

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)

Plaintiff)

v.)

Criminal No. 93-77-P-H

**AEDAN C. MCCARTHY and)
JEFFREY SCOTT HUNTER,)**

Defendants)

**RECOMMENDED DECISION AND ORDER ON THE DEFENDANTS'
MOTIONS TO SUPPRESS**

The defendants are charged in a five-count second superseding indictment with (1) conspiring to commit numerous armed bank robberies; (2) robbing a federally insured bank and aiding and abetting such conduct; (3) using firearms during the commission of that robbery and aiding and abetting such conduct; and (4) being felons in possession of firearms and aiding and abetting such conduct.

Before the court now are the defendants' motions to suppress certain statements and various items of physical evidence the government plans to introduce at trial. An evidentiary hearing was held on March 23-24, 1994. I recommend that the following findings of fact be adopted and that the motions to suppress be denied.

I. FINDINGS OF FACT

A. The Connecticut Robbery and Stop

On July 6, 1992, sometime around 1:45 p.m., two masked men, one armed with a pump shotgun and the other with a semi-automatic pistol, robbed a bank in Franklin, Connecticut. Tr. 69-70; Gov't Exh. 9 at 3. Each man was wearing a plastic, Halloween-type facial mask. Tr. 70; Gov't Exh. 9 at 3. The person with the shotgun stood in the bank's lobby issuing commands while the other robber vaulted the teller's counter and grabbed the money. *Id.* They made their getaway in a light-blue GMC Jimmy (the "getaway car"). Tr. 70. A police radio bulletin went out announcing the robbery and describing the getaway car. Tr. 12. A short time later the Connecticut State Police recovered a vehicle matching the getaway car abandoned in an industrial park less than a mile from the bank. Tr. 70. This vehicle was confirmed to be stolen. Tr. 31, 35.

Witnesses at the industrial park indicated that a red Pontiac Sunbird bearing Rhode Island license plates (the "switch car") had been parked in the same area where the stolen GMC Jimmy was abandoned and that the occupants of the GMC Jimmy had been seen leaving in that car. Tr. 27, 34, 71. The police radio bulletin was updated to indicate that the robbers were suspected of travelling in a red Pontiac Sunbird with Rhode Island plates. Tr. 13.

At around 2:30 p.m., Officer Arthur Richard of the Norwich Police Department spotted a vehicle matching this description in the town of Norwich, not far from Franklin. *Id.* The vehicle was at a gas station and only one person was around it, pumping gas. *Id.* Officer Richard radioed that he had located a car matching the switch car description and that he was going to make a stop. Tr. 13-14. He pulled the car over when it left the gas station, just as it was getting onto the entrance ramp of the highway. Tr. 14.

Officer Richard ordered the driver to stop the car, throw the keys out the window, and come back towards him. *Id.* He patted the driver down for weapons and told him to take a seat in the back of his cruiser. Tr. 14-15. Although he was not handcuffed, the back of the cruiser had a wire

cage and a spit guard and the internal rear door handles were inoperable, so the detained driver was not able to leave. Tr. 15, 21-22.

The driver identified himself as Jeffrey Hunter. Tr. 16. This was confirmed by his Connecticut driver's license. Tr. 28. Officer Richard ran a registration check on the vehicle. Tr. 16. He learned that the car was registered to a rental company located at a Providence, Rhode Island airport. Tr. 16. While he was seated in the back of the cruiser, Officer Richard spoke to Hunter briefly about the vehicle. *Id.* Hunter said that the vehicle had been rented for him by a friend because his car was at a repair shop. *Id.* Within three to four minutes from the time Hunter was stopped, just long enough for Officer Richard to run the registration check on the car, other officers from the Norwich Police Department and troopers from the Connecticut State Police arrived on the scene. Tr. 16-17. Officer Richard turned Hunter over to the state police who were investigating the robbery. Tr. 17. Officer Richard left his vehicle with one of the Norwich officers, with Hunter remaining in the rear. Tr. 18.

Trooper Jay Hall of the Connecticut State Police arrived on the scene around 2:35 p.m. Tr. 28, 32. He spoke with Hunter through the open rear door of the Norwich police cruiser. Tr. 29. Trooper Hall asked him who he was, where he had been in the afternoon and who he was with. *Id.* He was nonresponsive, saying only that he had been "with a friend" at the friend's house. Tr. 29, 37. The trooper detected an odor of alcohol and asked Hunter whether he had been drinking. Tr. 29, 37. Hunter said he had a couple of beers at his friend's house. Tr. 38. The trooper then had Hunter perform a sobriety test, which he passed. Tr. 29, 30, 38.

At this point, around 2:43 p.m., Hunter was advised of his *Miranda* rights, read from a standard *Miranda* warning card. Tr. 30, 39; Gov't Exh. 1. He was told that he was not under arrest but that he was being detained for investigative purposes because his vehicle matched the description of the suspected switch car. Tr. 30, 31, 35, 49. Hunter acknowledged understanding his *Miranda* rights and waived them. Tr. 32. Trooper Hall again asked him who he was, where he had been and what he had been doing since 1:00 p.m. that day. *Id.* Hunter responded that he had been

with a friend, a Born-Again Christian, but would not elaborate because he did not want to get him involved. *Id.* Hunter refused to provide the name of the friend when asked. Tr. 49. Trooper Hall observed neither a mask nor a weapon on Hunter's person or in his vehicle. Tr. 49-50. He took three instant photographs of Hunter while he sat in the rear of the Norwich police cruiser. Tr. 45. A teller from the Franklin bank was driven by the scene to look at Hunter but apparently could not identify him as one of the robbers. Tr. 33. Trooper Hall's involvement with Hunter lasted about forty-five minutes, ending around 3:20 p.m. Tr. 32-33, 48.

Trooper Louis Heller arrived at the scene around 2:45 p.m.. Tr. 54. He took the vehicle information, walked over to a telephone and called to ascertain from where the vehicle was leased and to whom it belonged. Tr. 55. He spoke with the rental manager of the agency that leased the car. *Id.* The manager told Heller that the car was leased to a Mr. Lance Hall and that Jeffrey Hunter was listed as a co-driver. *Id.* The rental agency provided the trooper with the operators' license numbers and dates of birth. *Id.* He then telephoned the state police barracks and ran the license information for a physical description of Lance Hall. Tr. 56. From the license information Heller learned that Lance Hall was black. *Id.*

Knowing that two persons had committed the robbery, Trooper Heller stopped in at a bar near where Hunter had been stopped to see if someone had recently come in fitting the description of Lance Hall. *Id.* He then returned to the scene, a short distance away, and spoke to Hunter. *Id.* Hunter gave an account that he was not near Franklin at the time of the robbery but was up in the woods at a friend's house, gesturing in a particular direction. Tr. 56-57. Heller asked him whereabouts. *Id.* at 57. Hunter said he had forgotten the name of the place. *Id.* Heller then asked him whether his friend was a black male. *Id.* Hunter, again looking towards a particular direction, became agitated and started swearing at Heller, telling him to go find out for himself whether his friend was a black male. *Id.*

Trooper Heller was very familiar with the neighborhood where Hunter was stopped and knew of only one black male in the vicinity where Hunter had twice motioned. Tr. 57, 59-60. At

this point, approximately 3:45 p.m., Heller drove to the area where Hunter had indicated his friend was located, going to the house of the only black male he knew who lived in that area. Tr. 57, 60. He knocked on the door and asked the man answering the door whether Hunter had been there. Tr. 57-58. The man answered affirmatively and proceeded to give him an interview about Hunter's presence there that day. Tr. 58. This man turned out to be James Hall, brother of Lance Hall, the lessee of the car driven by Hunter. Tr. 59, 96. James Hall told Trooper Heller that Hunter had borrowed his vehicle that day and had returned to the house to change his clothes. Tr. 58. He also said that Hunter had been in the company of another man. *Id.* Trooper Heller got a description of that man. *Id.*

After a brief initial interview, Trooper Heller returned to the scene of the stop. Tr. 59. The police at the scene were still detaining Hunter as a suspect. Tr. 41-43, 61. Upon the return of Trooper Heller from his interview with James Hall, the police determined that they did not have enough information to arrest him so he was released. Tr. 44-45. The release was at 4:43 p.m., roughly a little more than two hours after he was initially stopped. Tr. 40-41.

B. The Investigation

Following his release, Hunter remained the focus of the police investigation of the Franklin robbery. Tr. 73. The investigation involved a cooperative effort between the Connecticut State Police and the Federal Bureau of Investigation. *Id.* The state police interviewed James Hall three times during this investigation. Tr. 73-74. Hall told the police that on July 6, 1992, the day of the robbery, Hunter had borrowed his pickup truck to do a roofing job. Tr. 76. Hunter then stopped by on numerous occasions that day, accompanied by another man named "John." Tr. 75-76. Hall said that Hunter and John had changed their clothes and shaved their sideburns at some point during the day. Tr. 76. Hall's description of the clothes worn by Hunter and John was similar to the description provided by eyewitnesses to the bank robbery of the clothes worn by the two robbers. Tr. 83-84.

When Hunter appeared at Hall's home after being released by the police, Hall asked for the return of his pickup truck. Tr. 76-77. Hunter, who appeared nervous, drove Hall to an area known as Bradford Pond in Rhode Island, taking an erratic and indirect route. Tr. 77. Hall said that Hunter was concerned that the police were harassing him, that they may be following him and that his car may be bugged. *Id.* Hunter also told Hall that he did not want Hall to know where he was living because Hall might have to so testify in court. *Id.* Hunter then dropped Hall off at the Bradford Pond area, returning about thirty minutes later with the pickup truck and a bicycle in the back. Tr. 77-78. Hunter got on the bicycle and left. *Id.* Hunter telephoned Hall sometime later, wanting to know what Hall had told the police. Tr. 78. Hall said that Hunter became upset when Hall told him that he had told the police that Hunter and John had changed clothes on the day of the robbery. *Id.*

In addition to the information about Hunter, James Hall also told the police that the other individual accompanying Hunter, known as John, was from Alabama. Tr. 78. Hall said that on June 30, 1992 Hunter and John had borrowed his wife's car to go to the Connecticut Department of Motor Vehicles at Old Saybrook for John to obtain a Connecticut driver's license. Tr. 80. The state police then discovered that an individual named John E. Perry had turned in an Alabama license and obtained a Connecticut one at that location on that day. *Id.* The state police obtained a photocopy of the relinquished Alabama license from the Alabama Department of Motor Vehicles. Tr. 80-81; Gov't Exh 2. It identified the named individual as John Edward Perry, born June 2, 1940. Tr. 81; Gov't Exh. 2.

The state police showed James Hall the photocopy of the Alabama license. Tr. 85. He identified the person pictured in the license as the same John who had accompanied Hunter at his home on the date of the Franklin bank robbery. *Id.* In August 1992 Special Agent Lisa Tutty of the FBI's Connecticut office requested that the FBI's Alabama office conduct a background investigation on John E. Perry. Tr. 81, 127. Agent Tutty also relayed a description of the Franklin bank robbery to the FBI in Alabama. Tr. 82, 126. Given the Alabama connection to the

Connecticut investigation, Agent Tutty wanted to determine if there had been similar bank robberies in the Alabama area. Tr. 98-101. Based on marked similarities to the *modus operandi* of the Franklin robbery, Marshall Ridlehoover, Senior Resident Agent in the FBI's Tuscaloosa office, suspected that the same two individuals had robbed two banks in Woodstock, Alabama, one on July 17, 1992 and the other on November 13, 1992. Tr. 103, 125, 126-27, 129. Like the Connecticut robbery, the Alabama robberies involved two individuals, both wearing plastic, theatrical facial masks, one with a shotgun or assault rifle and one with a pistol, with the one carrying a pistol vaulting over the tellers' counter to grab the money. Tr. 165-67.

Agent Ridlehoover began an investigation of John E. Perry. Tr. 127-28. He first learned that John E. Perry lived in Centerville, Alabama and worked in Birmingham. Tr. 84, 127-28. Perry's employer, however, confirmed that Perry had been working on the dates of the Franklin robbery and the Woodstock robberies. Tr. 84-85, 131. Perry informed the FBI that he had lost his wallet and license sometime prior to the Franklin robbery. Tr. 86, 132-33. Perry identified the Alabama license surrendered in Connecticut as his lost license with his picture. Tr. 132. The FBI then surmised that someone had found or taken Perry's license and assumed his identity. Tr. 86, 87.

The Connecticut state police ran a criminal history check for the name John E. Perry with the same date of birth as the real John E. Perry. Tr. 274. They discovered that a person named John E. Perry with the same birth date had been arrested in Fort Lauderdale, Florida. Tr. 130, 274. Agent Tutty relayed this information to the FBI in Alabama. Tr. 130. The Florida authorities then sent a copy of a mug shot of this person to Agent Ridlehoover. Tr. 87, 131-32. This photograph was not of the real John E. Perry. Tr. 133. Agent Ridlehoover showed this photograph to the real John E. Perry, who identified the individual depicted as James Hardiman. Tr. 87, 134. Perry knew Hardiman because he was "kind of" married to Perry's ex-wife and was from the area. Tr. 134.

In addition to the Florida mug shot, the FBI in Alabama also obtained copies of two fingerprint cards that accompanied the Florida arrest of James Hardiman, a.k.a, John E. Perry.

Tr. 95. The fingerprints proved to be those of an individual whose real name is Aedan McCarthy. *Id.* This information was relayed to the FBI in Connecticut and the Connecticut State Police by January 11, 1993. Tr. 88, 139, 297. The Connecticut State Police subsequently discovered that Aedan McCarthy and Jeffrey Hunter were cellmates at Northeast Correctional Center during 1991. Tr. 94. The FBI in Connecticut was apprised of this discovery. *See id.*

While performing a background investigation on the name James Hardiman, Agent Ridlehoover learned that McCarthy, a.k.a. Hardiman, a.k.a. Perry, was possibly living in the Jamison, Chilton County, Alabama area with a younger white male, possibly Hunter. Tr. 136-37. In late January or early February 1993 Agent Ridlehoover apprised Jesse Payne, an investigator for the Chilton County Sheriff's Department, of this information and furnished him with photographs of both Hunter and McCarthy. Tr. 137-39. Agent Ridlehoover informed Payne that Hunter and McCarthy were suspects in various bank robberies in Alabama and Connecticut. Tr. 137, 180-81. He told Payne that the FBI would like to have Hunter and McCarthy kept under surveillance so that evidence could be gathered to support a search warrant. Tr. 138, 172-73.

Payne passed all this information on to Billy Fulmer, assistant chief deputy of the Chilton County Sheriff's Department. Tr. 180-81. Subsequently, Agent Ridlehoover informed the Chilton County Sheriff's Department that a federal arrest warrant, for unlawful flight from prosecution, had been issued for Hunter in Connecticut. Tr. 89, 181 This warrant was issued on March 12, 1993. Tr. 89. Although he is not sure exactly when, Deputy Fulmer learned of the existence of this warrant at some point prior to Hunter's arrest on April 23, 1993. Tr. 181, 199, 201, 212.

C. The Alabama Arrests

On the morning of April 23, 1993, Deputy Fulmer noticed a pickup truck bearing a Maine license plate. Tr. 182. He noticed the truck's plate because it was probably the only Maine plate he had ever seen in Chilton County, Alabama. Tr. 183. He ran the license number through the NCIC computer and discovered that the registered owner of the truck was one John E. Perry. Tr. 186.

Fulmer knew that one of the individuals for whom the FBI was looking, that is, McCarthy, a.k.a. Hardiman, was using the name John E. Perry as an alias. Tr. 181, 187.

After sighting the Maine truck, Fulmer was contacted by a woman from the local power company. Tr. 183. She reported that a person using the name Lyons had come in to the office to have power turned on at his trailer. *Id.* She thought the man was Hunter. *Id.* Apparently, the woman is the wife of a local law enforcement officer named Buck Foushee, to whom Fulmer had given a copy of Hunter's photograph, and Foushee had shown it to his wife. Tr. 183, 198. Ms. Foushee asked Fulmer to bring a copy of the photograph down to the office and he did. Tr. 183. Fulmer told her that if she saw Hunter, a.k.a. Lyons, again she should call him. Tr. 183-84.

Later that day Ms. Foushee called Deputy Fulmer and told him that Hunter had returned to the power company. Tr. 184. Deputy Fulmer radioed for a marked sheriff's vehicle to go to the area and left for the scene himself. *Id.* An unmarked vehicle arrived first. *Id.* The officer driving that vehicle stepped out of his car, identified himself to Hunter as a police officer and stated that he needed to speak with him. Tr. 188. At this point Hunter started to run. Tr. 184, 188. The officer radioed Deputy Fulmer that Hunter was running and then gave chase. *Id.*

Meanwhile, about three blocks from the power company Deputy Fulmer spotted the Isuzu truck with Maine plates that he had seen that morning. Tr. 159, 184, 188. The truck was heading away from the power company. *See id.* Deputy Fulmer and an Alabama state trooper, who were both going in the opposite direction, turned around and Fulmer directed the trooper to stop the truck. Tr. 184-85, 209. The reason that Fulmer wanted the truck stopped was because he knew that the FBI was looking for McCarthy, a.k.a. Perry, and also he was not absolutely sure who was driving the truck, Hunter or McCarthy, and who was running from the police. Tr. 212. At that point Fulmer had not seen the person who the police were then chasing on foot. *See id.* Even if the driver was McCarthy, however, Fulmer wanted to make sure there were no outstanding warrants on him, though he was unaware of any. Tr. 211-12.

The driver of the truck, later identified to be McCarthy, presented the trooper with a Maine

driver's license bearing the name John E. Perry. Tr. 186. The trooper told Fulmer that the man had given him a Maine license with the name John E. Perry and a Saco, Maine address. Tr. 185-86; Gov't Exh. 4. Fulmer knew that the individual associated with Hunter for whom the FBI was looking was using the alias John E. Perry. Tr. 186-87. McCarthy was taken into custody around 12:15 p.m.. Tr. 213.

1. *Hunter's Arrest*

Back at the power company, Hunter was subdued by the Alabama police after a brief foot chase. Tr. 188-89. Deputy Fulmer had informed the pursuing officers that there was an outstanding federal warrant for Hunter's arrest. Tr. 202. Hunter was placed under arrest pursuant to that warrant. Tr. 189. A Connecticut arrest warrant, issued for violation of probation, was also in effect at the time of his arrest. Tr. 79. An envelope containing \$6,039 in cash was found on Hunter's person. Tr. 149-50, 176-77; Gov't Exh. 3. On May 11, 1993 Agent Ridlehoover compared this money against a bait bill list sent to him by the FBI in Maine of money robbed from the Casco Northern Bank in Falmouth, Maine on April 12, 1993. Tr. 169, 311. All twenty numbers on the bait bill list matched bills in the money taken from Hunter. Tr. 169. Until Ridlehoover checked the money against the bait list, it had been resting in evidence in an envelope at the Clanton Police Department. Tr. 170. He did not have a search warrant to examine the money. *Id.*

2. *McCarthy's Arrest*

McCarthy was transported to the Chilton County courthouse. Tr. 213. The police found \$2,000 dollars in cash on his person. Tr. 189.; Gov't Exh. 4. Once he was in custody the Alabama authorities contacted the Connecticut authorities. Tr. 190. Connecticut asked Alabama to hold him, explaining that they were in the process of applying for an arrest warrant for the Franklin bank

robbery. Tr. 190, 212, 281. This occurred about ninety minutes after McCarthy was first stopped. Tr. 212-13. Detective Frederick Abrams of the Connecticut State Police informed Deputy Fulmer that they had recently learned that a fingerprint lifted from the getaway car was McCarthy's. Tr. 281. This fingerprint match, confirmed less than two weeks before, was the only new information on McCarthy the Connecticut police had obtained since the end of January 1993. Tr. 291, 297-98.

Back in Connecticut, FBI Special Agent Tutty and Connecticut State Police Detective Abrams worked the rest of the day on completing an affidavit in support of an application for an arrest warrant for McCarthy. Tr. 91, 280. Detective Abrams had started compiling information for a warrant application about a week earlier, but with the detention of McCarthy in Alabama the speedy completion of the process became essential. Tr. 291-92. Tutty and Abrams finished compiling all the material for the warrant application around 11:30 p.m. Tr. 281. A Connecticut Superior Court judge signed and issued the warrant around 1:00 a.m., on April 24, 1993. Tr. 282. Detective Abrams sent an NCIC teletype to Alabama confirming the existence of the arrest warrant. *Id.* McCarthy was formally arrested in Alabama shortly thereafter. Tr. 189-90.

Months later, Detective Abrams discovered that the affidavit supporting the warrant application contained an erroneous assertion, namely, that McCarthy's fingerprints had been found in the Franklin robbery getaway car. Tr. 277-78, 287-89. Abrams thought that McCarthy's fingerprints had been lifted from a soda can found in the getaway car. Tr. 287-89. The print had indeed been taken from a soda can, but that can had been found in the red Pontiac Sunbird driven by Hunter, not the confirmed getaway car. *Id.*

The reason for the error, explained Detective Abrams, was his mistaken belief that the police had only processed the confirmed getaway car and not the suspected switch car. Tr. 276-77, 289. A police investigator had processed the red Pontiac Sunbird, however, following its return to the rental agency, about four days after Hunter's initial stop, and this is where the soda can and fingerprints were found. Tr. 277-78, 289. Apparently, this officer, though documenting that a soda

can had been sent to the lab, had not at that point prepared a formal report indicating where he had found the soda can. Tr. 287-88. Abrams first became involved in the Franklin robbery investigation in November 1992, around four months after the robbery and sometime after the soda can had been sent to the lab. Tr. 272, 288. When he reviewed the previous detective's file upon joining the investigation, Detective Abrams found no documentation indicating that the can came from the suspected switch car. Tr. 287. A fingerprint examiner subsequently informed Detective Abrams that a print taken from the passenger compartment of "a vehicle" matched the fingerprint cards for McCarthy obtained from the Florida authorities. Tr. 274-75. Because Abrams thought only the getaway car had been processed, he mistakenly assumed that the print had come from the getaway car. Tr. 275-76. The officer who recovered the soda can from the Sunbird eventually prepared a report from his notes after the prints had been analyzed and returned, but unfortunately after the mistaken information had made its way into the warrant application. Tr. 107, 288-89.

The Connecticut State Police discovered this error in August 1993 while compiling all the evidence of the Franklin robbery for court. Tr. 120, 277-78. The FBI in Connecticut contacted the United States Attorney's office and advised it of the error. Tr. 121. The Connecticut case against McCarthy for the Franklin robbery was subsequently dismissed without prejudice. Tr. 121-22.

D. McCarthy's Suitcases

On the evening of April 23, 1993, the day McCarthy was stopped, Deputy Fulmer received a telephone call from a Mr. Jean Ellison, asking him to come up to the trailer of Joe Henderson, a neighbor of Ellison, because they had found something that pertained to Hunter and McCarthy. Tr. 191. Neither Henderson nor Ellison is affiliated with a federal or state law enforcement organization. Tr. 257. Fulmer went to Henderson's trailer and there, laying open on the kitchen table, was a maroon suitcase ("Giordano suitcase") with an assault rifle, a pistol, extra clips and a bullet-proof vest, all laying on the top layer of the open suitcase. Tr. 191-92, 204-06; Gov't Exh. 5.

The suitcase belonged to McCarthy. Tr. 223-24. McCarthy and Hunter had been staying at Henderson's trailer for the past week, paying \$40 for rent. Tr. 250, 267. McCarthy and Hunter knew Henderson through J.B. Ellison, Henderson's landlord, and had asked if they could stay at his place until they found a place of their own. Tr. 227-28, 247-49. On Thursday evening, April 22, Henderson made clear to Hunter and McCarthy that he wanted them out the next day. Tr. 251-52. On Friday, April 23, the day McCarthy and Hunter were stopped by the police, they were in the process of getting their own place and moving out of Henderson's trailer. Tr. 236. They had not taken all of their belongings with them when they left Henderson's trailer that morning, however. Tr. 238-39.

When Henderson returned from work on April 23, Ellison told him about McCarthy and Hunter's arrest. Tr. 252-53. Henderson checked the rear bedroom in his trailer where McCarthy and Hunter had been storing their belongings. Tr. 253. He noticed that some of their belongings were still there. *Id.* He wanted to move their belongings out to the storage building behind his trailer, but the first item he started to move, the maroon suitcase, was so heavy he could not carry it. Tr. 253-54. Ellison and Henderson became curious as to why the suitcase was so heavy. Tr. 254-55. Although the suitcase was padlocked, Ellison forced it open. Tr. 256. A rifle wrapped in plastic was laying in plain view. *Id.* They then rummaged through the entire suitcase, finding the other gun, the ammunition and bullet-proof vest. *Id.*

Ellison then called Deputy Fulmer. Tr. 213-14, 257. Henderson placed the rifle and pistol back in the suitcase, Tr. 258. When Fulmer arrived the suitcase was open with the weapons laying on top in plain view. Tr. 192. Fulmer did not rummage around in the suitcase. *Id.* Henderson told Deputy Fulmer to get take the suitcase and its contents out of his trailer. Tr. 193, 259. Deputy Fulmer took the suitcase and its contents back to his office and then turned it over to the FBI. Tr. 192-93.

When Henderson had first started moving Hunter and McCarthy's belongings out of his rear bedroom, he had noticed another suitcase ("American Tourister suitcase") that was laying there

open with clothes piled on it. Tr. 255, 263; Gov't Exh. 6. In the excitement of what was found in the first suitcase, however, Henderson forgot about the other suitcase. Tr. 259. About four days later, when being interviewed, Henderson told the FBI about the American Tourister suitcase. Tr. 156, 269. FBI Special Agent Richard Schott, accompanied by Deputy Fulmer, went back to Henderson's trailer on April 29, 1993 to get the American Tourister suitcase. Tr. 156, 194, 269. Henderson wanted that suitcase removed from his trailer as well. Tr. 158, 195, 260. On the recommendation of an assistant United States attorney, Agent Schott gave Henderson a receipt for the American Tourister suitcase, Tr. 156, 158, 269. The assistant United States attorney advised Agents Schott and Ridlehoover that a search warrant was not needed. Tr. 157. Agent Ridlehoover inventoried the American Tourister suitcase on May 1 pursuant to standard FBI practice. Tr. 156-57.

E. Search of McCarthy's Truck and Storage Unit

Following McCarthy's arrest in Alabama, a search warrant for his Isuzu truck was obtained on April 28, 1993. Tr. 159-60; Gov't Exh. 7. The truck was searched and inventoried on April 29, 1993. Tr. 160. One of the items found in the truck was a receipt for a storage unit in Scarborough, Maine. Tr. 97. After learning of the Scarborough storage unit receipt, Agent Tutty contacted FBI Special Agent Garry Barnes in Maine. Tr. 108. On May 12, 1993 Agent Barnes obtained a search warrant for the Scarborough storage unit and its contents. Tr. 310; Gov't Exh. 8B. A search of the storage unit revealed a footlocker containing numerous incriminating items possibly connected to the robbery of the Casco Northern Bank. Tr. 312-13; Gov't Exh. 8D. The footlocker belonged to McCarthy. Tr. 239. The storage unit had been rented by him in the name John Perry. Tr. 225; Gov't Exh. 7B.

II. CONCLUSIONS OF LAW

A. Hunter's Connecticut Stop

Hunter first contends that the Connecticut police obtained information from him about James Hall in violation of the Fourth and Fifth Amendments. He asserts that his statements and gestures concerning James Hall must therefore be suppressed and that James Hall himself should be excluded from testifying at trial as a fruit of the constitutional violations. For various reasons I find that Hunter's motion must fail on this point.

1. *The Initial Encounter*

It is well established under Fourth Amendment jurisprudence that police may make an investigatory stop of an individual if they have an articulable and reasonable suspicion that that person has just committed a crime. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *United States v. Quinn*, 815 F.2d 153, 156 (1st Cir. 1987). Such an investigatory stop constitutes a "seizure" and is thus regulated by the Fourth Amendment's proscription against unreasonable seizures. *United States v. Sharpe*, 470 U.S. 675, 682 (1985). In evaluating the reasonableness of an investigatory stop, the Supreme Court has established a two-part inquiry. *Id.* at 675. "[T]he court must first consider whether the officer's action was justified at its inception; and, second, whether the action taken was reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Stanley*, 915 F.2d 54, 55 (1st Cir. 1990) (citations omitted).

I first find that Officer Richard's investigatory stop of Hunter was justified at its inception. A "reasonable suspicion" warranting an investigatory stop is less than the probable cause needed to support a full-fledged arrest. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The officer making the stop, however, must be able to point to "specific and articulable facts" upon which the reasonable suspicion was based. *Terry*, 392 U.S. at 21. The court, in assessing those facts, must consider the totality of the circumstances confronting the officer at the time of the stop. *United States v. Trullo*, 809 F.2d 108, 111 (1st Cir.), *cert. denied*, 482 U.S. 916 (1987).

Based on the information he received over the radio, Officer Richard certainly had an articulable and reasonable suspicion that the red Pontiac Sunbird and its driver were connected to

the Franklin bank robbery. The car matched the exact description of the suspected switch car -- which included the unique identifying mark of an out-of-state, Rhode Island license plate -- and Officer Richard spotted it within one hour of the robbery in a neighboring town. As the car was just about to get onto the highway, Officer Richard was justified in pulling it over when he did.

The second question, whether the actions taken by the officers once Hunter was stopped were reasonably related in scope, both in manner and duration, to the circumstances which initially justified the stop, is not as clear and requires a more involved analysis. The First Circuit has consistently noted that an investigatory stop that is sufficiently coercive may constitute a *de facto* arrest for which full probable cause is required. *United States v. Zapata*, 18 F.3d 971, 975 (1st Cir. 1994); *Trullo*, 809 F.2d at 113. Whether a particular investigatory stop, though initially lawful, has escalated at some point into a *de facto* arrest is often not easily determined, however. *See, e.g., United States v. Maguire*, 918 F.2d 254, 259 (1st Cir. 1990), *cert. denied*, 499 U.S. 950 (1991). The conventional inquiry involves asking whether "a reasonable man in the suspect's position would have understood his situation, in the circumstances then obtaining, to be tantamount to being under arrest." *Zapata*, 18 F.3d at 975 (citations and internal quotation marks omitted). Thus, for example, a *de facto* arrest arises in a situation where the police impose restraints comparable to those of a formal arrest. *Maguire*, 918 F.2d at 259.

In the same vein, however, restrictions on a detainee's freedom of movement do not automatically transform a lawful investigatory stop into a *de facto* arrest. *Quinn*, 815 F.2d at 157 n.2. While investigatory stops must generally be nonintrusive, officers may take steps to protect themselves and to maintain the status quo during the stop if the circumstances reasonably warrant such measures. *United States v. Hensley*, 469 U.S. 221, 235 (1985). To assess the reasonableness of such intrusion against the opposing interests in crime detection and the police officer's safety. *Dunaway v. New York*, 442 U.S. 200, 209 (1979); *Terry*, 392 U.S. at 20-21; *Quinn*, 815 F.2d at 156. In short, the degree of intrusion upon the detainee must be proportional to the officer's reasonable suspicions justifying the stop in the first place. *Trullo*, 809 F.2d at 110.

Under this analysis, I find that Officer Richard's initial actions in conducting the stop were appropriate in light of his reasonable suspicion that the driver was one of the bank robbers. Officer Richard could take such steps as were reasonably necessary to protect his personal safety under the circumstances. Given that he was alone and he knew that the robbers were heavily armed, his actions in ordering the driver out, patting him down and placing him in the back seat of the cruiser were reasonably undertaken to ensure his safety. *See Dempsey v. Town of Brighton*, 749 F. Supp. 1215, 1224-25 (W.D.N.Y. 1990), *aff'd*, 940 F.2d 648 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 338 (1991) (similar stop of armed robbery suspects).

Although placing a detainee in a police cruiser may not be proper in the majority of *Terry* stops, *see* 3 W. LaFare, *Search & Seizure* ("LaFare"), § 9.2(d) at 366 (2d ed. 1987), such a measure is certainly reasonable when the officer is alone and the detainee is suspected of being armed, *see, e.g., State v. Reid*, 605 A.2d 1050, 1053 (N.H. 1992); *State v. Braxton*, 495 A.2d 273, 277 (Conn. 1985). Being alone, Officer Richard could not safely conduct a sweep of the inside of Hunter's car to check for weapons, as permitted by *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). The only available option to protect himself while carrying out the investigatory stop, short of letting Hunter drive off, involved moving Hunter away from his vehicle and keeping him there. Though placing him in the rear of the cruiser certainly imposed a restraint on Hunter's freedom, he was not handcuffed nor was a weapon drawn on him, measures which are arguably far more intrusive and a greater restraint on one's movements. I note that the First Circuit has sanctioned the use of handcuffs and weapons in conducting a lawful investigatory stop, if safety or security concerns warrant such measures, without transforming it into a *de facto* arrest. *Quinn*, 815 F.2d at 157 n.2 (handcuffs); *Trullo*, 809 F.2d at 113 (weapons). Accordingly, I find that Officer Richard's use of less drastic restraints, namely, placing Hunter in the rear of his cruiser, was reasonable under the circumstances to neutralize the potential danger and was not tantamount, by itself, to an arrest of Hunter.

2. *The Questioning*

Similarly, I find that the arrival of other police officers and the subsequent questioning of Hunter did not convert the stop into an arrest. Trooper Hall questioned Hunter first, while Hunter remained in the backseat of Officer Richard's cruiser. Hunter was unresponsive. After detecting an odor of alcohol, Trooper Hall conducted a field sobriety test. He then read Hunter his *Miranda* rights. After acknowledging and waiving these rights, Hunter again failed to provide answers to the trooper's questions about his friend. A drive-by showup was then conducted. After Trooper Heller discovered the information about the lessee of the car, Hunter was again questioned about his friend. Following an interview with that friend, Hunter was released.

Nothing done during this developing situation transformed the initial stop into an arrest; a reasonable person in Hunter's shoes would not have thought he was under arrest under these circumstances. Although he remained in the rear of the cruiser, where he had been properly placed for safety reasons, the back door stayed open and he was not handcuffed. *See United States v. Hawthorne*, 982 F.2d 1186, 1191 (8th Cir. 1992) (similar situation). This is a far cry from the level of restraint typically associated with a formal arrest. More importantly, Trooper Heller specifically informed Hunter that he was *not* under arrest. *See United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (1980) (intent of police relevant when communicated to detainee); *United States v. Streifel*, 781 F.2d 953, 959 (1st Cir. 1986) (same). The fact that Heller also provided Hunter with *Miranda* warnings, which are usually associated with formal arrest, does not necessarily transform this stop into an arrest, especially since these warnings were accompanied by a statement that he was in fact not under arrest.¹ *See United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1222 (11th Cir. 1993) (Mirandizing detainee does not convert stop into arrest). In addition, the mere physical presence of additional police officers at the scene of the stop does not lead to a reasonable inference that a *de facto* arrest had occurred. Although the increased presence of officers may have underscored the

¹ *Miranda* warnings are not generally required during a lawful *Terry* stop. *See Quinn*, 815 F.2d at 160; *Streifel*, 781 F.2d at 958. *But see United States v. Perdue*, 8 F.3d 1455, 1463-65 (10th Cir. 1993).

seriousness and earnestness of the investigation into the robbery, no additional physical restraint was exerted upon Hunter. *See Quinn*, 815 F.2d at 157. Finally, the fact that Hunter was not free to leave, as argued by the defendant, did not transform the stop into an illegal arrest. A *Terry* stop is a form of temporary detention, a permissible Fourth Amendment seizure short of a full-fledged arrest, and therefore the detainee may not be free to leave for the duration of the stop. *See Stanley*, 915 F.2d at 56 (stop entails restriction on individual's freedom).

As for the police questioning of Hunter, I find that it was properly limited in length and scope for an investigatory stop. The essence of a lawful *Terry* stop is the right of police to question the detainee about the suspicions that justified the investigative stop in the first place. *See LaFave* 9.2(f) at 375-76. Consistent with their initial suspicions, the police are permitted to pose a moderate number of questions to a detainee to try to obtain information to confirm or dispel those suspicions. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *Quinn*, 815 F.2d at 157; *Streifel*, 781 F.2d at 959.

Here, consistent with their reasonable suspicions that Hunter was connected to the Franklin robbery, the police asked him where he had been and what he had been doing during the time of the robbery. This was proper to confirm or dispel their suspicions that he was somehow involved with the robbery, as was the drive-by showup with the bank teller. *See Dempsey*, 749 F. Supp. at 1225. The situation did not involve a continuous interrogation, as the defense attempts to paint it. *See Tr.* 48. Rather, Hunter was asked limited questions by two police officers about his whereabouts at the time of the robbery. Each time Hunter responded vaguely, saying he was with a friend, whose name he refused to give, and motioning towards a particular area. His evasiveness when first questioned by Trooper Hall permitted follow-up questioning. *See United States v. Bautista*, 684 F.2d 1286, 1291 (9th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983). Moreover, though he was not required to do so, *see Streifel*, 781 F.2d at 958, perhaps out of an abundance of caution, Trooper Hall informed Hunter that he had the right not to answer. Hunter acknowledged his rights, waived them and spoke with Trooper Hall and then Trooper Heller. Considering all these circumstances, I

find that the questioning of Hunter was sufficiently nonintrusive and limited so as to fall within the boundaries of a lawful *Terry* stop.

3. *The Duration*

This is not the end of the matter, however. Hunter was detained for over two hours. For an investigatory stop to remain constitutionally permissible on less than probable cause, it "must be temporary and last no longer than is necessary to effectuate the purposes of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). The Supreme Court has noted, however, that there is no bright line for determining when a lawful stop becomes illegal, and that under certain circumstances the police must be able to detain an individual for longer than the brief time period associated with most investigatory stops. *See Sharpe*, 470 U.S. at 685-86.

In measuring whether a particular *Terry* stop is too long, a court must consider "the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *Id.* at 685. This requires the court to examine "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Id.* at 686. The Supreme Court has admonished that "[a] court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." *Id.*

I have been unable to find any cases that have upheld an investigatory stop of an individual that has lasted as long as the one in this case, around 135 minutes. Where a *Terry* stop extends too long it develops into an illegal arrest in the absence of probable cause. *Maguire*, 918 F.2d at 259. There is no dispute that the police lacked probable cause all throughout the Connecticut stop. The question then becomes when, if ever, over the 135 minutes did this stop turn into an illegal arrest. There is no pressing need to answer this thorny question, however, because I find that the statements and gestures Hunter seeks to suppress were elicited while the detention constituted a

valid investigatory stop.

Hunter's initial reference about a Christian friend occurred within the first 45 minutes of the stop; his statements and gestures to Trooper Heller about his friend occurred within the next 30 minutes. During this 75 minute period I find that the police acted diligently to investigate the suspicions that justified the stop in the first place, that is, that Hunter's vehicle was the suspected switch car. Trooper Hall first questioned Hunter about his whereabouts during the robbery. Hunter was inexplicit in his response. Upon detecting an odor of alcohol, a sobriety test was conducted. He was then read his *Miranda* rights and questioned again about his whereabouts. Hunter again was evasive. A drive-by showup was conducted. Meanwhile, Trooper Heller was attempting to verify the rental information about the car. He then sought to learn about the person who had rented the car. After receiving this information, Trooper Heller questioned Hunter about it. Hunter became agitated and uncooperative. At this point, about 75 minutes after the initial stop, Heller left the scene to investigate the area where Hunter motioned to see if he could locate Hunter's black friend.

Nothing about the length of this investigation strikes me as being improper. The police appear to have acted diligently, in a rapidly developing situation at the roadside, in investigating their suspicions about Hunter's involvement with the robbery. There is no suggestion that the police were dilatory in their investigation or unnecessarily prolonged Hunter's detention. *Sharpe*, 470 U.S. at 685. It should also be kept in mind that the police were investigating a seriously violent crime, not just some minor offense. *See LaFave* 9.2(f) at 385 (relative seriousness of offense important factor in assessing propriety of extended detention). Indeed, it would have been irresponsible for the police to release Hunter without first attempting to dispel their legitimate suspicions about him. *Cf. Adams v. Williams*, 407 U.S. 143, 145 (1972) (police not required to shrug shoulders and allow possible criminal to escape).

In this regard, I note that Hunter steadfastly refused to give the police his friend's name, the one person who could easily confirm or dispel the officer's suspicions about Hunter. The police

were then forced to resort to their own devices to find this person, which they did. Obviously this took time. When the detainee's own evasive actions have contributed to the delay about which he complains, the court may take this into consideration in assessing the reasonableness of the length of the stop. *See Sharpe*, 470 U.S. at 674. Moreover, Hunter's evasive answers reinforced the police's original suspicions, thereby creating further reason to extend the detention until those suspicions could be confirmed or dispelled. *See Bautista*, 684 F.2d at 1290-91.

Considering all these circumstances, I find that the length of the detention was reasonable and appropriate through at least the first 75 minutes, during which time Hunter referred to his Christian friend. Where the particular circumstances of an ongoing investigation warrant it, such as here, courts have upheld *Terry* stops that have lasted from 45 minutes, *United States v. Hardy*, 855 F.2d 753, 761 (11th Cir. 1988), *cert. denied*, 489 U.S. 1019 (1989) (50 minutes); *United States v. Davies*, 768 F.2d 893, 901-02 (7th Cir.), *cert. denied*, 474 U.S. 1008 (1985) (45 minutes), to one hour, *United States v. Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), *cert. denied*, 420 U.S. 924 (1975) (60 minutes plus); *United States v. McFarley*, 789 F. Supp. 705, 719-20 (W.D.N.C. 1992) (66 minutes); *State v. Moffatt*, 450 N.W.2d 116, 118 (Minn. 1990) (61 minutes), to 90 minutes, *United States v. \$64,765.00 in U.S. Currency*, 786 F. Supp. 906, 912 (D. Or. 1991); *United States v. \$28,980 in U.S. Currency*, 786 F. Supp. 899, 905 (D. Or. 1990); to over 100 minutes, *United States v. \$83,900.00 in U.S. Currency*, 774 F. Supp. 1305, 1310-11, 1317-18 (D. Kan. 1991) (102 minutes); *State v. Koopman*, 844 P.2d 1024, 1026-27 (Wash. App. 1992), *review denied*, 852 P.2d 1091 (Wash. 1993) (105 minutes). Although the Ninth Circuit has recently stated that the boundary of a lawful *Terry* stop is ninety minutes under current Supreme Court precedent, *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051, 1060 (9th Cir. 1994), I note that the Supreme Court itself has declined to adopt an outside time limitation, recognizing that the inquiry is necessarily fact driven, *United States v. Place*, 462 U.S. 696, 708-10 (1983). In any event, even if the 135 minutes for Hunter's entire detention may have exceeded the outermost reaches of a permissible *Terry* stop, which I need not decide, the relevant references to his friend occurred while the stop

was still lawful.

In summary, I find that the investigatory stop of Hunter was lawful as conducted, at least through the time that Hunter made the statements he now seeks to suppress, and that Hunter's verbal and physical references to his Christian friend should therefore not be suppressed, nor should the testimony of that friend, James Hall, be excluded. Furthermore, I note that even if I were to conclude that Hunter's stop became unlawful at some point and that his references to James Hall should thus be suppressed,² I would nevertheless *not* recommend that James Hall be precluded as a witness as a fruit of Hunter's illegal detention. James Hall is the brother of Lance Hall, the lessee of the car driven by Hunter at the time of his stop. The police learned of Lance Hall upon contacting the rental agency after conducting a legitimate registration check on the car within the first few minutes of the lawful stop. Because this car was suspected of being the switch car, the investigation into the crime would have continued to focus upon it and its driver, as it did, which would have involved questioning Lance Hall, which would have eventually and independently led to James Hall. Thus, I conclude that the police would have inevitably discovered James Hall during the course of the investigation regardless of Hunter's obscure references to his Christian friend. *See, e.g., Nix v. Williams*, 467 U.S. 431, 444 (1984); *United States v. Silvestri*, 787 F.2d 736, 746 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988).

B. Hunter's Alabama Arrest

Hunter seeks to suppress evidence seized from him incident to his arrest in Alabama on April 23, 1993. He also seeks to suppress the results of the May 11, 1993 comparison of money seized from him and the Maine bait list. He contends that, first, the arrest was unlawful as not being based on probable cause and, second, the examination of his money was performed without a warrant.

² If Hunter's references were made during an illegal arrest, the mere giving of *Miranda* warnings would not purge them of their Fourth Amendment taint. *See Brown v. Illinois*, 422 U.S. 590, 602 (1975).

1. Search Incident to Arrest

The items Hunter seeks to suppress were seized from him pursuant to a search incident to his arrest, as permitted by *New York v. Belton*, 453 U.S. 454, 461 (1981). This search is valid, therefore, only if the underlying arrest was valid. Hunter does not dispute the validity of the outstanding federal warrant for flight from prosecution, a felony warrant, as of the time he was arrested. See 18 U.S.C. 1073. Hunter merely contends that the Alabama authorities who arrested him lacked probable cause to do so because they were unaware of the existence of the federal warrant. I find otherwise.

When a state officer makes an arrest for a federal crime, as here, the legality of that arrest is determined by the law of the state in which the arrest took place, subject, of course, to constitutional standards. *United States v. Taylor*, 797 F.2d 1563 (11th Cir. 1986). Under Alabama law a police officer is permitted to arrest an individual if he knows of the existence of an outstanding felony warrant for that person even though he does not have that warrant in his possession. *Coral v. State*, 628 So.2d 954, 972-73 (Ala. Cr. App. 1992), *aff'd*, 628 So.2d 1004 (Ala. 1993), *cert. denied*, 114 S. Ct. 1387 (1994) (quoting 5 Am. Jur. 2d *Arrest* 72 (1962)). As for compliance with the Fourth Amendment, there is no constitutional requirement that an arresting officer actually have an outstanding warrant in hand when effecting that arrest. See, e.g., Fed. R. Crim. Proc. 4(d)(3); *United States v. Buckner*, 717 F.2d 297, 301 (6th Cir. 1983); *United States v. Clifford*, 664 F.2d 1090, 1093 n.6 (8th Cir. 1981). The officer's knowledge of the existence of the outstanding warrant supplies probable cause to constitutionalize the arrest for that felony. See, e.g., *United States v. D'Angelo*, 819 F.2d 1062, 1063-65 (11th Cir. 1987).

The record is replete with Deputy Fulmer's assertions that he knew of the existence of the outstanding federal warrant at the time of Hunter's arrest. At the time Fulmer left for the power company where Hunter had been spotted, he also claims to have relayed this information to the officers who first confronted Hunter, gave chase and then subdued him. I find Fulmer's assertions

to be credible. Hunter contends that Fulmer's lack of a reference to the outstanding warrant in his subsequent report indicates that he was unaware of it. *See* Hunter's Exh. No. 3. I find it hard to believe, however, that Agent Ridlehoover would not have apprised Deputy Fulmer of the outstanding federal warrant at some point during his coordination of the Alabama effort to locate Hunter and McCarthy. I thus find that Deputy Fulmer and the other arresting officers had knowledge of the outstanding warrant at the time of Hunter's arrest. Accordingly, Hunter's arrest was lawful and the evidence seized pursuant to the search incident to his arrest was lawfully obtained.

2. *Comparison of the Serial Numbers*

The search of Hunter produced an envelope containing \$6,039 in cash. This money was counted, inventoried and held as evidence at the Clanton Police Department. Over two weeks later, on May 11, 1993, Agent Ridlehoover compared this money against the bait list for money stolen from the Casco Northern Bank. Twenty of the serial numbers matched.

Hunter contends that, once this money had been seized and placed in police custody, Agent Ridlehoover should have obtained a search warrant to look at the serial numbers. This argument is unavailing. The \$6,039 in cash was lawfully in the possession of the police as evidence. Because Hunter was a suspect in numerous bank robberies, this large amount of cash had immediate evidentiary value. The comparison of the serial numbers against the bait list thus constituted nothing more than a second, closer look at evidence already in the lawful possession of the law enforcement authorities. This did not entail an infringement of Hunter's legitimate expectation of privacy in the money; the initial, valid search and seizure of the money effectively abolished whatever reasonable expectation of privacy Hunter may have had in the money's serial numbers. *See, e.g., United States v. Johnson*, 820 F.2d 1065, 1071-72 (9th Cir. 1987); *United States v. Lacey*, 530 F.2d 821, 823 (8th Cir.), *cert. denied*, 429 U.S. 845 (1976); *United States v. Jenkins*, 496 F.2d 57, 73-74 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). Consequently, the results of the bait

money comparison should not be suppressed. *See United States v. Edwards*, 415 U.S. 800, 803-04, 807 (1974).

C. Detective Abrams' False Affidavit: Hunter

As his final ground, Hunter seeks to suppress numerous items and statements supposedly flowing from Detective Abrams' false affidavit contained in McCarthy's arrest warrant, namely, the contents of the Isuzu pickup truck, the discovery of the Maine storage unit receipt and the contents of that storage unit. However, the Isuzu truck was owned, registered and operated by McCarthy; the storage unit was rented by McCarthy and the footlocker inside it owned by McCarthy. *See generally* Tr. 224-25, 239-42. Because Hunter has not asserted any possessory or proprietary interest in either the truck or the storage unit, indicating a legitimate expectation of privacy in either area, he lacks "standing" to raise a Fourth Amendment violation flowing from either search. *See, e.g., United States v. Sanchez*, 943 F.2d 110, 112-14 (1st Cir. 1991); *United States v. Soule*, 908 F.2d 1032, 1036-37 (1st Cir. 1990) (vehicle); *United States v. Melucci*, 888 F.2d 200, 202 (1st Cir. 1989) (storage unit).

D. McCarthy's Alabama Arrest

McCarthy seeks to suppress items of evidence seized from his person when he was taken into custody by the Alabama authorities on April 23, 1993. Citing to the false fingerprint information used in obtaining the Connecticut arrest warrant, McCarthy asserts that the police lacked probable cause to arrest him for the Franklin robbery. Because his arrest was illegal, says McCarthy, all evidence flowing from that illegal arrest must be suppressed.

The circumstances surrounding the stop and subsequent arrest of McCarthy must be evaluated objectively. *Scott v. United States*, 436 U.S. 128, 138 (1978). Thus, the fact that Deputy Fulmer subjectively thought he was making an investigatory stop to question McCarthy does not foreclose the government from justifying the detention by proving probable cause to support an

arrest. *Royer*, 460 U.S. at 507. The inquiry for the court is whether the circumstances known to the officers at the time of their stop, viewed objectively, justified their actions in making the stop and subsequent arrest. *Scott*, 436 U.S. at 138. "[S]o long as the police are doing no more than they are legally permitted and objectively authorized to do, the resulting stop or arrest is constitutional." *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 428 (1991) (internal quotation marks and citations omitted); *see also United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989); *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc). In this regard, the underlying motives and intentions of the police are generally irrelevant to the court's inquiry. *See Scott*, 436 U.S. at 138 & n.12; *United States v. Arra*, 630 F.2d 836, 845 n.12 (1st Cir. 1980); *United States v. McCambridge*, 551 F.2d 865, 870 (1st Cir. 1977).³

First, I find that Deputy Fulmer and the accompanying officer had an articulable and reasonable suspicion to make a *Terry* stop of McCarthy when they pulled his truck over on April 23. At the time of the stop, Fulmer knew that the Isuzu truck was owned and registered to an individual named John E. Perry; that John E. Perry was an alias for a person named Hardiman; that Hardiman was linked to Hunter, a wanted fugitive, who was a suspect in some bank robberies; that Hardiman himself was a suspect in those bank robberies; that Hardiman and Hunter were reported travelling and living together; and that the Isuzu was only three blocks away from the area where Hunter had just been spotted running from the police.

These facts, viewed objectively, gave Fulmer reasonable grounds to make an investigatory stop of the Isuzu pickup truck on the basis that the driver, presumably McCarthy, was connected to

³ The First Circuit has recognized that there may be an "egregious situation" where an arrest made on "purely colorable grounds" would be held invalid as "pretextual." *McCambridge*, 551 F.2d 865, 870 (1st Cir. 1977). Such a situation may develop, for example, where the police stop and arrest an individual for a minor traffic violation as a pretext to search the car to confirm their suspicions about an unrelated offense. *See United States v. Miller*, 589 F.2d 1117, 1128-29 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979). In that situation the motives of the arresting officer would be relevant to determining the validity of the search. The First Circuit, however, has noted its reluctance to inquire into the state of mind of an arresting officer. *Arra*, 630 F.2d 845 n.12; *McCambridge*, 551 F.2d at 870. Thus, when an officer is presented with completely independent probable cause to arrest an individual on something more than colorable grounds, the motives of the arresting officer in making such an arrest are immaterial. *See Mann v. Cannon*, 731 F.2d 54, 63 (1st Cir. 1984); *Miller*, 589 F.2d at 1129-30.

the Franklin robbery. The fingerprint evidence aside, the joint Alabama and Connecticut investigation had developed evidence that conclusively tied McCarthy to Hunter in Connecticut on the day of the Franklin robbery. As I have already discussed, the Connecticut police had a well founded suspicion that Hunter was involved in the robbery as of the time of his Connecticut stop. Following his release, further investigation, especially the interviews of James Hall, reinforced and heightened this suspicion. This same investigation also linked McCarthy to Hunter in Connecticut on the day of the Franklin robbery. Given this linkage, of which Fulmer was fully aware, Fulmer had reasonable grounds to suspect that McCarthy, like Hunter, was also connected to the Franklin robbery, thereby justifying the investigatory stop of McCarthy's truck on April 23. Once McCarthy was lawfully stopped, he showed the police a Maine driver's license bearing the name John E. Perry. McCarthy was then taken into custody and transported to the Clanton County courthouse where he was held, saysce's obtaining of an arrest warrant for the Franklin robbery. At this point, however, Hunter was effectively under arrest and his detention must be justified by probable cause. *See Dunaway*, 442 U.S. at 216 (stop converted to arrest when officers moved suspect from original site of stop to police station for interrogation).

As noted earlier, Fulmer had reason to believe that this person was not the real John E. Perry, but rather James Hardiman. He also knew that providing false identification to a police officer was a crime. *See Ala. Code 13A-9-18.1 (1975)* ("Giving of false name or address to a law enforcement officer."); *see also Ala Code 13A-9-18 (1975)* ("Criminal impersonation"). Accordingly, I find that the objective circumstances surrounding McCarthy's stop and detention indicate the existence of probable cause to justify McCarthy's detention as a *de facto* arrest.

The Supreme Court has articulated that probable cause to justify an arrest means "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed . . . an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). And because the existence of probable cause involves an objective inquiry, as noted earlier, an arresting officer's articulated

justifications for actions amounting to an arrest are irrelevant. *See, e.g., Scott*, 436 U.S. at 138. Thus, regardless of the officer's subjective views of his actions, absent any showing of pretext, a *de facto* arrest is constitutional so long as the arresting officer has probable cause to arrest the detainee for some offense. *See, e.g., United States v. Pollack*, 739 F.2d 187, 191 (5th Cir. 1984) (if arresting officer knows facts that constitute probable cause to believe suspect has committed a crime, it is not required that officer subjectively believe that probable cause exists to arrest for that crime); *United States v. Lester*, 647 F.2d 869, 873 (8th Cir. 1981) (validity of arrest should be judged by whether arresting officer had probable cause for arrest rather than by whether officer gave arrested person right reason for arrest); *see also Miller*, 589 F.2d at 1127-30 (officer had probable cause to arrest detainee for speeding or drug trafficking; detention for questioning thus valid as *de facto* arrest).

Here, Fulmer clearly had probable cause to arrest McCarthy for giving him false identification. Though he may have intended to stop and question McCarthy about the Franklin robbery, once McCarthy gave Fulmer false identification, Fulmer was presented with "completely independent probable cause" to justify arresting him for that offense. *Miller*, 589 F.2d at 1129. Viewed objectively, therefore, I find that the circumstances surrounding McCarthy's stop indicate the existence of probable cause to justify his *de facto* arrest. *See United States v. Huffhines*, 967 F.2d 314, 317-18 (9th Cir. 1992) (similar circumstances). The fact that Fulmer may not have intended to arrest McCarthy for giving him false identification is irrelevant since Fulmer, in detaining McCarthy, did no more than he was objectively authorized and legally permitted to do in the circumstances presented to him. *See Cummins*, 920 F.2d at 501; *Trigg*, 878 F.2d at 1041; *Causey*, 834 F.2d at 1184; *see also Miller*, 589 F.2d at 1127-30. In light of the existence of probable cause, McCarthy's arrest was thus valid from the time he was transported to the county courthouse, as was the search conducted incident to that arrest. Because of this timing, the fact that Detective Abrams' fingerprint error was incorporated into the Connecticut arrest warrant executed later that night is immaterial to the inquiry here, since the search of McCarthy incident to a lawful arrest had already occurred. *See United States v. Elkins*, 774 F.2d 530, 534-35 (1st Cir. 1985)

(timing). Accordingly, the items seized from McCarthy's person pursuant to that search were lawfully obtained.

E. McCarthy's Suitcases

McCarthy also seeks to suppress items seized from the Giordano and American Tourister suitcases. He asserts that both searches were unconstitutional since they were conducted without a warrant. I will deal with each suitcase separately.

1. The Giordano Suitcase

The Giordano suitcase belonged to McCarthy, who was a temporary boarder at Henderson's trailer. The suitcase was closed, locked and kept in a back bedroom where Henderson had let McCarthy and Hunter store their belongings. Although Henderson had just ordered him to leave, McCarthy was in the process of moving out on the morning of the day on which the suitcase was seized. Given the short lapse of time from his leaving that morning and the suitcase's seizure that evening, with his intervening arrest apparently preventing his completion of the move, McCarthy did not relinquish his manifest expectation of privacy in the suitcase, nor was such an expectation of privacy unreasonable as of the time the suitcase was seized. I thus find that McCarthy had a justified expectation of privacy in this suitcase that was protected by the Fourth Amendment. *See California v. Greenwood*, 486 U.S. 35, 39 (1988).

Nevertheless, I find that Deputy Fulmer's seizure of the Giordano suitcase complied with all Fourth Amendment requirements. This suitcase was forcibly opened by Henderson and Ellison. They rummaged through it, took the guns, ammunition and body armor out and called the police. The Fourth Amendment does not protect against such invasions by private individuals. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Henderson and Ellison then laid the weapons on top of the other contents of the suitcase and left it open, awaiting the arrival of the police. Upon

arriving at the trailer Deputy Fulmer saw the guns, ammunition and body armor lying in plain view on the top layer of the open suitcase on Henderson's kitchen table. Being lawfully on the premises of Henderson's trailer, Deputy Fulmer was justified at this point in seizing the suitcase and its contents without first obtaining a search warrant. *Horton v. California*, 496 U.S. 128, 136-37 (1990).

2. *The American Tourister Suitcase*

Likewise, I find that the seizure and search of the American Tourister also complied with the Fourth Amendment. Henderson turned this suitcase over to the FBI on April 29, 1993, six days after he had asked McCarthy to leave. This suitcase had been laying open in Henderson's back bedroom with clothes piled in it. Having discovered weapons in McCarthy's other bag, Henderson understandably wanted McCarthy's belongings out of his home. He thereupon asked the police to remove the American Tourister suitcase from his premises. In light of this request, the FBI was permitted to remove the offending item from Henderson's home. Because the American Tourister lawfully came into the possession of the police, an inventory search of its contents, conducted pursuant to standard practice, was permissible. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). This is what was done here. Tr. 157.

In addition, I note that McCarthy had left the American Tourister suitcase wide open in a storage area in Henderson's trailer to which Henderson had full access. McCarthy had taken no steps to protect his claimed privacy interest in the American Tourister suitcase like he had with the Giordano suitcase. Indeed, Henderson had viewed the clothing contents of the suitcase without even rummaging through it. Tr. 263, 268. Moreover, the suitcase had remained open in Henderson's trailer for a period of six days after Henderson's termination of McCarthy's right to live there. McCarthy could not at that point claim a legitimate expectation of privacy in the suitcase or its contents, which had already been exposed to view. Under these circumstances Henderson could have properly given the FBI permission to search and seize the suitcase and its contents. *See*

United States v. Sellers, 667 F.2d 1123, 1124, 1125-26 (4th Cir. 1981) (similar circumstances).

F. McCarthy's Truck

McCarthy seeks suppression of the items seized during the search of his Isuzu truck on April 28, 1993. He claims that the search is the fruit of his illegal arrest on April 24, 1993 for the Franklin robbery. Specifically, he argues that the search warrant was derived from his unlawful arrest under the Connecticut arrest warrant, which was predicated on Detective Abrams' fingerprint error.

First, I note that McCarthy has failed to prove that Abrams' fingerprint error in his affidavit was anything but an unfortunate mistake. Given the fact that Detective Abrams joined the investigation of the Franklin robbery midway, his confusion and subsequent error concerning the two cars involved, one in police custody the other not, is understandable. McCarthy has failed to meet his burden of proving that the mistake was intentionally or recklessly made.⁴ *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). At the most the inclusion of the fingerprint reference in the affidavit for the Connecticut arrest warrant was negligent. By itself this would not suffice to invalidate the April 28 search warrant. *See United States v. Melvin*, 596 F.2d 492, 498-500 (1st Cir.), *cert. denied*, 444 U.S. 837 (1979).

As for fruit of the poisonous tree, I find that the April 28 search warrant is in no way tainted by McCarthy's claimed illegal arrest under the Connecticut arrest warrant. Even assuming that McCarthy's arrest for the Franklin robbery was unlawful due to the fingerprint error, which I need

⁴ McCarthy has recently submitted an addendum to his supplemental memorandum in support of his motion to suppress, *see* Defendant McCarthy's Addendum to Supplemental Memorandum in Support of Motion to Suppress (Docket No. 71), to which the government has objected, *see* Government's Objection to Defendant McCarthy's Addendum to Supplemental Memorandum (Docket No. 74). McCarthy seeks to supplement the evidentiary record by offering two reports from the files of the Connecticut State Police concerning McCarthy's fingerprints. Without addressing the procedural shortcomings of this offering, I find that McCarthy's addendum lacks merit. Neither of the two offered reports detracts from Detective Abrams' credibility, as McCarthy suggests. The crucial point of Abrams' testimony for *Franks* purposes, which I credit as truthful, is that he did not possess any report reflecting a processing of the rental car at the time he prepared his warrant affidavit; information of this processing came to his attention after the arrest warrant had been issued and executed. Nothing in McCarthy's addendum suggests otherwise.

not decide, the April 28 search warrant is not a fruit of that claimed illegality. Excising from the search warrant affidavit any reference to McCarthy's arrest under the Connecticut arrest warrant does not affect one bit the probable cause existing for the issuance of that search warrant. *See Laaman v. United States*, 973 F.2d 107, 115 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1368 (1993). Once the weapons were lawfully removed from Henderson's trailer on the evening of April 23 -- weapons identical to the ones used in the November 13, 1992 Woodstock, Alabama bank robbery -- probable cause developed to believe that McCarthy's truck would contain evidence of bank robbery. *See* Gov't Exh. 7 (Byers affidavit 6, 11). This was the stated purpose of the search warrant. *Id.* (Att. 1). Probable cause supporting the April 28 search warrant thus developed wholly independent of McCarthy's April 24 arrest under the Connecticut arrest warrant.⁵ *See Murray v. United States*, 487 U.S. 533, 537-41 (1988). As such, the April 28 search warrant is not tainted by the claimed illegality of that arrest. Items seized pursuant to the April 29 search of the Isuzu truck are not subject to suppression.

G. McCarthy's Storage Unit

As with his truck, McCarthy asserts that the search of his leased Scarborough, Maine storage unit is the fruit of his illegal arrest on the Connecticut arrest warrant. Because the rental receipt leading the FBI to the Maine storage unit stemmed from the search of his truck conducted after his illegal arrest, argues McCarthy, the results of the search of the rental unit are tainted by the illegal arrest.

Like the search of the truck, I find that the search of the storage unit is not tainted by McCarthy's asserted illegal arrest. The rental receipt leading the FBI to the storage unit was lawfully discovered during the April 28 search of the Isuzu truck. On May 12, 1993 Special Agent Barnes applied for and received a search warrant for that rental unit. Gov't Exh. 8B. The search

⁵ The fact that McCarthy could have cleaned out his truck had he not been arrested is of no significance, even if his arrest was illegal. There is no constitutional right to remove or destroy evidence. *Segura v. United States*, 468 U.S. 796, 815-16 (1984).

was executed on May 12, 1993.

As with the truck affidavit, deleting all mention of McCarthy's Connecticut arrest from the supporting affidavit does not impact in any way the probable cause supporting the issuance of that search warrant. Critical to the finding of probable cause for the search of the Maine storage unit is the fact that Hunter, while in Alabama, was found to possess stolen bait money from the robbed Casco Northern Bank. The supporting affidavit notes this. *See Gov't Exh. 8A at 6.* In fact, the affidavit actually understates the number of bills matching the bait list. Tr. 315-16. Although the affidavit incorrectly states that bait money was found on McCarthy as well as Hunter, this misstatement in no way detracts from the bait money's significance for probable cause purposes. As already thoroughly discussed, the investigation into the various bank robberies had effectively linked Hunter and McCarthy together as the two suspects in various bank robberies. Given this linkage, the fact that Hunter possessed the Maine bait money is just as probative for probable cause to search the Maine storage unit as would be McCarthy's possession of that money. Consequently, despite the affidavit's misstatement, and because probable cause to support the search warrant for the Maine storage unit existed entirely independent of McCarthy's claimed illegal Connecticut arrest, the results of that search need not be suppressed.

III. CONCLUSION

For the foregoing reasons, I recommend that the motions to suppress be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 11th day of May, 1994.

David M. Cohen
United States Magistrate Judge