugglers than other drivers on
11 the road." No such evidence was ever presented during the
12 hearing. Officers Kropholler and McQuillan do not use race or
13 gender as factors in determining who they stop along I-5, and
14 their enforcement of the vehicle code is not predicated at the
15 onset by the race or gender of the driver. The officers use
16 their police training and knowledge to objectively evaluate
17 whether criminal indicators are present once the vehicles are
18 stopped. And here again, no evidence was presented that the
19 officers use race as a factor in assessing the potential criminal
20 activity afoot in a stopped vehicle.

21 The Court agrees with Defendants that a large number of
22 Hispanic males in this area of I-5 are stopped and searched.
23 However, suspicion and conjecture cannot surmount the requisite
24 constitutional threshold of finding a bona fide violation of
25 one's Equal Protection rights. For these reasons, the Court
26 concludes that the officers' conduct in the instant case does not
27 violate Defendants' rights under the Fourteenth Amendment.

28 ///

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss the Indictment or Suppress Evidence (ECF Nos. 59 and 60) are DENIED. The trial date is confirmed for March 21, 2011 at 9:00 a.m.

IT IS SO ORDERED.

Dated: February 18, 2011



MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE