

DECLARATION OF BLAIR J. AUSTIN

I, Blair J. Austin, hereby declare and state:

1. I am employed by the United States Postal Service as a Postal Inspector and have been so employed for approximately twelve years. This declaration is being submitted in support of the Government's Opposition to Defendant Bunny Campbell's Motion to Suppress Evidence.

2. On January 23, 2008, I received a call from a reliable source named Carol Dixon. Dixon works at the Postal Express at 1801 16th Street, Gould City, Gould. Postal Express is a privately owned business that rents post office boxes. Dixon told me that a woman had been visiting the business at about 3 p.m. every day for the past three days. Dixon said the woman had been acting suspiciously. Specifically, she would walk in, mill around until no other patrons were in the business, and then come up to request her packages. After signing for her packages, all of which have been pink, she would run out the door. On the third afternoon, Dixon asked the woman why she was getting so many packages, but the woman refused to answer. Dixon described the woman as a middle-aged, well-dressed Caucasian who always wore a big hat and sunglasses.

3. Dixon said the woman was receiving these odd packages through a post office box registered to "Sarah Connors." Dixon also stated that Postal Express requires its employees to check customers' identification when they rent a box. Dixon asked the woman for her driver's license when she rented the box a week earlier. Dixon remembered thinking that the woman's license did not look quite right. Dixon also said that the return address on the boxes was a post office box in New York. Based on that

information and my training and experience, I suspected that the woman renting the box might be using it to receive some type of contraband, so I decided to go to Postal Express the following day to investigate.

4. On January 24, 2008, I got an unmarked car from the motor pool. At approximately 2:45 p.m., I drove to the Postal Express business and parked across the street, in a location where I could see the Postal Express parking lot and entrance.

5. Shortly before 3 p.m., a red Volkswagen Jetta pulled into the parking lot. I noticed its windows were illegally tinted. The driver of the car remained inside for a few moments after parking. I used my binoculars to see if I could observe the driver but was unable to see inside the vehicle. Shortly thereafter, a middle-aged, well-dressed woman wearing a large hat and sunglasses exited the vehicle. She glanced around at her surroundings and then entered the business.

6. Approximately five minutes later, the woman ran out of the post office with a large pink box in her hands. As she approached the curb, she tripped and dropped the box. The box burst open and its contents spilled onto the pavement. The woman quickly got up, looked around nervously, and threw the spilled contents into the back-seat area of her car. She then exited the parking lot and headed northbound on 16th Street.

7. Convinced that this was the woman Dixon had called me about, I followed the vehicle down 16th Street. After driving a couple blocks, I called the Gould Police Department, identified myself, gave them the vehicle's license plate number, and asked them to send a marked police vehicle to stop the vehicle for illegally tinted windows.

8. About five minutes later, I saw a Gould Police Department vehicle turn onto 16th Street, pull behind the Jetta, and turn on its siren and lights. The Jetta immediately pulled to the side of the road. The police vehicle stopped behind it, and I pulled over behind the police vehicle. I got out of my vehicle and asked one of the local officers, Sarah Andrews, to go to the passenger side of the Jetta, while I approached the driver's side. When I got to the driver's-side door, I asked the driver for her license and registration. The driver handed me her license and then opened the glove compartment to search for the registration. I looked at the driver's license and noticed that it identified the driver as Bunny Campbell. As Campbell searched for the registration, I asked her if she knew why she had been pulled over. She replied that she did not. I informed her that her windows were illegally tinted. As we were speaking, Campbell was unable to find her registration and became visibly flustered. At that point, I told her I had seen her fall as she exited the post office and asked her why she had been in such a hurry to leave. She denied that she was hurrying and claimed that she did not know what I was talking about. Eventually, she located her registration. Officer Andrews remained by the passenger door during this exchange but did not say anything.

9. Because the name on Campbell's driver's license was different from the name that had been used to rent the post office box, I believed that Campbell was trying to hide something. I know that criminals often use post office boxes to mask criminal activities. In addition, her denial of her behavior outside the post office heightened my suspicions. I

asked Officer Andrews to run a computerized "wants and warrants" check on Campbell's license and registration. I also radioed my partner, Inspector Adam Daniels, to come to the scene to assist me. After a few moments, Officer Andrews informed me that the computerized check had come back clean. Although the check did not reveal any warrants, I kept Campbell's license and registration in my possession.

10. When my partner arrived a few moments later, I informed him of the situation. He suggested that we get Campbell out of her car and try to question her again. He and I then reapproached Campbell's vehicle. Officer Andrews and her partner waited by their police car. I again asked Campbell about the incident that had taken place at the post office. Campbell quickly became defensive and exclaimed that what she was doing was none of our business. At that point, because I did not know what was inside her vehicle and because she was becoming agitated, I asked Campbell to exit her vehicle and have a seat on the curb. I could not see inside the vehicle because of the illegally tinted windows.

11. After Campbell got out of her vehicle, Officer Andrews conducted a pat-down search for weapons but did not find any. Officer Andrews then directed Campbell to sit on the curb but did not handcuff her or use any other form of restraint. As she sat on the curb, I told Campbell that she was not under arrest, but that I still wanted to know what had been happening at the post office. Once again, she refused to answer my questions.

12. At this point, it had been about twenty-five minutes since Campbell was first stopped. I told her that I had reason to believe she was involved in criminal activity. Campbell

responded by finally admitting that she had come out of the post office and that she was in a hurry because she was hosting a "passion party."

13. Unfamiliar with the term "passion party," I asked my partner and Officer Andrews if either of them knew what Campbell was talking about. Officer Andrews explained that a "passion party" was another name for a Tupperware-style party featuring sex toys, such as vibrators, dildos, and artificial vaginas, for purchase. I then asked Campbell if the packages she had received from the post office had contained sex toys, to which she replied, "Yes." She also admitted she had purchased the toys from a New York company via the internet.

14. I then placed Campbell under arrest for possession of sexual devices with intent to promote them, in violation of 18 U.S.C. § 1472.

I hereby declare under penalties of perjury that the foregoing is true and accurate. Executed this 4th day of November, 2008 in Gould City, Gould.

BLAIR J. AUSTIN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GOULD

UNITED STATES OF AMERICA,

Case No. CR 08-233-WH

PLAINTIFF,

v.

BUNNY CAMPBELL,

DEFENDANT.

HONORABLE WHITNEY HODGES, DISTRICT JUDGE, PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION TO SUPPRESS EVIDENCE

GOULD CITY, GOULD

November 14, 2008

APPEARANCES BY COUNSEL:

FOR THE UNITED STATES:

STEFFI GASCON

ASSISTANT UNITED STATES ATTORNEY

UNITED STATES COURTHOUSE

1000 THIRD STREET

GOULD CITY, GOULD 90005

FOR THE DEFENDANT:

JILL PARKER

ATTORNEY AT LAW

600 SOUTH FIG STREET

GOULD CITY, GOULD 90005

GOULD CITY, GOULD: NOVEMBER 14, 2008

(COURT IN SESSION AT 1:30 P.M.)

THE CLERK: Calling CR No. 08-233-WH: United States v. Campbell.

MS. GASCON: Good afternoon, your Honor. Steffi Gascon for the United States of America, with Inspector Blair Austin of the United States Postal Service.

MS. PARKER: Good afternoon, your Honor. Jill Parker for the Defendant Bunny Campbell.

THE COURT: It is your motion to suppress, Ms. Parker. How would you like to proceed?

MS. PARKER: Your Honor, I believe that the government has submitted the declaration of Inspector Austin. At this time, I'd like to cross-examine him.

GOVERNMENT'S WITNESS BLAIR J. AUSTIN, SWORN

THE CLERK: Please take the stand. Please state your full name and spell your last name for the record.

THE WITNESS: Inspector Blair Jackson Austin. A-U-S-T-I-N.

THE CLERK: Thank you.

CROSS-EXAMINATION BY MS. PARKER:

Q: Why did you ask the local officer to pull Ms. Campbell's car over on January 24, 2008?

A: For two reasons. First, her car had illegally tinted windows. Second, I had reasonable suspicion that she was participating in criminal activity using the mail.

Q: How could you tell her windows were of illegal tint?

A: You can tell by trying to look through the window. What makes tint illegal is if it is so dark that you can't see the driver through the window, which I couldn't.

Q: You were watching her from all the way across the street, right?

A: Yes. I was across the street.

Q: Isn't it true that it would have been hard for you to see through the windows regardless of how dark the tint was?

A: No. I used my binoculars to watch the whole incident.

Q: What caused you to become suspicious of Ms. Campbell?

A: I had received a phone call the previous day from a reliable source of mine, Carol Dixon, who worked at a private post office business called Postal Express. She told me that Ms. Campbell had been receiving suspicious packages three days in a row. Moreover, she mentioned that Ms. Campbell was acting suspicious each of these days.

Q: Did she explain how she was acting suspicious?

A: Yes. Apparently, she would walk in and wait until no one else was in the post office to come up and request her packages. She would come up and sign for the packages and then run out the door.

Q: Did Ms. Dixon tell you what was in these packages?

A: No. She didn't know. Dixon had asked Ms. Campbell questions about the packages on the third day, but Ms. Campbell refused to answer any questions about them. All Dixon could tell me was that the packages were large, pink, and addressed to a post office box.

Q: What name was the box registered in?

A: According to Dixon, it was registered in the name of "Sarah Connors."

Q: This was enough to raise your suspicions that Ms. Campbell was doing something illegal?

A: Based on my training and experience, absolutely. I've had many investigations before involving criminals who use post office boxes registered in false names, because they think that there is no way to trace them back to the boxes.

Also, it's certainly out of the ordinary to see anyone come to the post office three consecutive days, behaving the way Ms. Campbell had done.

Q: I want to move onto the next day if I may. When did you arrive at the post office?

A: I arrived at about 2:45 p.m. in the afternoon.

Q: Did Dixon tell you what Campbell looked like?

A: She said that Campbell was a middle-aged, Caucasian woman who always wore a large hat and sunglasses.

Q: When did you first identify this woman as Ms. Campbell?

A: Well, I did not know her true name until I pulled her over and asked for her driver's license and registration, but I had an idea that the woman who arrived at the post office at 3:00 p.m. was the same woman who had been acting suspiciously.

Q: Why did you think that?

A: She fit the description. She was a middle-aged, well-dressed Caucasian woman who was wearing a big hat and sunglasses. In addition, she seemed nervous as she was entering the post office and more so when she came sprinting back out with the pink box, which she dropped.

Q: Did you see the contents of the box?

A: I saw them spill all over the sidewalk.

Q: Could you tell what the items were?

A: No. I was too far away.

Q: Why didn't you just stop Campbell on her way out of the post office?

A: I had to wait for a marked police car to make the traffic stop because I was in an unmarked, undercover vehicle.

Q: So how long was it after she left the parking lot that the Gould Police Department officer pulled her over?

A: I'd say five minutes.

Q: When you approached her vehicle after she was stopped, did you tell her why she had been stopped?

A: Yes, I identified myself and told her that her windows were illegally tinted.

Q: But that wasn't the real reason you pulled her over, was it?

A: Well, I also wanted to find out what she was doing at the post office.

Q: Did you tell her that you suspected that she was involved in some sort of illegal activity?

A: At that point in the stop, no.

Q: Did you see anything in plain view inside the car that signaled to you that she was doing something illegal?

A: No. Her windows were very dark, so I couldn't see in the back, but there was nothing in the front.

Q: If you couldn't see anything illegal, why didn't Officer Andrews write her a ticket for the windows and let her go?

A: Because when I asked her questions about the incident in the post office parking lot, she became evasive and denied ever being there. I knew that was not accurate, so I wanted to investigate further.

Q: When did your partner, Inspector Daniels, arrive at the scene?

A: Probably fifteen minutes after the original traffic stop.

Q: Why did you need him when you already had three officers at the scene?

A: I called for backup because Ms. Campbell was acting suspicious. Her reactions to my initial questions led me to suspect that she was involved in something illegal, so I called for backup in case I ended up making an arrest.

Q: How many additional inspectors showed up?

A: One.

Q: And what did he do when he arrived?

A: The two local officers, my partner, and I convened outside my car. After I briefed my partner on the situation, he suggested that we get Campbell out of her car. Inspector Daniels and I reapproached Campbell's vehicle.

Q: Did you or the other officers ever draw your weapons?

A: Inspector Daniels did as he walked toward the car. I told him to reholster his gun when I noticed that he had it out. He did so before he got to the passenger-side door.

Q: Was Ms. Campbell more cooperative when you began questioning her again, after Daniels pulled his gun?

A: Not in the least. She was still being evasive, and her tone began to escalate. She kept answering all of my questions with, "It's none of your business."

Q: Did anyone else ask Campbell questions?

A: No.

Q: Did any of the other officers say anything?

A: Inspector Daniels instructed Ms. Campbell at one point to watch her tone and to answer my questions, but she refused to cooperate.

Q: So then what happened?

A: I asked her to step out of the car, so that we could sort the situation out.

Q: Did you tell her she was under arrest?

A: No. I told her that she was not under arrest.

Q: Did you read her Miranda warnings?

A: No. There was no need. Like I said, she was not under arrest at that point.

Q: So what did you tell her?

A: I told her that I had reason to believe that she was involved in criminal activity and that we needed to get it sorted out before any of us could leave.

Q: Did more backup units arrive at some point?

A: After Campbell was out of the vehicle and sitting on the curb, two more Gould Police Department officers coincidentally happened to be driving past in a marked vehicle. They stopped at the scene, but I would not say that they were backup officers.

Q: Did you keep questioning Campbell after the additional officers arrived?

A: Yes. I knew she was not telling us the truth and I wanted the truth, so I kept questioning her.

Q: At this point, there were a total of six officers at the scene, correct?

A: Yes. There were two inspectors and four local officers, but the local officers were not really doing anything.

Q: What did you say to Campbell at that point?

A: I told her that I did not want to have to ask her again about what she was doing. I also informed her that there were consequences for lying to the police.

Q: How did she respond?

A: She said that she wanted to call her husband. I told her she could do that as soon as she was done answering my questions.

Q: Did any of the other inspectors or officers say anything to Campbell?

A: Inspector Daniels did. He was irritated because he had been passed over for a promotion that day. I believe he walked over to her at one point and told her that he was not particularly interested in playing games and that we would find out the truth, one way or another.

Q: What about the local officers? Did any of them say or do anything to Ms. Campbell?

A: They didn't say anything at all.

Q: How were you and the others positioned relative to where Ms. Campbell was sitting?

A: We were all near her. I'd say within ten feet, but no one was standing directly over her.

Q: Isn't it true that my client never said anything incriminating until after you had been interrogating her for more than twenty-five minutes, after your partner had

approached her with his gun drawn, and after you told her that she was not going to be allowed to leave unless she answered your questions?

A: It's true our encounter lasted twenty-five minutes, but it was not like you made it sound. My partner put away his weapon before he got to her car, and we never threatened or coerced her. I think she just realized she needed to tell us the truth.

Q: Would you have let my client leave before you finished questioning her?

A: Probably not, but she never tried to leave.

MS. PARKER: Thank you, Inspector Austin.

REDIRECT EXAMINATION BY MS. GASCON:

Q: Is it your understanding that law enforcement officers are permitted to pull people over based on reasonable suspicion?

MS. PARKER: Objection. Calls for a legal conclusion.

THE COURT: The objection is sustained. Move on, counsel.

Q: Does the Postal Service have any sort of policy about reading suspects their Miranda warnings?

A: Yes. We are required to give Miranda warnings to suspects who have been placed under arrest.

Q: Did you comply with that policy during this encounter?

A: Yes. This was a Terry stop, not an arrest.

MS. PARKER: Objection. Irrelevant.

THE COURT: Overruled. Please continue.

Q: When Ms. Campbell had been pulled over and you approached her car, how would you characterize her behavior?

A: Suspicious. She was acting weird and flustered. She looked a lot more nervous than most people do when they get pulled over for a traffic stop.

Q: What were your intentions when you asked Officer Andrews to pull her over?

A: First, to cite her for illegally tinted windows, and second, to confirm or dispel my suspicion that she was involved in some sort of criminal activity using her post office box.

Q: Does the Postal Service have specific guidelines for how to question suspects?

A: Yes.

Q: Do these guidelines set any time limit for this type of questioning?

A: Generally speaking, we are permitted to question them until we either confirm or dispel our suspicions.

Q: Why did you need your partner to come to the scene?

A: It's always smart to have backup when a suspect starts getting agitated because you never know what can happen. Second, based on her initial reactions to my questions, I thought I might be making an arrest, and the Postal Service requires us to have two inspectors present when escorting an arrestee.

Q: Did you advise any of the other officers to draw their weapons when they approached the car?

A: No. I told Inspector Daniels to holster his weapon immediately after I saw him take it out, and he complied with my request.

Q: At any point in questioning Ms. Campbell, did you threaten her with arrest?

A: No.

Q: Did you tell her that you had evidence that she was involved in criminal activity?

A: I just said that I had reason to believe she might be involved in criminal activity. That's all.

Q: Did you handcuff her at any point?

A: No.

Q: Did you tell her that you received a call from a source at the post office regarding her?

A: No. I didn't tell her anything except that I wanted the truth.

Q: Did you or any of the other officers threaten Ms. Campbell in any way before she admitted her involvement in criminal activity?

A: No.

Q: At some point did you read her Miranda rights to Ms. Campbell?

A: Yes. As soon as she admitted that she had purchased sex toys over the internet intending to sell them at a "passion party," which is a felony, I read her rights to her because, at that point, I had probable cause to arrest her.

MS. GASCON: Thank you, Inspector Austin.

THE COURT: Ms. Parker, would you like to call any witnesses for the defense?

MS. PARKER: Yes, Your Honor. At this time, I'd like to call Ms. Bunny Campbell to the stand.

DEFENSE WITNESS BUNNY CAMPBELL, SWORN

THE CLERK: Please take the stand. Please state your full name and spell your last name for the record.

THE WITNESS: Bunny Campbell. C-A-M-P-B-E-L-L.

THE CLERK: Thank you.

DIRECT EXAMINATION BY MS. PARKER:

Q: Good afternoon, Ms. Campbell. I would like to direct your attention to the afternoon of January 24, 2008. Do you recall being pulled over by the police that day?

A: Yes.

Q: Where were you when you were pulled over?

A: I had just left the Postal Express parking lot and was heading back to my house.

Q: Do you recall how many officers approached the vehicle when you were first pulled over?

A: Two. A male officer who identified himself as Postal Inspector Blair Austin and a uniformed female named Officer Andrews. There was a third officer in the police car that pulled me over, but he stayed in the car at that point.

Q: Did either of the officers who approached your car explain why you had been pulled over?

A: Yes. Inspector Austin did.

Q: What did he say?

A: He told me that my windows were illegally tinted. He also mentioned that he had observed me running out of the post office and asked me why I was in such a hurry.

Q: Did you tell him why you were in a hurry?

A: No. That was none of his business, and I told him that. I told him that I had done nothing wrong and asked him to write me my ticket so that I could get on with my day.

Q: Did he ask you for your license and registration?

A: Yes.

Q: Did you provide him with these documents?

A: Yes, but it took me some time to find my registration. I had forgotten that I had recently renewed it and put it underneath the visor instead of in the glove compartment.

Q: What happened next?

A: They went back to their vehicles, and I waited in my car for them to issue me a ticket.

Q: Did you do anything while you waited?

A: Not really. I just sat there and waited. I turned around to look back at the police car and noticed some sex toys lying across the back seat, but my windows were tinted, so I was not worried about the officers seeing them.

Q: How long was it before the officers reapproached your vehicle?

A: I'd say maybe five minutes.

Q: Was it the same officers who reapproached?

A: No. Two officers reapproached. One was Inspector Austin, who had questioned me initially, but the other was a new guy. I found out later he was Inspector Austin's partner.

Q: Did you observe Daniels and Austin as they reapproached your car?

A: Yes. I was watching through my side-view and rear-view mirrors.

Q: Did you notice anything that they were doing?

A: I noticed Inspector Daniels had his gun drawn while he was walking up to my car.

Q: How did you react when you saw that?

A: I was shocked and frightened. One second I'm told that I was pulled over for illegally tinted windows, and then I have an officer coming up to my car with his weapon drawn. I had no idea what was happening.

Q: What happened then?

A: Inspector Austin told me to put my window down so that his partner could see into the car, which I did. Then he began asking me questions again about what I was doing in the post office.

Q: What was your response to these questions?

A: I refused to answer any of the questions. I told him that it was none of his business what I was doing. I just wanted my ticket so I could go.

Q: Did the Inspector accept that response?

A: Not at all. Inspector Daniels yelled at me to "watch my tone" and "answer the questions." Before I knew it, I was being asked to get out of my car and sit on the curb.

Q: Were you told that you were under arrest at that time?

A: No.

Q: Did you feel free to leave?

A: Absolutely not. I was outside of my car surrounded by officers who were telling me that they thought I was some sort of criminal. The female officer even did a pat-down search of my body, like in the movies.

Q: Do you recall how many officers were around you when you were sitting outside your vehicle?

A: Four. The two inspectors and the two police officers.

Q: What was your response to the Inspector's questions?

A: I was so confused. I wanted to get out of there, so I just told the Inspector that I had to get home because I was hosting a party for my friends.

Q: Did he let you leave after that?

A: No. He asked me what type of party it was.

Q: Did you tell them what type of party it was?

A: Not at first, but I thought that they would not let me leave until I told them.

Q: Why did you feel like you had to tell them this?

A: Because of the whole situation. I was surrounded by officers on the side of the road. Inspector Austin told me that he thought I was lying to him and that there were other ways to get at the truth, none of which he wanted to pursue. I also knew that if they looked into my car, they might see the sex toys in the backseat, so I figured I had to tell them the truth, and I hoped they would let me go.

Q: So what did you do?

A: I told him that I was having a passion party.

Q: What happened next?

A: He arrested me.

Q: How long would you say the encounter lasted?

A: Approximately 25 minutes.

MS. PARKER: Thank you. No further questions.

CROSS-EXAMINATION BY MS. GASCON:

Q: Ms. Campbell, I would like to go back to the point where you were asked to exit your vehicle. At the time, Inspector Austin informed you that you were not under arrest, isn't that correct?

A: Yes, that's correct.

Q: It's also true that you were not handcuffed, correct?

A: Correct.

Q: Nor were you physically restrained in any other way?

A: That's correct.

Q: Other than Officer Andrews, who patted you down for weapons, none of the other officers laid a hand on you, did they?

A: No.

Q: Moving briefly to the questioning outside your vehicle, Inspector Austin never told you that you had to answer his questions if you wanted to leave, did he?

A: Not explicitly.

Q: He never threatened you either, correct?

A: No. He never threatened me.

Q: Nor did any of the other officers threaten you?

A: Well, Inspector Daniels yelled at me.

Q: But he never threatened to arrest you or to hurt you in any way, did he?

A: Not in so many words, but I was scared by the whole situation, especially after I saw him with his gun out.

Q: But he put his gun away before he reached your vehicle, isn't that true?

A: Yes.

MS. GASCON: Thank you, no further questions.

THE COURT: Thank you. I will take the matter under submission.

(Whereupon the proceedings were adjourned.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GOULD

UNITED STATES OF AMERICA,)	CR No. 08-233-WH
)	
PLAINTIFF,)	<u>ORDER DENYING DEFENDANT'S</u>
)	<u>(1) MOTION TO SUPPRESS</u>
v.)	<u>EVIDENCE AND (2) MOTION TO</u>
)	<u>DISMISS THE INDICTMENT</u>
BUNNY CAMPBELL,)	
)	
DEFENDANT.)	
_____)	

This matter comes before the Court on Defendant Bunny Campbell's motions. Defendant Campbell moved (1) to suppress her incriminating statements that were made during a traffic stop before she was given her Miranda warnings and (2) to dismiss the Indictment on the ground that the charging statute violates her constitutional right to privacy. For the reasons set forth below, both her motions are DENIED.

I. Factual Background

The facts are recounted in the parties' papers and supporting documents and in the transcript of the hearing, so

the Court recounts them here in summary fashion. On January 24, 2008, Bunny Campbell was pulled over by United States Postal Inspector Blair Austin after she drove out of the parking lot of a private post office business. Inspector Austin had received a tip from a source indicating that a middle-aged Caucasian woman had been acting strangely while picking up packages. After observing a woman matching the source's description cautiously enter the post office and then trip while sprinting out, Inspector Austin decided to conduct a traffic stop because the woman's car windows were illegally tinted.

Two local officers pulled Campbell over. Inspector Austin approached Campbell's vehicle, informed her that her windows had an illegal tint, and asked her for her driver's license and registration. While Campbell was looking for her registration, Inspector Austin asked why she was in such a hurry to leave the post office. Campbell denied hurrying. She became defensive and agitated, raising Inspector Austin's suspicions.

After Austin's partner, Inspector Adam Daniels, arrived, they decided to get Campbell out of her car and question her again. Gould Police Officer Andrews, who was female, did a pat-down search to make sure Campbell was not carrying a weapon, which she was not. Campbell was then seated on the curb, but she was not handcuffed or otherwise restrained. Inspector Austin told her that she was not under arrest, as he was just

investigating potential criminal activity. He asked her again what she had been doing, and Campbell again refused to answer his questions, exclaiming that it was "none of [their] business."

After approximately twenty-five minutes, Campbell finally admitted that she was in a hurry because she was having a "passion party," a sex-toy party. She admitted that she had ordered the sex toys over the internet from New York, picking them up at the Postal Express. Deputy Austin then arrested Campbell for possessing sex toys with the intent to promote, in violation of 18 U.S.C. § 1472 (Supp. 2005).¹

¹Section 1472 reads in relevant part:

- a) For the purposes of this section, the following definitions apply:
 - 1) A "device used to stimulate sexual organs" is any device, including an artificial penis or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.
 - 2) "Promote" means to manufacture, sell, give, provide, lend, mail, deliver, transfer, distribute, disseminate, or to offer or agree to do any of the above.
- b) No person shall knowingly and intentionally promote a device used to stimulate sexual organs, or possess with intent to promote such a device if:
 - 1) The promotion involved the use of the mails for the mailing, carriage in the mails, or delivery of any such device, or
 - 2) The promotion of the device involved the transportation, distribution, traveling, or transmission in interstate or foreign commerce, or the use of a facility or means of interstate or foreign commerce in or affecting such commerce.
- c) An offense under Subsection (b) is a felony.
- d) A person who possesses three or more such devices is presumed to possess them with intent to promote the same.

Campbell moved to suppress her statements on the ground that they were obtained in violation of her Fifth Amendment rights and to dismiss the Indictment on the ground that § 1472 violated her due process right to privacy.

II. Legal Analysis

These motions present two issues. First, did Inspector Austin's questioning of Campbell violate her right under the Fifth Amendment to be advised of her Miranda rights before being interrogated by officers during an extended traffic stop? Second, is 18 U.S.C. § 1472 unconstitutional under the Due Process Clause of the Fifth Amendment? The Court hereby finds that Campbell's constitutional rights were not violated by Inspector Austin's questioning and that § 1472 is constitutional. Accordingly, both motions are DENIED.

A. Defendant's Motion to Suppress Her Incriminating Statements Is Denied Because the Investigatory Stop Was Reasonable and Did Not Require Miranda Warnings

In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the Supreme Court held that before conducting a custodial interrogation, police must advise suspects of their right to be free from compulsory self-incrimination and their right to counsel. In Terry v. Ohio, 392 U.S. 1, 29 (1968), the Court

e) It is an affirmative defense to prosecution under this section that the person who possesses or promotes a device used to stimulate sexual organs does so for a bona fide medical, psychiatric, judicial, legislative, educational, or law enforcement purpose.

held that an officer who reasonably suspects that a person has committed a crime may briefly detain the suspect to investigate the circumstances giving rise to that suspicion, regardless of whether the officer eventually develops probable cause to arrest the person. This case involves the interaction between those two well-accepted rules: whether a suspect is entitled to Miranda warnings during a Terry stop that continues for an extended time and involves arguably coercive behavior by the police. This is an issue of first impression in the Twelfth Circuit, and other courts are split.

The First, Fourth, and Eighth circuits have used a bright-line rule, holding that if the Terry stop was reasonable under the Fourth Amendment, the suspect was not in custody and not entitled to be given Miranda warnings. See, e.g., United States v. Pelayo-Ruelas, 345 F.3d 589, 592 (8th Cir. 2003); United States v. Trueber, 238 F.3d 79, 92 (1st Cir. 2001); United States v. Leshuk, 65 F.3d 1105, 1110 (4th Cir. 1995). For example, in Trueber, federal agents pulled a car over based on a reasonable suspicion of cocaine dealing. 238 F.3d at 82-83. The agents, one of whom had his unholstered gun pointing toward the ground, instructed the defendant and his companion to exit the vehicle. Id. at 83. The agents separated the suspects and questioned them. Id. During the questioning the defendant made incriminating admissions. Id. The agents then asked for

permission to search the defendant's hotel room. Id. at 84. At the hotel, the agents questioned the defendant for another hour and twenty minutes and obtained additional incriminating statements. Id. at 84-85. The First Circuit held that the agents were not required to read the defendant his Miranda rights during the traffic stop because it was reasonable in scope and did not develop into a custodial investigation. Id. at 95. The court remanded the matter for further factual findings relating to the admissibility of the defendant's statements at the hotel. Id.

In contrast, the Second, Seventh, Ninth, and Tenth circuits have held that Fourth Amendment reasonableness is not the standard for resolving challenges based on a failure to give a suspect Miranda warnings; rather, courts should examine the totality of the circumstances to determine whether the suspect was in custody and therefore entitled to warnings. See, e.g., United States v. Jones, 523 F.3d 1235, 1239-40 (10th Cir. 2008); United States v. Newton, 369 F.3d 659, 673 (2d Cir. 2004); United States v. Kim, 292 F.3d 969, 976 (9th Cir. 2002); United States v. Smith, 3 F.3d 1088, 1097 (7th Cir. 1993).

These circuits have listed a variety of factors that must be considered. For example, the Tenth Circuit has established a nonexhaustive list of factors, including: (1) the extent to which the suspect is made aware that he or she is free not to

answer questions or to end the interview; (2) the nature of the questioning; and (3) whether police dominate the encounter. Jones, 523 F.3d at 1240. In Jones, federal agents stopped the defendant outside her car and asked if they could question her in their unmarked police car. Id. at 1237-38. The suspect agreed. Id. The agents told the suspect that she was not under arrest and was free to stop the questioning and leave. Id. at 1238. The encounter lasted approximately forty-five minutes to an hour, and the agents never brandished their weapons, raised their voices, or implied that Jones was required to submit to their authority. Id. Under the totality of the circumstances, the Tenth Circuit found that Jones was not in custody and therefore not entitled to Miranda warnings. Id. at 1244.

This Court finds the reasoning in the First, Fourth, and Eighth circuits persuasive and, thus, adopts the reasonableness test used by those circuits. It is well accepted that Miranda warnings are not required until a suspect is "in custody." Under Terry, a suspect who has been briefly detained by officers who have a reasonable suspicion to believe a crime has been committed is not "in custody" as long as the scope of the investigatory stop is reasonable. Since both these determinations hinge on whether a suspect is "in custody," it makes sense to hold that as long as the detention is a reasonable Terry stop, Miranda warnings are not required. This

results in a clear rule that will both protect suspects' rights and provide officers with workable guidance.

Here, Inspector Austin reasonably suspected that Campbell was involved in criminal activity and conducted a reasonable Terry stop that did not trigger the need for Miranda warnings. It is undisputed that Austin's questioning of Campbell took place in a neutral, public setting. Inspector Austin never raised his voice or brandished his weapon, and, although Inspector Daniels drew his weapon, he quickly reholstered it. In addition, even though six officers were eventually present, only one actually questioned Campbell, and he told her that she was not under arrest. None of the officers ever threatened or physically restrained Campbell. These facts show that the officers conducted a reasonable Terry stop that could include questioning without Miranda warnings.

B. Defendant's Motion to Dismiss Must Be Denied Because 18 U.S.C. § 1472 Does Not Violate Her Right to Substantive Due Process

Although no court has addressed whether the federal statute prohibiting the promotion of devices used to stimulate sexual organs is constitutional, the Fifth and Eleventh Circuits have addressed the constitutionality of similar state statutes. Because 18 U.S.C. § 1472 is virtually identical to the state statutes at issue in those cases, and there is no meaningful difference between the substantive due process analysis under

the Fifth and Fourteenth Amendments, see, e.g., Reno v. Flores, 507 U.S. 292, 301-02 (1993), this Court believes it is useful to examine the reasoning in those cases.

The Eleventh Circuit has examined the constitutionality of an Alabama statute prohibiting the sale of any device primarily used for the stimulation of human genitals. See Williams v. Att'y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004), aff'd after remand by Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007). In examining the constitutionality of that statute, the Eleventh Circuit first noted that even though many Supreme Court decisions have found that there was a right to privacy for certain sexual matters, it has "never indicated that the mere fact an activity is sexual and private entitles it to protection as a fundamental right." Att'y Gen., 378 F.3d at 1236. More specifically, it noted that although the Supreme Court held in Lawrence v. Texas, 539 U.S. 558, 578 (2003), that a statute criminalizing homosexual sex violated the rights of two males convicted of having sex in the privacy of their home, the Court did not expressly create a fundamental right to sexual privacy, despite being invited to do so by the litigants. Att'y Gen., 378 F.3d at 1236-37. The Eleventh Circuit concluded that the Supreme Court had not already found a constitutionally protected fundamental right to privacy that would include the prohibited conduct. Id. at 1237.

Assuming that the Supreme Court had not already held that there was a fundamental right to privacy in all types of sexual conduct, the Eleventh Circuit then examined whether it should establish such a right. It noted that the Court had set forth a process for determining whether to establish a new fundamental right, which requires courts to carefully define the right at issue and then determine whether that right is (1) "objectively, deeply rooted in this Nation's history and tradition" and (2) "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." Id. at 1242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). It then determined that the issue in that case was whether the constitutional right to privacy encompassed the right to promote sexual devices. Att'y Gen., 378 F.3d at 1240-41. It further found that there was no such deeply rooted right and therefore declined to extend the right to privacy to cover that conduct. Id. at 1243-45, 50.

In contrast, the Fifth Circuit found that a similar Texas statute was unconstitutional because it infringed the defendant's right to privacy. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 747 (5th Cir. 2008). Relying on Lawrence, the Fifth Circuit broadly construed the right at issue as "the individual's substantive due process right to engage in private

intimate conduct of his or her choosing” and held that the Texas statute impermissibly burdened that right. Id. at 744.

This Court is persuaded by the reasoning of the Eleventh Circuit, holding that a statute that prohibits the commercial distribution of sexual devices does not violate a defendant’s right to substantive due process. The right at issue in § 1472 is distinguishable from the right at issue in Lawrence because § 1472 involves commercial, public conduct, while Lawrence involved conduct occurring in the privacy of a person’s home. Though she might have a constitutional right to have sexual devices in her home, this Court does not believe that Campbell had a constitutional right to promote such devices.

III. Conclusion

In summary, officers conducting a reasonable Terry stop are not required to read the suspect her Miranda rights before asking questions. In addition, the fundamental right to privacy established under the Due Process Clause does not encompass the right to promote sexual devices. Based on the foregoing, the motions to suppress evidence and to dismiss the Indictment are hereby DENIED.

Dated: November 17, 2008

WHITNEY HODGES
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE
TWELFTH CIRCUIT

Case No. 09-1923

Decided Aug. 11, 2009

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

BUNNY CAMPBELL,
DEFENDANT-APPELLANT.

APPEAL from a judgment of the United States District Court for
the District of Gould. Before Rader, Hage, and Carter.

Opinion by CARTER, J. Reversed.

Defendant-Appellant Bunny Campbell appeals from her conviction following a guilty plea for possession of sexual devices with intent to promote, in violation of 18 U.S.C. § 1472 (Supp. 2005). Campbell contends that her conviction must be reversed because the district court erred by denying her motions to (1) suppress her prearrest statements and (2) dismiss the Indictment.

Specifically, Campbell argues that her Fifth Amendment rights were violated when she was interrogated by Postal Inspector Blair Austin without having received Miranda warnings. We agree. Deciding an issue of first impression in this circuit, we hereby hold that when analyzing whether a suspect must be given Miranda warnings following a traffic stop, courts must consider the totality of the circumstances. Applying that test to the present case, the Court finds that Inspector Austin's questioning amounted to custodial interrogation and Campbell was entitled to Miranda warnings.

Additionally, Campbell argues that § 1472 violates her fundamental right to engage in private, intimate conduct of her choosing by proscribing the promotion of sexual devices. Deciding another issue of first impression in this circuit, we hereby hold that the fundamental right to privacy includes the right to promote and purchase sexual devices, such as those possessed by Campbell at the time of her arrest. Accordingly,

we find that the district court erred in denying Campbell's motions to suppress and to dismiss, that error was not harmless, and her conviction must be reversed.

I. FACTUAL AND PROCEDURAL SUMMARY

On January 23, 2008, Inspector Austin received a call from Carol Dixon, a reliable source who worked at a business that rented private post office boxes. Dixon had grown suspicious of a female patron who had been receiving odd-looking packages. Dixon explained that this woman had come into the business three days in a row at 3 p.m., wearing a big hat and sunglasses.

The packages, which were different shades of pink, were addressed to a post office box rented in the name of "Sarah Connors." Dixon explained that the woman (who was later identified as Campbell) would walk in, loiter until no other patrons were around, then come up and request her packages. After receiving them, Campbell would run out the door.

Suspecting that Campbell might be doing something illegal, Dixon called Inspector Austin, who decided to go to the business the next day to observe Campbell's behavior. As a twelve-year veteran postal inspector, Austin knew that criminals often use post office boxes to receive contraband.

The following day, Inspector Austin drove to the postal business around 2:45 p.m. and positioned himself across the street, so he could see the parking lot and entrance. At

approximately 2:55 p.m., he observed a red Volkswagen Jetta with dark-tinted windows pull into the parking lot.

Inspector Austin used his binoculars to try to see inside the car, but the car windows were so dark that he could not. He was aware that it is illegal to have windows with such a dark tint. Two minutes later, he observed a Caucasian female with a big hat and sunglasses get out of the vehicle. She looked around and quickly entered the business.

Shortly thereafter, the same woman came sprinting out with a large, pink box in her hands. As she approached the curb, she tripped and dropped the box, causing the box's contents to spill onto the pavement. She immediately jumped up, and after looking around as if to see if anyone had seen her, she threw the items into her car and pulled out of the parking lot.

Convinced this woman was the one his source had identified, Inspector Austin followed her out of the parking lot and called for a local officer to make a traffic stop. After a few minutes, a Gould Police Department vehicle arrived at the scene and began following Campbell's vehicle with its lights and sirens on. Campbell immediately pulled to a stop. Inspector Austin then approached the driver's door and asked Campbell for her license and registration. One of the local officers was standing by the passenger door. Campbell gave Austin her driver's license and started looking for her registration.

Inspector Austin asked Campbell if she knew why he had pulled her over, and Campbell replied that she had no idea. Inspector Austin then informed her that her windows were illegally tinted.

Campbell appeared to get flustered. While she continued to search for her registration, the Inspector told her that he had seen her run out of the post office and trip over the curb. He then asked why she had been in such a rush. Campbell denied that any such thing had happened. At that time, she found her registration and gave it to Inspector Austin. Before returning to his car, the Inspector reiterated that he had seen her run out of the post office and asked what the rush was. Campbell got defensive, exclaiming that she had done nothing wrong. She then asked the Inspector to write her a ticket so that she could "get on with her day."

Inspector Austin became increasingly suspicious of Campbell's behavior. In his years as an inspector, he had encountered many suspects who got defensive, and, more often than not, these people were hiding criminal behavior. Inspector Austin called his partner, Inspector Adam Daniels, to assist with the stop. He also asked one of the local officers, Sarah Andrews, to run a computerized check for "wants and warrants" on Campbell. Officer Andrews ran the check and informed Inspector Austin that Campbell had no warrants.

Within a few minutes, Inspector Daniels arrived. Inspector Austin told Daniels what had occurred. They decided to continue questioning Campbell. Inspector Austin approached the driver's door again, while Daniels approached the passenger side.

Meanwhile, as Campbell was waiting in her car, she noticed that some of the sex toys were lying across her car's back seat, but she thought the officers would not be able to see them because her windows were tinted. She watched in her car mirrors as the two inspectors reapproached her vehicle. She saw that Inspector Daniels had his gun out by his side, and she was shocked and frightened.

When he got to the driver's-side window, Inspector Austin instructed Campbell to put her passenger-side window down so that Inspector Daniels could see her. Again, he asked Campbell about the incident in the parking lot. Once more, Campbell exclaimed that she had done nothing wrong and that it was "none of [his] business." From the other side of the car, Inspector Daniels instructed her to "watch [her] tone" and answer the questions.

Sensing the situation was escalating, Inspector Austin asked Campbell to exit the vehicle and have a seat on the curb. One of the local officers conducted a pat-down search of Campbell but did not find any weapons. Campbell was not placed in handcuffs or otherwise restrained. Austin told her she was

not under arrest but also said that he had reason to believe that she was involved in criminal activity. Once again, the inspector asked her what she had been doing at the Postal Express, and Campbell refused to answer his questions.

Inspector Austin then explained to Campbell that there were consequences for lying to the police. He also informed her that there were alternative ways to get at the truth, none of which she would want to pursue. Afraid that he might go look in the back of the car and wanting to end the encounter, Campbell finally admitted that she was planning to have a "passion party." Inspector Austin then asked Campbell if she was having a sex-toy party, to which she replied, "Yes." He asked if what she had gotten in the box were sex toys. Campbell admitted that she had purchased boxes of sex toys over the internet from a company in New York. Both parties agree that the questioning lasted approximately twenty-five minutes.

After she admitted purchasing the sex toys to sell them at a party, Inspector Austin placed Campbell under arrest for violating 18 U.S.C. § 1472, read Campbell her Miranda rights, and took her into custody.

Campbell eventually entered a guilty plea, conditioned on her ability to appeal the denial of her motions to suppress and to dismiss the Indictment.

II. DISCUSSION

A district court's denial of a motion to suppress and denial of a motion to dismiss an indictment on constitutional grounds are both legal questions that are reviewed de novo, but the factual findings underlying them are reviewed for clear error. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995); Maine v. Taylor, 477 U.S. 131, 145 (1986). If a defendant's constitutional rights were violated, the conviction must be overturned unless the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967).

A. The District Court Erred when It Held that Campbell's Freedom Was Not Curtailed to the Degree Associated with a Formal Arrest

The Fifth Amendment provides that "[a] person shall not be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Supreme Court has recognized that any statements, whether inculpatory or exculpatory, made by a suspect as the result of custodial interrogation may not be used against that suspect in a criminal trial, unless it can be shown that the police provided effective procedural safeguards to secure the suspect's Fifth Amendment privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444, 498-99 (1966). Absent some other effective means of informing a defendant of her rights, the police must tell the defendant that

(1) she has the right to remain silent; (2) any statement made may be used against her; (3) she has a right to an attorney; and (4) if she cannot afford an attorney, one will be appointed for her. Id. at 444.

Miranda warnings are not required every time police question a suspect; rather, Miranda applies only to custodial interrogations. Id. In Terry v. Ohio, the Supreme Court recognized that when a police officer reasonably suspects that an individual is committing a crime or is about to commit a crime, the officer may stop the individual and make reasonable inquiries to confirm or dispel his suspicion. 392 U.S. 1, 30 (1968).

The Supreme Court has also held that routine traffic stops are more analogous to Terry stops than formal arrest, and thus they generally do not require Miranda warnings. Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984). The reasons for this are two-fold. Id. at 437. First, the detention of a motorist during a traffic stop is presumptively temporary and brief. Id. at 437-38. Second, the circumstances surrounding a routine stop are not such that the motorist is likely to believe that he or she is at the mercy of the police. Id. at 438-39. However, if a motorist who has been stopped is subjected to treatment that places him in de facto custody and then interrogated, he is entitled to Miranda warnings. Id. at 440. The relevant inquiry

is how a reasonable person in the suspect's position would have understood the situation. Id. at 442.

This case involves the intersection of all of these rules. The question here is whether a suspect who has been subjected to arguably coercive police behavior during a traffic stop that is justified by a reasonable suspicion but has also already lasted for a relatively long time is entitled to receive Miranda warnings before being questioned. The Supreme Court has not yet answered that exact question, and the circuits are split on it.

Relying on Berkemer, three circuits have held that a Terry stop that is reasonably limited in scope and duration does not place the suspect in custody, so no Miranda warnings are required. See United States v. Pelayo-Ruelas, 345 F.3d 589, 592 (8th Cir. 2003); United States v. Trueber, 238 F.3d 79, 92 (1st Cir. 2001); United States v. Leshuk, 65 F.3d 1105, 1110 (4th Cir. 1995). For example, in Pelayo-Ruelas, a driver was pulled over by DEA agents and questioned after the agents received reliable information from an informant that the driver's car contained methamphetamine. 345 F.3d at 590-91. The Eighth Circuit held that the questioning did not constitute custodial interrogation because the Terry stop was reasonable and did not curtail the defendant's freedom to the degree associated with a formal arrest, so the defendant was not entitled to Miranda warnings. Id. at 593.

In contrast, four circuits have held that Fourth Amendment reasonableness is not the appropriate standard for resolving Miranda challenges. See United States v. Ali, 68 F.3d 1468, 1473 (2d Cir. 1995) (holding that whether a stop was reasonable under Terry is irrelevant to Miranda, because “Terry is an exception to the Fourth Amendment probable cause requirements, not to the Fifth Amendment protections against self-incrimination”); see also United States v. Jones, 523 F.3d 1235, 1239-40 (10th Cir. 2008); United States v. Kim, 292 F.3d 969, 976-77 (9th Cir. 2002); United States v. Smith, 3 F.3d 1088, 1097 (7th Cir. 1993).

These circuits have held that the totality of the circumstances must be considered to determine whether a suspect was in custody. See, e.g., Kim, 292 F.3d at 978; Jones, 523 F.3d at 1239-40. For example, the Ninth Circuit considers five factors, including (1) the language used to summon the individual, (2) the extent to which he or she is confronted with evidence of guilt, (3) the physical surrounding of the interrogation, (4) the duration of the detention, and (5) the degree of pressure applied to the individual. Kim, 292 F.3d at 974. In Kim, the defendant was not handcuffed but was isolated from her family in a back room of her business and questioned for approximately forty-five minutes. Id. at 971-72. The court concluded that this amounted to a custodial interrogation,

because the atmosphere was police dominated and the questioning was a full-fledged inquiry. Id. at 977-78.

Similarly, the Tenth Circuit has considered three factors, including (1) the extent to which the suspect is made aware that he or she is free to refrain from answering questions, (2) the nature of the questioning, and (3) whether police dominated the encounter. Jones, 523 F.3d at 1240. In Jones, federal agents stopped a woman coming out of a convenience store and questioned her inside their unmarked car about a package. Id. at 1237-38. Under the totality of the circumstances, the questioning did not constitute custodial interrogation because the defendant was informed that she was free to leave and the questioning was not police dominated. Id. at 1244.

We agree with the circuits that have held that an otherwise valid Terry stop may still require Miranda warnings, and that courts must evaluate the totality of the circumstances when determining whether the stop developed into a custodial interrogation. We reject the use of a bright-line rule that incorrectly focuses on the reasonableness of the stop under the Fourth Amendment.

Considering the totality of the circumstances in this case, the facts show that Inspector Austin's stop of Campbell developed into a custodial interrogation necessitating Miranda warnings. Although Austin informed Campbell that she was not

under arrest at the time he questioned her, he never informed her that she could refrain from answering his questions or end the interview. Rather, the totality of their contact reasonably suggested that Campbell would not be allowed to leave unless she answered Austin's questions.

First, the questioning was prolonged and accusatory. Rather than writing a citation and letting Campbell leave, the inspectors ordered her out of the car and continued to question her while she was surrounded by officers, thereby creating a coercive environment from which Campbell did not feel free to leave. Second, the encounter was police dominated. A total of six officers eventually were within ten feet of Campbell. The inspectors, not Campbell, were in complete control of the environment. One of the inspectors drew his weapon as he approached Campbell's the car. This same inspector raised his voice at Campbell during the stop, thereby creating a coercive environment.

Accordingly, the totality of the circumstances in this case shows that the stop was a de facto custodial interrogation that necessitated Miranda warnings. Campbell's Fifth Amendment rights were violated, and her subsequent admissions should have been suppressed.

B. The District Court Erred by Denying Campbell's Motion to Dismiss

The Fifth Amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. Const. amend. V. To provide substance for the Due Process Clause, the judiciary has routinely held that it protects certain fundamental rights from infringement by government action, even if those rights are not enumerated elsewhere in the Constitution. Griswold v. Connecticut, 381 U.S. 479, 491-92 (1965); see also Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977); NAACP v. Alabama, 357 U.S. 449, 460-62 (1958); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

While the Court may determine what rights are fundamental, such a decision must not be based on private notions but on answers to the following questions: (1) is the right so rooted in the traditions and collective conscience of the nation as to be considered fundamental and (2) is the right "of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? Griswold, 381 U.S. at 493. Applying this test, Griswold held that a right to privacy is among the fundamental rights retained by the people. Id. at 499.

Following Griswold, the Supreme Court has recognized several instances in which the fundamental right to privacy applies, including several situations that involve sexual privacy. See Lawrence v. Texas, 539 U.S. 558 (2003) (right to engage in consensual sodomy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to obtain contraceptives must be the same for married and unmarried persons); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (right to obtain an abortion); Carey, 431 U.S. at 678 (distribution of contraceptives to people under the age of sixteen).

Despite these rulings, the Court has not explicitly established a fundamental right to sexual privacy. In Lawrence, however, the Court took a step toward doing so when it overruled Bowers v. Hardwick, 478 U.S. 186 (1986), which had held that homosexuals do not have a fundamental right to engage in sodomy. See 539 U.S. at 578. The Court rejected Bowers, stating that it failed "to appreciate the extent of the liberty interest at stake" and demeaned "the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." Id. at 567. The Court found that Bowers had overstated the historical grounds supporting its holding and that public morality did not justify restricting homosexual sex. Id. at 571. Instead, the Court agreed with Justice Stevens's dissent in Bowers, which

argued that morality, history, and tradition were insufficient to uphold the disputed law, and that the decisions of married and unmarried persons “concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” Id. at 577-78 (quoting Bowers, 478 U.S. at 216). Thus, although the Court did not specifically create a fundamental right to sexual privacy, it seemed to rely on such a right in striking down the statute as unconstitutional. See 539 U.S. at 579.

Though there have been many decisions discussing the scope of the constitutional right to privacy, the constitutionality of § 1472 has not yet been addressed by any court, probably due to the recency of its enactment. The Fifth and Eleventh circuits have, however, examined the constitutionality of state statutes that contained very similar provisions. Given the similarity between § 1472 and those state statutes and given the similarity of a due process analysis under the Fifth and Fourteenth Amendments, see Griswold, 381 U.S. at 487 n.1, we think it will be useful to analyze the reasoning in those cases.

Relying on Lawrence, the Fifth Circuit has held that a statute very similar to the one before this Court was unconstitutional because it improperly burdened the plaintiffs’ right to engage in the private, intimate conduct of their

choosing. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008); see also State v. Brennan, 772 So.2d 64 (La. 2000). In Reliable, the court upheld the right of a vendor of sexual devices to challenge a Texas statute that criminalized the promotion of sexual devices. 517 F.3d at 743. The court disagreed with the state's classification of the right at issue² and interpreted Lawrence as recognizing a constitutional right to "be free from governmental intrusion regarding 'the most private human contact, sexual behavior.'" Id. at 744. The court characterized the issue as whether the statute "impermissibly burdens the individual's due process right to engage in private intimate conduct of his or her choosing." Id. The court further emphasized that public morality cannot serve as the justification for regulating private sexual intimacy. Id. at 745-46.

In contrast, in another case challenging a similar statute, the Eleventh Circuit focused narrowly on whether there was a constitutional right to use sexual devices. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1243, 1252 (11th Cir. 2004); see also PHE, Inc. v. State, 877 So.2d 1244, 1249 (Miss. 2004). The court focused on the need for caution when determining new fundamental rights or extending existing ones, saying that

² The state argued that the right involved was "the right to stimulate one's genitals for non-medical purposes unrelated to procreation or outside of an interpersonal relationship." Id.

courts “must proceed with ‘utmost care’ because of the dangers inherent in the process of elevating extra-textual rights to constitutional status, thereby removing them from the democratic field of play.” Att’y Gen., 378 F.3d at 1239 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)). The court also distinguished the type of conduct proscribed in the sexual devices statute from the conduct proscribed in Lawrence, noting that “there is nothing ‘private’ or ‘consensual’ about the . . . sale of a dildo” and that it is within the traditional police power of a state to “provide for the public health, safety, and morals” of society. Id. at 1238 n.8; see also Williams v. Morgan, 478 F.3d 1316, 1321-24 (11th Cir. 2007). Accordingly, the Eleventh Circuit declined to create a fundamental right to sexual privacy. Att’y Gen., 378 F.3d at 1235.

After careful consideration, we believe that the right at issue should be construed broadly as the right to engage in the consensual sexual conduct of one’s choice. Only by examining the right in those terms is the importance of the right recognized and the precedent set forth in Lawrence followed. As the Fifth Circuit noted in Reliable, “whatever one might think or believe about the use of these devices, government interference with their personal and private use violates the Constitution.” 517 F.3d at 747. We find, therefore, that a

statute proscribing the promotion of or possession with intent to promote sexual devices is unconstitutional.

C. The District Court's Error Was Not Harmless

When a defendant's constitutional rights have been violated, the conviction must be overturned unless the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Here, because the charging statute was unconstitutional, the entire prosecution must be reversed. Similarly, Campbell's statements provided most of the evidence against her and thus the improper admission of these statements is not harmless error. Campbell's conviction must be REVERSED. Hage, J., dissenting.

I respectfully dissent because I believe that the district court correctly concluded that a reasonable Terry stop does not require Miranda warnings and that a statute prohibiting the promotion of sexual devices does not violate the Due Process Clause of the Fifth Amendment.

A. The District Court Correctly Denied Campbell's Motion to Suppress

The Supreme Court has made clear that the questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" for the purposes of the Miranda rule. Berkemer v. McCarty, 468 U.S. 420, 433-40 (1984). Rather, such cases are more analogous to Terry stops. Id. In Terry, the Court held that a brief investigatory stop that is

reasonable and limited in scope and duration is not an arrest and therefore does not place the suspect in custody. Terry v. Ohio, 392 U.S. 1, 30 (1968).

Other circuits have correctly adopted this reasoning and held that Miranda warnings are not required in situations similar to this case. See, e.g., United States v. Leshuk, 65 F.3d 1105, 1110 (4th Cir. 1995) (holding that if police have reasonable suspicion to conduct an investigatory Terry stop and do not unduly detain the suspect, Miranda warnings are not required). As long as an interrogation does not last longer than necessary to verify or dispel the officer's suspicions, a brief but complete restriction of a suspect is appropriate. Terry, 392 U.S. at 30. In such a circumstance, any brief intrusion on the suspect's freedom is properly tested under Fourth Amendment reasonableness analysis. Id.

The majority's holding today ignores the general rule established in Berkemer and instead adopts a confusing totality of the circumstances test. This is certainly not the test the Supreme Court contemplated for scenarios such as this one, nor is it workable. Its vagueness and uncertainty will make it difficult for police and courts to apply and make time-consuming litigation likely. A bright-line reasonableness test would provide better guidance for courts, officers, and suspects. I

would therefore affirm the district court's denial of Campbell's motion.

B. The District Court Did Not Err in Denying Campbell's Motion to Dismiss the Indictment

This Court holds today that the fundamental right to privacy guaranteed by the substantive component of the Fifth Amendment's Due Process Clause encompasses the right to promote sexual devices. I respectfully disagree for several reasons.

First, the majority has ignored Supreme Court precedent that specifically established the lack of a fundamental right to personal autonomy: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." Washington v. Glucksberg, 521 U.S. 702, 727 (1997).

Second, the majority has improperly expanded the holding in Lawrence v. Texas, 539 U.S. 558, 579 (2003), to include such a right. The conduct in Lawrence, however, was clearly distinguishable from the case at hand - Lawrence was largely concerned with the state controlling "a personal relationship" by criminalizing the practice of sodomy, while the sale of a dildo is a vastly different type of commercial transaction. See 539 U.S. at 578.

Third, the majority has circumvented the recommendation in Glucksberg, 521 U.S. at 720, directing courts to exercise great

care before establishing or extending the scope of fundamental rights. The court should have begun by carefully crafting a description of the right at issue. See Reno v. Flores, 507 U.S. 292, 302 (1993). The proper question is whether there is a constitutionally protected right to privacy that includes the right to promote sexual devices. See Williams v. Att’y Gen. of Ala., 378 F.3d 1232, 1239 (11th Cir. 2004). To answer that question, the court should have determined whether that particular right is so deeply rooted in this nation’s traditions and history that it should be classified as fundamental. See Glucksberg, 521 U.S. at 720. Because historical support for sexual rights has generally been limited to noninterference rather than protection, see Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991), the right to promote sexual devices should not be classified as fundamental. See Att’y Gen., 378 F.3d at 1244-45.

Given that the right in this case does not satisfy the test for establishing a fundamental right, and thus is not subject to strict scrutiny, the statute need only satisfy rational basis review. Id. at 1236. Because the state has a legitimate and important interest in protecting public morality, the statute easily withstands rational basis review and should have been found to be constitutional. See Morgan, 478 F.3d at 1321.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

No. 09-71

UNITED STATES OF AMERICA,

Petitioner,

v.

BUNNY CAMPBELL,

Respondent.

The petition for writ of certiorari is granted, limited to consideration of the following questions presented by the petition:

1. Is a person who has been detained during a traffic stop for an extended time period and subjected to arguably coercive police conduct entitled to Miranda warnings before being questioned by police?

2. Is there a fundamental right to privacy under the Due Process Clause of the Fifth Amendment that protects the right to promote devices intended to stimulate human sexual organs and thus renders unconstitutional a statute prohibiting such conduct?