No. _____

IN THE
Supreme Court of the United States

MURAT AKSU,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of the State of California
for the County of Ventura, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal courts of appeals and state courts of last resort acknowledge that they are intractably split about a recurring and important issue under the Fourth Amendment. A large number of courts treat the question of whether a defendant voluntarily consented to a warrantless search as a mixed question of fact and law that is reviewed *de novo* on appeal, much like the voluntariness of a confession under the Fifth Amendment. An equally large number of courts, including the court here, have treated the voluntariness of a consent to a search as a factual question, subject only to highly deferential appellate review.

The question presented is: What is the standard by which appellate courts review a trial court's holding that a defendant voluntarily consented to a warrantless search for Fourth Amendment purposes?

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Murat Aksu petitions for a writ of certiorari to review the judgment of the Superior Court of the State of California for the County of Ventura, Appellate Division (the "Appellate Court").

OPINIONS BELOW

The Opinion and Judgment of the Appellate Court (Pet. App. 2a-19a) is unreported. The Order of the California Court of Appeal, Second Appellate District, Sixth Division denying Petitioner's petition to transfer the case (Pet. App. 1a) also is unreported.

JURISDICTION

The Appellate Court issued its Opinion and Judgment on August 10, 2016. Petitioner timely petitioned to transfer the case to the California Court of Appeal, Second Appellate District, Sixth Division. That court denied petitioner's petition to transfer the case on October 20, 2016.

Petitioner filed a timely Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari on January 6, 2017. Justice Kennedy granted that Application on January 9, 2017, making the petition due on February 17, 2017.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

INTRODUCTION

This case presents an important question of law that has divided both state courts of last resort and the federal courts of appeals. Under the Fourth Amendment, law enforcement officers are permitted to conduct a warrantless search of an individual who has given valid consent for the search. The Fourth Amendment requires that such consent to a warrantless search be "voluntary" and "not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). A mere "acquiescence to a claim of lawful authority" does not constitute voluntary consent to a search. *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968).

State and federal courts are sharply split, however, on what standard of review applies to a trial court's ultimate conclusion that an individual voluntarily consented to a warrantless search. Some appellate courts treat the trial court's ruling as a purely factual one, and thus apply a very deferential standard of review, such as clear error or abuse of discretion. Other courts, however, treat the trial court's ruling as a mixed question of law and fact. Those courts, while deferring to the trial court's factual findings, review the ultimate question of voluntariness *de novo*. The state courts of last resort have a wide and entrenched split on this issue, with more than ten states on each side of the split, and

the federal courts of appeals are split on this issue, as well. This split has been acknowledged in numerous decisions.

This case is an excellent vehicle for this Court to resolve this important question. In this case, a California appellate court applied the highly deferential "substantial evidence" standard of review, upholding the trial court's ruling that the defendant had voluntarily consented to a warrantless search of his person and property. If this case arose in many other jurisdictions, however, the appellate court would have independently reviewed whether the uncontroverted facts (as determined by the trial court) constituted voluntary consent for purposes of the Fourth Amendment. Moreover, this is precisely the sort of close case where the standard of review makes a difference and is likely to be outcome-determinative.

The question presented in this case recurs frequently and is the subject of a substantial and acknowledged conflict of authority. The Court should grant certiorari to resolve the conflict.

STATEMENT OF THE CASE

A. Detention and Search by Police

This case stems from a warrantless search of petitioner Murat Aksu's person, briefcase, and car by Ventura County Sheriff's Officers on June 18, 2010. Aksu, a naturalized American citizen who grew up in Turkey, moved to the United States on September 4,

2001. Tr. 146, 191.[1] Prior to his detention and arrest in this case, Aksu had never been detained or arrested by the police. Tr. 145.

The morning of the search at issue, Deputy Stephen Egnatchik of the Ventura County Sheriff's Office attended a morning departmental briefing.[2] Pet. App. 3a; Tr. 36. At the briefing, a senior deputy informed the officers that two or three women who worked at the Government Center, the county courthouse building, had said that a man had walked near them as they were walking up to the entrance of the Government Center, manipulated something on his briefcase when he got near the building, and then turned around and walked away quickly without going inside. Pet. App. 3a; 24a; Tr. 36, 43, 60-61. The senior deputy also said that he had seen this man outside the Government Center just before the briefing, but that the man had walked away when the senior deputy tried to approach him. Tr. 37-38. During the briefing, Aksu was identified by name and his DMV photograph as this man. Pet. App. 3a; Tr. 36. The officers were instructed that, if they saw Aksu

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[1] The abbreviation "Tr." refers to the transcript of the hearing on Aksu's motion to suppress, conducted before Judge Brian J. Back of the Superior Court of the State of California for the County of Ventura on June 13 and 14, 2011.

[2] As discussed further below, in ruling on Aksu's motion to suppress the evidence uncovered by the warrantless searches, the trial court made a factual finding that the officers' testimony was credible. Pet. App. 22a, 28a. Accordingly, the facts set forth herein are taken from the trial court's findings and the officers' testimony that was credited by the trial court. There thus are no disputes of fact at issue in this petition.

engaging in this behavior, they should "conduct an investigation to see what this behavior was, to see if it was terrorist related." Tr. 36-37.

Approximately fifteen minutes after the briefing, Deputy Egnatchik saw Aksu walking with a briefcase outside the Government Center. Pet. App. 3a; 24a. As Deputy Egnatchik started walking toward Aksu, Aksu appeared to see him, changed direction, and brought his cell phone up to his ear. Pet. App. 3a; Tr. 39-42. Based on the morning briefing and Aksu's behavior, Deputy Egnatchik hypothesized that Aksu might be engaged in a potential terrorist attack or some other attack on the Government Center. Pet. App. 3a-4a; 24a-25a; Tr. 43. Deputy Egnatchik therefore decided to "conduct an investigation" to determine whether Aksu was involved in terrorist-related activity. Tr. 43-44.

Deputy Egnatchik approached Aksu by a bench in the courtyard of the Government Center. Pet. App. 3a-4a; Tr. 43. Deputy Egnatchik was in the "full" Ventura County Sheriff's Deputy uniform, "wearing boots, green pants," "[p]atches affixed to both shoulders," "a baton on my hip," "a sidearm attached to my hip," and additional magazine clips of ammunition. Tr. 67. He was "[c]learly a Sheriff's Deputy." *Id.* Deputy Egnatchik called Aksu by name and "told him I needed to talk to him." Tr. 44. He ordered Aksu to put his cell phone down on the bench. Tr. 65, 88. Aksu told Deputy Egnatchik that he was at the Government Center to see two women, whom he identified by name. Pet. App. 4a; Tr. 45. Aksu was wearing a Department of Defense nametag around his neck, as at the time he worked at a naval base as a

civilian electronics engineer for the United States Department of Defense. Tr. 82, 147.

Deputy Egnatchik testified that he had detained Aksu at this point, and that the encounter was a detention and not a casual encounter from the outset. Tr. 63-64. Deputy Egnatchik never told Aksu that he was free to leave; to the contrary, Aksu was not free to walk away. Pet. App. 25a; Tr. 66, 69. A second officer, Deputy Veloz, arrived within minutes of Deputy Egnatchik's initial contact with Aksu.[3] Tr. 78-79. Deputy Veloz stood off to Deputy Egnatchik's left side as a "cover officer," to provide cover if Aksu tried to run away. Tr. 79.

Deputy Egnatchik told Aksu "what [his] suspicions were—what act I thought he may be involved in." Tr. 46. Deputy Egnatchik told Aksu that "I would like to search him and his briefcase for any sort of contraband for the terrorist related activity that I suspected." Pet. App. 4a; Tr. 46. Deputy Egnatchik admitted that he "can't recall the exact words" that Aksu said in response, but testified that "he said, you know, yes, it was fine." Tr. 46.

Deputy Egnatchik then had Aksu face away from him, held Aksu's hands behind his back, and searched his person, including inside his pockets. Tr. 46-47, 214. During the search, Deputy Egnatchik "pulled everything out of [Aksu's] pockets." Tr. 85.

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[3] Like Deputy Egnatchik, Deputy Veloz was wearing his Sheriff's Deputy uniform. Tr. 67.

Deputy Egnatchik pulled from Aksu's pocket two pieces of paper, both of which contained magazine images of adult naked women in erotic poses, and placed them on the bench. Tr. 47, 85. Deputy Egnatchik did not believe that either of the images was illegal, and he did not find any weapons, evidence of terrorist activity, or anything else illegal on Aksu. Tr. 70. Deputy Egnatchik also seized Aksu's keys during the search, and Deputy Egnatchik "most likely left everything on the bench there." Tr. 84-85. Deputy Egnatchik confirmed: "I wouldn't call it a frisk. It was a search of his entire person." Tr. 214.

Deputy Veloz then conducted a search of Aksu's briefcase, inside of which he found a small video camera. Tr. 48. Deputy Egnatchik told Aksu that he suspected him of terrorist activity, and asked if he was using the camera for terrorist pre-planning. Tr. 80-81. Aksu responded that he had used the video camera to videotape attractive women. Pet. App. 4a; Tr. 48-49. In response to an officer's question, Aksu also said that he accidentally had filmed up a woman's skirt on one occasion. Pet. App. 27a; Tr. 49. Aksu cried during the exchange. Tr. 75, 81. One of the officers asked to see the videos on the video camera, and Aksu said "yes." Tr. 50-51.

Sergeant Robert Arthur, also of the Ventura County Sheriff's Department, arrived on the scene after the officers had conducted the searches of Aksu's person and briefcase. Tr. 92. Sergeant Arthur asked Aksu to sign a form giving the officers written permission for their searches. Tr. 92. Aksu refused to do so. Tr. 93. Aksu initially expressed concern that the form included a

consent to search his residence, but Aksu refused to sign the form even after Sergeant Arthur agreed to revise it so that it was limited only to his briefcase and video camera. Tr. 93, 122.

Sergeant Arthur testified that "from the first moment I got there," Aksu expressed concern that the detention was causing him to be late for work. Tr. 130. Like Deputy Egnatchik, though, Sergeant Arthur testified that Aksu was not free to leave and that the officers would not have let him leave had he attempted to do so. Tr. 119. During the searches, Sergeant Arthur contacted both of the women Aksu claimed to be at the Government Center to see, and both affirmed that they knew Aksu and did not feel threatened by him, but were not expecting him that day. Tr. 111, 117, 126, 128.

Thereafter, the officers searched Aksu's vehicle, interviewed him at the Sheriff's facility, reviewed the materials on his video camera, and then obtained a warrant to search for related materials at his home. Pet. App. 4a. Approximately thirty or forty minutes elapsed from the officers' initial contact with Aksu to the time they escorted him into the Sheriff's facility. Tr. 51, 53. Aksu was formally placed under arrest at the Sheriff's facility for an alleged violation of California state law in connection with his videotaping of women.

B. Trial Court Ruling on Motion to Suppress

The state of California charged Aksu with six violations and one attempted violation of California Penal Code § 647(j)(2), which makes it a misdemeanor to

secretly videotape another using a concealed camera under certain circumstances.[4]

Aksu moved to suppress the evidence seized as a result of the officers' searches on Fourth Amendment grounds. It is undisputed that the deputies had not obtained a warrant before searching Aksu's person or briefcase. The prosecution sought to justify the searches by arguing that they fell within a narrow exception to the Fourth Amendment warrant requirement—namely, that Aksu had given free and voluntary consent for the searches. Aksu disagreed, arguing that he had not given valid consent to the searches for purposes of the Fourth Amendment. Pet. App. 4a. Judge Brian J. Back heard testimony on Aksu's motion to suppress over two days in June 2011. *Id.*

After the hearing, the trial court issued an oral ruling on the motion to suppress. At the outset of that oral ruling, the trial court stated:

> I'll state this at the outset because it permeates the Court's consideration here. Even before I state what I'm about to state, reading the motions and even us going through the hearing, [there are]

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[4] Specifically, that provision prohibits using a concealed camera to secretly film another person "under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy."

> very legitimate issues…. This one the Court -- had to think hard on…."

Pet. App. 22a.

The trial court made the factual finding that the deputies' testimony was credible and that Aksu's testimony lacked credibility. Pet. App. 22a.[5] Accordingly, the trial court credited the deputies' testimony as set forth above.

The trial court concluded that Deputy Egnatchik had reasonable suspicion to stop Aksu, and that Deputy Egnatchik believed that he had detained Aksu from the outset. Pet. App. 25a, 29a-31a.[6]

The trial court then denied the motion to suppress, concluding that Aksu had given what the trial court referred to as a "directed consent" for the searches. Pet. App. 26a. The trial court cited on the record a number of different factors that it considered in reaching the conclusion that Aksu had given valid consent for purposes of the Fourth Amendment, including the distinction between consensual encounters and temporary detentions, the length of the detention, the lack of restraints or drawn weapons, the number of officers present, Aksu's level of sophistication, Aksu's

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[5] Those credibility findings are not at issue in this petition, as this petition is based solely on the officers' testimony credited by the trial court.

[6] The trial court also stated that "the Court can't conclude that we were at a legal detention at that point." (Pet. App. 25a, 29a-31a). The trial court did not clarify what it meant by "legal detention" in this context, however.

cooperative behavior, and the court's credibility findings. Pet. App. 22a-30a; *see also* Pet. App. 9a-10a (summarizing trial court ruling). After citing the various factors, the trial court denied the motion to suppress in its entirety. Pet. App. 35a.

Aksu subsequently pleaded guilty to two counts of violating California Penal Code § 647(j)(2). Under California state law, he did not waive his right to appeal the denial of his motion to suppress by pleading guilty. *See* Cal. Penal Code § 1538.5(m). At his sentencing hearing, the court required Aksu to register as a sex offender under California Penal Code § 290 for the rest of his life. He also was sentenced to 60 days in jail, and that sentence currently is stayed pending the outcome of this petition.

C. Appellate Division Judgment and Order

Aksu appealed the denial of his motion to suppress to the Appellate Court. On appeal, the government did not dispute that the officers had detained Aksu at the time of the searches. The government also did not seek to justify the searches as limited "frisks" under *Terry v. Ohio*, 392 U.S. 1 (1968), or on the ground that there was probable cause to arrest Aksu at the time of the searches. The government instead argued that Aksu had voluntarily and freely consented to the searches for purposes of the Fourth Amendment. The Appellate Court recognized that the government bore the burden of showing that Aksu had freely and voluntarily consented. Pet. App. 6a.

In their appellate briefs, the parties advocated for different standards of review of the trial court's holding

that Aksu had given voluntary consent—Aksu contending that the *de novo* standard should apply, and the government stating that the substantial evidence standard should apply. The Appellate Court agreed with the government, describing the applicable standard of review as follows:

> Our role in reviewing the resolution of this issue is limited. The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, [t]he power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence.

Id. (internal citations and quotation marks omitted). Thus, the Court held, "on review, the court determines whether there is some evidence, no matter how slight, of reasonable, solid, credible value that supports the express or implied findings of the trial court." Pet. App. 7a.

Applying that standard, the Appellate Court affirmed the trial court's holding that Aksu validly consented to the search for purposes of the Fourth Amendment. Pet. App. 9a-10a. The Appellate Court concluded that the officers had reasonable suspicion to stop Aksu, and also stated that "[t]he most reasonable

interpretation of the record from the motion to suppress hearing is that the court found the initial contact between Officer Egnatchik and Mr. Aksu to be a consensual encounter that quickly transitioned into a temporary detention." Pet. App. 7a. The Appellate Court also listed the different factors cited by the trial court in support of its denial of the motion to suppress, and then stated without further analysis that those factors constituted "substantial evidence" for the trial court's holding. Pet. App. 9a-10a. The Appellate Court thus held that, under the substantial evidence standard, the trial court properly denied the suppression motion. Pet. App. 10a.

REASONS FOR GRANTING THE PETITION

The Appellate Court below treated the trial court's conclusion that Aksu had consented to the search as a finding of fact that it would uphold so long as it was supported by substantial evidence. Other appellate courts, however, have treated that issue as a mixed question of law and fact that, on appeal, would be reviewed *de novo*. Numerous courts have acknowledged that the state courts of last resort and federal courts of appeals are widely split on this issue. The split is entrenched, and only this Court can resolve it. The issue is plainly important and recurs frequently. This case provides an excellent vehicle for resolving the question. This Court's review is therefore warranted.

I. The State Courts of Last Resort and Federal Courts of Appeals Are Irreconcilably Split As To Whether The Voluntariness of a Consent To Search Should Be Reviewed *De Novo*.

This Court has noted that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller v. Fenton*, 474 U.S. 104, 113 (1985). Nowhere is the elusive nature of this distinction more apparent than in the context of voluntariness determinations under the Fourth Amendment, where the state high courts and federal courts of appeals are deeply divided on the appropriate standard of review.

The appellate courts that use the more deferential standard of review typically invoke this Court's statement that—at the trial stage—voluntariness of consent is "a question of fact to be determined from all the circumstances." *Schneckloth*, 412 U.S. at 248–49. In contrast, many courts applying *de novo* review treat voluntariness of a consent under the Fourth Amendment like voluntariness of a confession under the Fifth Amendment—a mixed question of fact and law, in which issues of "historical fact" are reviewed deferentially, while the constitutional question of whether those facts amount to voluntary consent is reviewed *de novo*. The split is entrenched, acknowledged and deep.

A. The state courts of last resort are divided on the standard of review for determinations regarding the voluntariness of a consent to search.

State courts have been divided for decades on the proper standard of review of a trial court's conclusion that an individual voluntarily consented to a search for purposes of the Fourth Amendment. Some states view the determination as a mixed question of law and fact, reviewable *de novo*, and others view it as a pure question of fact, reviewable only for clear error, substantial evidence, or abuse of discretion. *Compare State v. Wilson*, 367 A.2d 1223, 1231 (Md. 1977) ("On appeal, we examine the entire record and make an independent determination of the ultimate issue of voluntariness."), *and State v. Stevens*, 806 P.2d 92, 102–03 (Or. 1991) ("In reviewing the voluntariness of a defendant's statements . . . we are not bound by the trial court's ultimate holding as to voluntariness, [rather,] we assess anew whether the facts suffice to meet constitutional standards." (citations omitted)), *with State v. King*, 209 A.2d 110, 114 (N.J. 1965) ("The fact that the present case has to do with an ultimate finding of fact of constitutional dimension does not compel a different standard of appellate review. . . . [T]he appellate court should reverse only when it finds [the trial court's] determination to be Clearly erroneous."), *and People v. James*, 561 P.2d 1135, 1139 (Cal. 1977) ("The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact. . . . On appeal . . . the trial court's findings—whether express or implied—

must be upheld if supported by substantial evidence." (internal quotation marks omitted)).

The state courts that favor *de novo* review typically adopt a two-step approach, deferring to the trial court on questions of simple "historical fact," while "independently deciding as a matter of law whether they ultimately demonstrate that the defendant's consent was voluntary and not the product of police duress or coercion." *State v. Weisler*, 35 A.3d 970, 975–76 (Vt. 2011) (collecting cases). This two-step approach follows this Court's decisions concerning voluntariness of a confession in the Fifth Amendment context. *See Miller*, 474 U.S. at 115 (emphasizing that voluntariness of a confession "is a legal question meriting independent consideration"); *Davis v. North Carolina*, 384 U.S. 737, 741–42 (1966) ("It is our duty . . . to examine the entire record and make an independent determination of the ultimate issue of voluntariness."); *United States v. Tompkins*, 130 F.3d 117, 120 n.10 (5th Cir. 1997) (emphasizing that any "ultimate" question about the voluntariness of a confession "is uniformly held to be subject to *de novo* review").

In contrast, the state courts that review voluntariness for clear error or abuse of discretion often invoke *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), in which this Court stated that, during a trial, the question of whether consent to a search "was in fact voluntarily given, and not the result of duress or coercion, express or implied," is "a question of fact to be determined from all the circumstances," *id.* at 248–49. Like many federal courts, these state courts infer from this statement in *Schneckloth* that voluntariness

determinations should be reviewed deferentially on appeal as pure questions of fact.[7] For example, the D.C. Court of Appeals determined that it was "bound" by "the Supreme Court's repeated emphasis that the voluntariness of a consent to search is 'a question of fact'" to "uphold the trial court's finding that a search was consensual unless such a finding is clearly erroneous." *In re J.M.*, 619 A.2d 497, 500 (D.C. 1992) (citations omitted).

The divide among state high courts over the proper standard of review is deeply entrenched, with at least twelve state courts of last resort applying a deferential standard of review[8] and at least fourteen state high

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[7] As discussed further in Section III below, *Schneckloth* did not address or otherwise pertain to the standard of review that should be applied on appeal, and therefore is inapplicable in this case.

[8] *See State v. Butler*, 309 P.3d 609, 613 (Ariz. 2013) (en banc) ("Voluntariness is a question of fact, and we review the trial court's voluntariness finding for abuse of discretion." (citations and internal quotation marks omitted)); *People v. Monterroso*, 101 P.3d 956, 967–68 (Cal. 2004) ("Our review of the trial court's implied finding that defendant voluntarily consented to the search is limited… The trial court's findings—whether express or implied—must be upheld if supported by substantial evidence." (citations and internal quotation marks omitted)); *State v. Jenkins*, 3 A.3d 806, 833 (Conn. 2010) ("The question whether consent to a search has in fact been freely and voluntarily given . . . is a question of fact. . . . We may reverse the trial court's factual findings on appeal only if they are clearly erroneous." (quotation and alteration marks omitted)); *In re J.M.*, 619 A.2d at 501 ("[I]n light of the Supreme Court's repeated emphasis that the voluntariness of a consent to search is a question of fact to be determined from all the circumstances, we have considered ourselves bound to uphold the trial court's finding that a search was consensual unless such a finding is clearly erroneous."

(citation and internal quotation marks omitted)); *Knight v. State*, 690 A.2d 929, 932 (Del. 1996) ("The trial judge's determination that a defendant's consent was voluntary will not be set aside on appeal unless that finding is clearly erroneous."); *State v. Varie*, 26 P.3d 31, 35 (Idaho 2001) ("Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority is a question of fact. . . . The district court's determination that [ ] consent was freely and voluntarily given is supported by the evidence and is not clearly erroneous." (citations and internal quotation marks omitted)); *People v. Smith*, 827 N.E.2d 444, 452 (Ill. 2005) (finding that "[w]hether consent to a search was voluntary is a question of fact," that should not be overturned unless "it is against the manifest weight of the evidence" (citations omitted)), *abrogated on other grounds by People v. Luedemann*, 857 N.E.2d 187 (Ill. 2006); *Commonwealth v. Gray*, 990 N.E.2d 528, 540 (Mass. 2013) ("Because a finding of voluntariness is a question of fact, it should not be reversed absent clear error by the judge." (citation omitted)); *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011) ("[T]he 'clearly erroneous' standard controls our review of a district court's finding of voluntary consent." (citation omitted)); *King*, 209 A.2d at 114 (1965) ("[T]he determination whether consent was voluntarily given is a factual issue to be decided by the trial judge; and the appellate court should reverse only when it finds that determination to be Clearly erroneous."); *State v. $217,590.00 in U.S. Currency*, 18 S.W.3d 631, 633 (Tex. 2000) ("Whether a consent to search was voluntary under the totality of the circumstances involves questions of both fact and law. . . . We review a trial court's decision on a mixed question of law and fact for an abuse of discretion."); *Campbell v. State*, 339 P.3d 258, 265 (Wyo. 2014) ("Whether consent is voluntary is a question of fact. . . . We will not disturb a district court's resolution of that factual issue unless, viewing the evidence in the light most favorable to the district court's decision, we conclude that it is clearly erroneous." (citation omitted)).

courts favoring *de novo* review.[9] Other state courts have issued contradictory statements on the proper standard

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[9] *See People v. Chavez-Barragan*, 379 P.3d 330, 338 (Colo. 2016) ("[W]e review the trial court's findings of historic fact deferentially, accepting them if they are supported by competent record evidence, but we review the legal effect of those facts de novo. Put differently, while we generally accept the trial court's findings about what happened, the ultimate conclusion of constitutional law is ours to draw." (citation omitted)); *State v. Yong Shik Won*, 372 P.3d 1065, 1076 (Haw. 2015) ("[T]he ultimate issue of whether the defendant provided 'consent' is reviewed de novo." (citation omitted)); *State v. Overbay*, 810 N.W.2d 871, 875 (Iowa 2012) ("When a defendant [asserts that a search was] involuntary, we evaluate the totality of the circumstances to determine whether or not the decision was made voluntarily. Our review is de novo; therefore, we make an independent evaluation based on the entire record." (citation and internal quotation marks omitted)); *State v. Ransom*, 212 P.3d 203, 209 (Kan. 2009) (finding that an appellate court reviewing a voluntariness determination must judge "whether the factual underpinnings of the district judge's decision are supported by substantial competent evidence," however, the "ultimate legal conclusion to be drawn from those facts raises a question of law requiring application of a de novo standard" (citation and internal quotation marks omitted)); *Payton v. Commonwealth*, 327 S.W.3d 468, 473 n.9 (Ky. 2010) ("[With respect to voluntariness determinations,] a trial court's purely factual findings (not involving application of law) are conclusive if supported by substantial evidence, although questions of application of law to the facts are subjected to a de novo standard of review."); *State v. Nadeau*, 1 A.3d 445, 454 (Me. 2010) ("The ultimate question of whether the facts, as found, establish that an individual consented to the ensuing search and seizure is a distinctly legal question that we will review de novo."); *Wilson*, 367 A.2d at 1231 ("On appeal, we examine the entire record and make an independent determination of the ultimate issue of voluntariness."); *State v. Tyler*, 870 N.W.2d 119, 127 (Neb. 2015), *cert. denied*, 136 S. Ct. 1207 (2016) ("As to the historical facts or circumstances leading up to a consent to search, we review the trial court's findings for clear error. However, whether those facts or

of review without acknowledging the inconsistency,[10] and the remainder appear to have failed to announce a

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circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which we review independently of the trial court."); *State v. Davis*, 304 P.3d 10, 13 (N.M. 2013) ("Factual questions [surrounding the voluntariness of a consent to search] are viewed under a substantial evidence standard, and the application of law to the facts de novo." (citation omitted)); *State v. Moore*, 318 P.3d 1133, 1139 (Or. 2013), *opinion adhered to as modified on reconsideration*, 322 P.3d 486 (Or. 2014) ("The trial court's findings of fact are binding on appeal if there is evidence in the record to support them, but, ultimately, whether consent was voluntary is a question of law, and appellate courts are not bound by the trial judge's conclusion."); *State v. Shelton*, 990 A.2d 191, 199 (R.I. 2010) ("[T]he determination of the voluntariness of an individual's consent to search is reviewed by this Court *de novo*. However, '[n]otwithstanding our *de novo* review of the ultimate determination of voluntariness, we give deference to the findings of historical fact made by a trial justice in the context of making that determination.'") (citation omitted); *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993) ("[T]he ultimate conclusion that consent was voluntary or involuntary [is] a question of law, reviewable for correctness."); *Weisler*, 35 A.3d at 984 ("[T]he voluntariness of a consent search must be reviewed de novo on appeal."); *State v. Phillips*, 577 N.W.2d 794, 800 (Wis. 1998) ("[W]e are permitted to independently determine from the facts as found by the trial court whether any time-honored constitutional principles were offended in this case. This is true whether we are examining the voluntariness of defendant's consent to search or whether we are deciding if defendant's confession was voluntarily procured." (citations and internal quotation marks omitted)).

[10] *Compare, e.g.*, *State v. Livingston*, 897 A.2d 977, 982 (N.H. 2006) (finding that "voluntariness of the consent is a question of fact" but that an appellate court's "review of the trial court's legal conclusions [with respect to that fact] is *de novo*"), *with State v. LaBarre*, 992 A.2d 733, 740 (N.H. 2010) ("Voluntariness is a question of fact . . . . We will disturb the trial court's finding of consent only if it is not

clear standard of review at all, often simply asserting that "voluntariness is a question of fact" without discussing what effect—if any—the supposedly fact-intensive nature of voluntariness determinations has on appellate review. *See, e.g.*, *Ex parte Bridgett*, 1 So. 3d 1057, 1063 (Ala. 2008).

B. The federal courts of appeals disagree about whether the voluntariness of a consent to search should be reviewed *de novo*.

Every federal court of appeals (except the Federal Circuit) has weighed in on the question of whether the voluntariness of a consent to search is reviewed for clear error or *de novo*—and they have reached different conclusions. The Second, Third, and Tenth Circuits appear to agree that the appropriate standard of review is clear error. *See, e.g.*, *United States v. Snype*, 441 F.3d 119, 131 (2d Cir. 2006) ("We will not reverse a finding of voluntary consent except for clear error."); *United States v. Martinez*, 460 F. App'x 190, 194 (3d Cir. 2012) ("The District Court's finding of voluntary consent was not clearly erroneous."); *United States v. Silva-Arzeta*, 602 F.3d 1208, 1213 (10th Cir. 2010) ("Whether voluntary consent was given is a question of fact, determined by the totality of the circumstances and reviewed for clear error." (citations omitted)). The other circuits have on numerous occasions engaged in *de novo* review of this issue—although their decisions also reveal the confusion and inconsistency characteristic of the area.

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supported by the record." (citations and internal quotation marks omitted)).

The Eleventh Circuit, for example, has said: "[W]e will review the judge's finding of voluntariness *de novo* and determine whether under the circumstances described by the government's witnesses, [the defendant's] consent was voluntary." *United States v. Garcia*, 890 F.2d 355, 360 (11th Cir. 1989). *See also United States v. Valdez*, 931 F.2d 1448, 1452 (11th Cir. 1991) (applying *de novo* review and noting that, where the question is whether the uncontroverted facts constitute voluntary consent, "we believe that we are in as good a position as the district court to apply the law to the uncontroverted facts"). A panel of the Fourth Circuit has ruled: "Because the 'voluntariness' of a search is a matter of law, it is reviewed de novo." *United States v. Carter*, 300 F.3d 415, 423 (4th Cir. 2002). Similarly, a Fifth Circuit panel has held that "[w]e review *de novo* the voluntariness of consent to a search." *United States v. Asibor*, 109 F.3d 1023, 1038 (5th Cir. 1997). The First Circuit has stated: "The issue of consent to search is reviewed *de novo*." *United States v. Casey*, 825 F.3d 1, 14 (1st Cir. 2016), *cert. denied*, No. 16-7241, 2017 WL 276255 (U.S. Jan. 23, 2017). In *United States v. Wade*, 400 F.3d 1019 (7th Cir. 2005), the Seventh Circuit ruled that "[q]uestions of law—that is, the legal conclusion of whether [the defendant's] consent was voluntary and whether he was illegally seized—are reviewed *de novo*." *Id.* at 1021.

The Eighth Circuit has explicitly recognized that voluntariness determinations under the Fourth and Fifth Amendments should be treated the same and explained the difference between reviewing the district court's findings of historical fact for clear error and

reviewing the ultimate conclusion of voluntariness *de novo*: "A confession or a consent to a search is voluntary unless, in light of all the circumstances, pressures exerted upon the suspect have overborne his will. We review the ultimate question of voluntariness de novo but uphold the district court's factual findings unless they are clearly erroneous." *United States v. Magness*, 69 F.3d 872, 874 (8th Cir. 1995) (citations and internal quotation marks omitted). A panel of the D.C. Circuit took a similar approach in *United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990), explaining that "we will review the judge's finding of voluntariness *de novo*" and "determine, on the basis of the uncontroverted evidence taken as a whole, whether [the] consent was voluntary." *Id.* at 1301 (citation and internal quotation marks omitted). The Ninth Circuit has flatly stated: "We review *de novo* whether consent was voluntary." *United States v. Diaz*, 230 F.3d 1368, 1368, 2000 WL 1234248, at *1 (9th Cir. 2000) (unpublished table decision).

At the same time, however, many other panels in these circuits have reached the opposite conclusion and reviewed the determination that a defendant voluntarily consented to a search only for clear error.[11] While an

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[11] *See, e.g., United States v. Fornia-Castillo*, 408 F.3d 52, 62 (1st Cir. 2005) ("Typically, whether consent is voluntary turns on questions of fact, determinable from the totality of the circumstances. For that reason, a finding of voluntary consent (other than one based on an erroneous legal standard) is reviewable only for clear error, and the trial court's credibility determinations ordinarily must be respected." (citation omitted)); *United States v. Jones*, 614 F.3d 423, 425 (7th Cir. 2010) ("We will reverse a district court's finding of voluntary consent only if it is clearly erroneous."); *United States v. $231,930.00 in U.S. Currency*, 614 F.3d 837, 844 (8th Cir. 2010) ("We

intra-circuit conflict would not ordinarily call for this Court's intervention, in this case, the confusion within several circuits has persisted for decades, with panels vacillating between the different approaches and no resolution in sight. The parallel between the questions of voluntariness under the Fourth and Fifth Amendments—where *de novo* review is the well-established standard for the Fifth Amendment issue—is a further reason to believe that the courts of appeals are

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review the district court's determination of whether a voluntary consent to a search was given under the clearly erroneous standard." (citation omitted)); *United States v. Vega*, 585 F. App'x 618, 619 (9th Cir. 2014) ("We review de novo the district court's denial of [] motion to suppress, though we review for clear error its factual finding that consent was voluntary."); *United States v. Blount*, 953 F.2d 688 (D.C. Cir. 1992) ("[A] court's determination that a search was voluntary, including the determination that the party had capacity to consent to the search, will be reversed only if clearly erroneous."); *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) ("The voluntariness of consent to search is a factual question, and as a reviewing court, we must affirm the determination of the district court unless its finding is clearly erroneous."); *United States v. Robertson*, 736 F.3d 677, 680 (4th Cir. 2013) ("We review for clear error a district court's determination that a search is consensual under the Fourth Amendment."); *Tompkins*, 130 F.3d at 120 ("[T]he voluntariness of a detainee's consent to a warrantless search is a finding of fact to be reviewed for clear error."). In *United States v. Lee*, 793 F.3d 680 (6th Cir.), *cert. denied*, 136 S. Ct. 517 (2015) the Sixth Circuit stated: "As for the question of consent [to a search], this court has inconsistently announced both a de novo and a clearly erroneous standard of review . . . . We will therefore review the question of consent under the 'clear error' standard." *Id.* at 684 (citation and internal quotation marks omitted). *Lee*, however, was not a decision by the *en banc* court, so even the Sixth Circuit may not have come to rest on this issue.

simply at sea. Moreover, when the conflicting decisions in the federal appellate courts are viewed alongside the wide and entrenched split in the state courts of last resort, it is clear that the appellate courts are approaching their review of trial courts' Fourth Amendment holdings with different levels of scrutiny—and that they are almost certain to continue doing so, absent guidance from this Court.

II. This Case Warrants The Court's Review.

This case meets the Court's criteria for granting certiorari. This case presents an intractable, wide and developed split on a recurring and important question that only this Court can resolve. It also presents an excellent vehicle for the Court's review of this issue.

1. This is an important issue of federal criminal procedure that arises frequently, as the large number of cases dealing with the question attest. As discussed above, each federal circuit and most state courts of last resort have weighed in on this issue—with a very deep split among them. This wide and longstanding split has little chance of resolving itself. Indeed, most of the state high courts that were divided several decades ago remain divided along the same lines today.[12] Moreover,

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[12] *See, e.g.*, *Monterroso*, 101 P.3d at 967–68 (reaffirming *James*, 561 P.2d at 1146); *Scott v. State*, 782 A.2d 862, 875 (Md. 2001) (reaffirming the legal standard announced in *Wilson*, 367 A.2d 1223); *Moore*, 318 P.3d at 1139 (reaffirming the legal standard announced in *Stevens*, 806 P.2d at 100–01); *State v. Elders*, 927 A.2d 1250, 1261–62 (N.J. 2007) (reaffirming the legal standard announced in *King*, 209 A.2d at 114). And the Supreme Court of Texas—which considered the issue for the first time in 2000—recently announced an idiosyncratic approach, acknowledging that voluntariness

those courts that have acknowledged interstate and intersystem splits or intrastate inconsistencies have continued to adhere to their past precedents. *See, e.g.*, *Weisler*, 35 A.3d at 975–85 (reaffirming the court's commitment to a *de novo* standard after discussing the split between state and federal courts); *Phillips*, 577 N.W.2d at 800–01 (same); *Chavez-Barragan*, 379 P.3d at 338 (reaffirming the court's commitment to a *de novo* standard after acknowledging prior intrastate inconsistencies); *In re J.M.*, 619 A.2d at 500–01 (acknowledging the intersystem split but reaffirming the court's commitment to clear error review). This Court's intervention is needed to resolve the deep and enduring division in the state high courts and federal circuits.

2. This case is a good vehicle for the Court's review of this issue because it is one where the standard of review is likely to change the outcome. Indeed, the trial court stated in its ruling that the motion to suppress raised "very legitimate issues" and was "one the Court . . . had to think hard on." Pet. App. 22a. The trial court also characterized Aksu's statements as "directed consent" to the officers' searches, although the trial court did not elaborate on what it meant by the term "directed" in this context. Pet. App. 26a.

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determinations typically involve mixed questions of law and fact, but nevertheless applying a deferential standard of review to the trial court's ultimate determination of voluntariness. *$217,590.00 in U.S. Currency*, 18 S.W.3d at 633 ("Whether a consent to search was voluntary under the totality of the circumstances involves questions of both fact and law. . . . We review a trial court's decision on a mixed question of law and fact for an abuse of discretion.").

Taking the facts as found by the trial court as true, a number of different factors show that Aksu's consent was involuntary and coerced, and thus was not valid consent under the Fourth Amendment. First, throughout his encounter with law enforcement, Aksu signaled that he wanted to have nothing to do with them. Earlier in the day, he actively avoided an encounter with one officer by taking evasive maneuvers. Tr. 37-38. When Deputy Egnatchik later approached him, Aksu changed direction and began to talk on his phone, in what even Deputy Egnatchik characterized as "behavior changes" people make "because they don't want to be stopped or detained." Tr. 39-41. Courts have interpreted such actions to avoid or delay search as indicative of a lack of voluntary consent. *See*, *e.g.*, *Vaughn v. State*, 477 S.W.2d. 260, 262–63 (Tenn. Crim. App. 1971) (finding consent to search the trunk of car a mere acquiesce to authority and involuntary where defendant first refused and then delayed in producing keys); *United States v. Lewis*, 274 F. Supp. 184, 188 (S.D.N.Y. 1967) (finding consent to search an apartment involuntary where defendant led agents away from apartment).

A person approached in a consensual encounter may "decline to listen to the questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 498 (1983). Yet despite having every reason to believe that Aksu did not wish to engage with officers, Deputy Egnatchik testified that he detained Aksu. Tr. 63-64. Deputy Egnatchik then "ordered" Aksu to put down his phone and told him he "needed" to talk to him. Tr. 44, 65, 88. Command language of this type "presents no option" but to submit

and comply. *Kaupp v. Texas*, 538 U.S. 626, 631 (2003); *see also People v. Lopez*, 212 Cal. App. 3d 289, 292-93 (1989) ("[Q]uestions of a sufficiently accusatory nature may by themselves be cause to view an encounter as a nonconsensual detention.") Deputy Egnatchik went even further, telling Aksu that he wanted to search Aksu and his briefcase because he believed that Aksu was engaged in terrorist activity. Pet. App. 4a; Tr. 46. Aksu was never apprised of his rights or given any indication that he could depart. Tr. 66, 69, 80.

While such objective circumstances alone could lead a court conducting *de novo* review to conclude that Aksu's "'will had been overborne and his capacity for self-determination critically impaired'" thus denying him an "'essentially free and unconstrained choice,'" (*United States v. Watson*, 423 U.S. 411, 424 (1976) (citation omitted)), such an assessment is all the more likely once Aksu's subjective circumstances are considered. While Aksu possesses a graduate degree, it is in engineering, a field unrelated to law, and he had no prior experience with law enforcement—to say nothing of the experience of being surrounded by a growing number of officers in uniform. Tr. 145, 191. Indeed, Aksu was visibly upset and broke down into tears. Pet. App. 25a.

Any fear a reasonable person would experience upon being accused of being a suspected terrorist was likely compounded by the fact that Aksu had immigrated to the United States from a majority-Muslim, military-dominated country that does not recognize freedoms Americans take for granted. Tr. 146. Although one might expect the Department of Defense credentials he

wore around his neck to entitle him to more casual questioning before being confronted with the prospect of an intrusive full-body search, Deputy Egnatchik began the search "immediately upon … contact, within seconds" (Tr. 71), likely adding to Aksu's impression that resistance would be worse than futile given the terrorism accusations being lodged against him. All circumstances considered, an appellate court reviewing *de novo* would likely find Aksu's consent to be coerced and involuntary.

This case thus is a good vehicle for the question presented. Moreover, vehicle issues that might arise in other cases raising this issue are not present here. It is undisputed that the officers had reasonable suspicion to stop Aksu when they first approached him, and the validity of the stop is not at issue. Similarly, Aksu's consent was the only ground the government pursued on appeal to justify the warrantless searches.[13] In addition, under either a *de novo* standard of review or a more deferential standard of review (such as clear error, abuse of discretion, or substantial evidence), the trial court's factual findings are given deference. Accordingly, there are no disputes of fact at issue in this petition.

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[13] As noted above, the government did not argue on appeal that these searches were justified under *Terry*. The scope of the searches went beyond a "pat down," in any event, as Deputy Egnatchik removed pieces of paper from Aksu's pocket as part of the searches. Nor did the government contend that there was probable cause to arrest Aksu at the time of the searches.

III. The Decision Of The Appellate Court In This Case Is Wrong.

The Appellate Court erred in applying the deferential "substantial evidence" standard of review in this case. Supreme Court precedent in analogous cases makes clear that appellate courts must independently resolve the constitutional question in this case, after crediting the trial court's factual findings. The Appellate Court therefore should have applied the *de novo* standard of review to the question of whether Aksu voluntarily consented to the searches for Fourth Amendment purposes.

This Court repeatedly has recognized that the voluntariness of a criminal defendant's confessions in the Fifth and Fourteenth Amendments context must be reviewed *de novo*. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) ("We normally give great deference to the factual findings of the state court. Nevertheless, the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." (internal citations and quotation marks omitted)); *Miller*, 474 U.S. at 115 (emphasizing that voluntariness of a confession "is a legal question meriting independent consideration"); *Davis*, 384 U.S. at 741–42 ("It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness."); *Haynes v. Washington*, 373 U.S. 503, 515 (1963) ("It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due

Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an independent determination here."). As this Court recognized in *Miller*, the question of whether a defendant's consent was given voluntarily and in compliance with his constitutional rights implicates a "complex of values . . . [that] militates against treating the question as one of simple historical fact." 474 U.S. at 116 (citation and internal quotation marks omitted). Thus, "the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension." *Id.*

The Court's holdings in the Fourth Amendment context are in accord. Although this Court has not expressly stated what standard of review should be applied to a lower court's holding that a defendant voluntarily consented to a search, its decisions involving the voluntariness of consent do not suggest that they are purely factual determinations subject only to very deferential review. *See, e.g.*, *Kaupp v. Texas*, 538 U.S. 626 (2003); *Bumper v. North Carolina*, 391 U.S. 543 (1968). And in related Fourth Amendment inquiries, the Court has affirmatively held that *de novo* review is warranted. In *Ornelas v. United States*, 517 U.S. 690, 691 (1996), for example, this Court held that the questions of whether there was reasonable suspicion to stop and probable cause to conduct a warrantless search under the Fourth Amendment must be reviewed *de novo*. The Court observed that, once the historical facts are established by the trial court, the decision turns on the constitutional questions of whether those historical facts amount to reasonable suspicion or probable cause.

Id. at 697. The Court further acknowledged that the application of the *de novo* standard of review in these cases "tends to unify precedent and will come closer to providing law enforcement officers with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 697-98 (internal quotation marks omitted).

There is no principled reason for treating appellate review of the voluntariness of a consent under the Fourth Amendment differently. As the Wisconsin Supreme Court aptly stated, "[w]e too recognize that a circuit court's determination of voluntariness is fact-specific and often turns on 'credibility choices resulting from conflicting testimony.' This, however, does not sufficiently distinguish the issue of voluntariness of consent from other constitutional determinations circuit courts must make." *Phillips*, 577 N.W.2d at 800 (citation omitted). The logic of this Court's decisions therefore dictates that *de novo* review is warranted in this case.

While many courts have relied on *Schneckloth* in applying clear error review to a determination that a consent to search was voluntary, that reliance is misplaced. At issue in *Schneckloth* was whether a prosecutor, when arguing that a defendant voluntarily consented to a warrantless search for Fourth Amendment purposes, is required to prove at trial that the defendant knew he could refuse consent. *See* 412 U.S. at 223. The Court answered that question in the negative, concluding that voluntariness of consent instead is a "question of fact to be determined from all

the circumstances." *Id.* at 248–49. The Court's reference to voluntariness as a "question of fact" thus was in the context of explaining the required showings at trial—and did not address or otherwise pertain to the standard of review that should be applied on appeal. It thus is inapplicable in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 17, 2017

APPENDIX

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Appendix A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MURAT AKSU, Defendant and Appellant.	2d Crim. No. B277896 (Super. Ct. No. 2010021861) (Ventura County) ORDER

THE COURT:

We deny the petition to transfer. (Cal. Rules of Court, rule 8.1002.)

Court of Appeal-Second Dist.

FILED

OCT 20 2016

JOSEPH A. LANE, Clerk
Deputy Clerk

Appendix B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. MURAT AKSU, Defendant/Appellant.	)	Case No.: 2010021861 OPINION AND JUDGMENT

On June 18, 2010, Defendant and Appellant, Murat Aksu (hereinafter "Mr. Aksu"), was stopped by a law enforcement officer in front of the Hall of Justice at the Ventura County Government Center on suspicion of engaging in terrorist activity. During the ensuing investigation, law enforcement officers determined that Mr. Aksu was using a concealed camera to secretly photograph women in the area in front of the entrance to the Hall of Justice. Criminal proceedings ensued and, ultimately, Mr. Aksu pleaded guilty to two counts of violating Penal Code section 647, subdivision (j)(2), a misdemeanor.

Mr. Aksu has filed two separate appeals wherein he alleges that four separate errors were made during his prosecution. In the first appeal, he argues three things:

(1) a pre-plea motion to suppress evidence was wrongfully denied, (2) that the court improperly accepted his guilty plea, and (3) the court committed error when it ordered Mr. Aksu to register as a sex offender pursuant to Penal Code section 290. In his second appeal, which has been consolidated with the first appeal, Mr. Aksu argues (4) that his motion to withdraw his guilty plea was wrongfully denied.

After a review of the record and legal authorities, each of the rulings and actions of the trial court is affirmed.

FACTS AND PROCEDURAL BACKGROUND

On the morning of June 18, 2010, Stephen Egnatchik of the Ventura County Sheriff's Office attended a department briefing where he learned from other officers that women who worked at the Ventura Government Center had complained about being followed by someone who was later identified as Mr. Aksu. The women reported that as Mr. Aksu got close to them, he appeared to manipulate something on his briefcase. When the women and Mr. Aksu got close to the entrance of the government center, Mr. Aksu would turn away and not follow them into the building.

Shortly after the briefing, Officer Egnatchik observed Mr. Aksu in the area in front of the Hall of Justice. Officer Egnatchik testified that as he started walking toward Mr. Aksu, Mr. Aksu saw him, then simultaneously changed his direction away from where he had been walking and placed his cell phone to his ear. Based upon what he had learned from the briefing sessions, his personal observations, and his training in

terrorist activities, Officer Egnatchik concluded that Mr. Aksu was engaged in "some kind of pre-planning for either some sort of terrorist activity or attack on the Government Center."

Upon initial contact, Officer Egnatchik asked Mr. Aksu what he was doing at the Government Center. Mr. Aksu said he was there to see two women who worked at the center. Notwithstanding that answer, Officer Egnatchik testified that he told Mr. Aksu that "I would like to search him and his briefcase for any sort of contraband for the terrorist related activity that I suspected." Per Officer Egnatchik, Mr. Aksu consented to the search, and when pornographic images and a small, wireless, HD video camera were discovered, Mr. Aksu demonstrated how he used the camera to film "attractive women." When asked if he ever "records" up women's dresses or any other parts of women, Mr. Aksu responded that he had recently accidentally filmed up the dress of a woman.

After this initial encounter between Officer Egnatchik and Mr. Aksu, other law enforcement officers became involved. Thereafter, there was a search of Mr. Aksu's vehicle, an interview at a sheriff's office facility, a review of the photos on Mr. Aksu's camera, and the issuance of a search warrant to search for related materials at Mr. Aksu's home.

Mr. Aksu was arrested, charges were filed, and a motion to suppress was filed and heard over a three-day period in June 2011. Mr. Aksu denied giving consent to Officer Egnatchik or others to search his person or property, and to the extent he may have unwittingly given consent, it was only because he was

overwhelmed by their presence and their demands. Notwithstanding Mr. Aksu's testimony, the court denied the motion to suppress.

Upon receiving the court's ruling on the motion to suppress, on June 16, 2011, Mr. Aksu pleaded guilty to two counts of violating Penal Code section § 647 subdivision (f)(2). At his sentencing hearing on October 3, 2011, the court imposed a lifetime Penal Code section 290 registration term. On October 11, 2011, Mr. Aksu filed his first appeal, asserting error in the motion to suppress, that the court improperly took his guilty plea, and that the court abused its discretion in ordering registration terms.

While the first appeal was pending, on April 2, 2012, Mr. Aksu filed a motion to withdraw his guilty plea. That motion was heard over the course of three days and denied on March 28, 2014. That ruling then became the subject of the second appeal, filed April 24, 2014, which by court order was consolidated with the first appeal.

DISCUSSION

I. MOTION TO SUPPRESS EVIDENCE

A. STANDARD OF REVIEW

The standard of review on a motion to suppress ruling, particularly when there is a claim of consent for the search is:

"Our guiding principles are well settled. Inasmuch as the search herein was conducted without a warrant, the burden was on the People to establish justification under a recognized exception to the warrant

requirement. (*People v. Rios* (1976) 16 Cal.3d 351, 355-356 [128 Cal.Rptr. 5, 546 P.2d 293].) The People relied on consent, which constitutes such an exception. (*People v. Michael* (1955) 45 Cal.2d 751, 753 [290 P.2d 852].) In that event, however, the People had the additional burden of proving that the defendant's manifestation of consent was the product of his free will and not a mere submission to an express or implied assertion of authority. (*People v. Johnson* (1968) 68 Cal.2d 629, 632 [68 Cal.Rptr. 441, 440 P.2d 921].) The voluntariness of the consent is in every case 'a question of fact to be determined in the light of all the circumstances.' (*People v. Michael*, *supra*, 45 Cal.2d at p. 753; accord, *People v. Reyes* (1974) 12 Cal.3d 486, 501 [116 Cal.Rptr. 217, 526 P.2d 225].)" (*People v. James* (1977) 19 Cal.3d 99.)

"Our role in reviewing the resolution of this issue is limited. The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence.' (*People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410 (118 Cal.Rptr. 617, 530 P.2d 585]; accord, *People v. Ruster* (1976) 16 Cal.3d 690, 701 [129 Cal.Rptr. 153, 548 P.2d 353].)" (*Ibid.*)

At footnote 4 of *James*, *supra*, the court noted, "The People may discharge the foregoing burdens by a

preponderance of the evidence. (*United States v. Matlock* (1874) 415 U.S. 164.)"

In determining whether the trial court's express or implied findings are supported by substantial evidence, the reviewing court does not reweigh the evidence or reconsider the credibility of witnesses. Instead, on review, the court determines whether there is some evidence, no matter how slight, of reasonable, solid, credible value that supports the express or implied findings of the trial court. (*People v. Johnson* (1980) 26 Cal 3d. 557, 577-578 [162 Cal.Rptr. 431].)

B. ANALYSIS

The most reasonable interpretation of the record from the motion to suppress hearing is that the court found the initial contact between Officer Egnatchik and Mr. Aksu to be a consensual encounter that quickly transitioned into a temporary detention. Consensual encounters are not seizures and do not require any level of "cause." Temporary detentions are seizures and require reasonable suspicion of criminal activity.

"The Supreme Court recently summarized the governing principles: "The Fourth Amendment permits brief investigative stops ... when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' *United States v. Cortez*, 449 U.S. 411, 417-418 [66 L. Ed. 2d 621, 101 S. Ct. 690] (1981); see also *Terry v. Ohio*, 392 U.S. 1, 21-22 [20 L. Ed. 2d 889, 88 S. Ct. 1868] (1968). The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its

degree of reliability[,]'·*Alabama v. White*, 496 U.S. 325, 330 [110 L. Ed. 2d 301, 110 S. Ct. 2412] (1990) ... tak[ing] into account 'the totality of the circumstances .... *Cortez*, *supra*, at 417 .... Although a mere "'hunch'" does not create reasonable suspicion, *Terry*, *supra*, at 27 ... , the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause, *United States v. Sokolow*, 490 U.S. 1, 7 [104 L. Ed. 2d 1, 109 S. Ct. 1581] (1989)." (*Navarette v. California* (2014) 572 U.S.__ [188 L. Ed. 2d 680, 134 S. Ct. 1683, 1687] (*Navarette*); accord, *Souza*, *supra*, 9 Cal.4th at pp. 229-231.) '[W]here a reasonable suspicion of criminal activity exists, "the public rightfully expects a police officer to inquire into such circumstances 'in the proper exercise of the officer's duties.'"' (*People v. Wells* (2006) 38 Cal.4th 1078, 1083 [45 Cal. Rptr. 3d 8, 136 P.3d 810] (*Wells*), quoting *In re Tony C.* (1978) 21 Cal.3d 888, 894 [148 Cal.Rptr. 366, 582 P.2d 957].)" (*People v. Brown* (2015) 61 Cal. 4th 968, 981.)

There cannot be a legitimate dispute that as Officer Egnatchik approached Mr. Aksu on the morning of June 18, 20l0, he had ample reasonable suspicion to engage Mr. Aksu in a temporary detention. Officer Egnatchik had just left a briefing where he had learned that several women had made complaints about Mr. Aksu. As he came upon Mr. Aksu in front of the government center, Officer Egnatchik observed Mr. Aksu's furtive behavior and was concerned that the brief case and cell phone might be part of terrorist

activity separate and apart from the complaints of the women.

Upon that basis, the search that immediately ensued would be justified either by obtaining voluntary consent from Mr. Aksu or by virtue of Officer Egnatchik's right to perform a *Terry* pat-down search for the safety of himself and others—albeit with the possible exception of reaching into Mr. Aksu's pockets.

However, it is not necessary to examine the propriety of the Terry pat-down search of Mr. Aksu's pocket. Rather, if consent was given for the search, either as part of a consensual encounter or as part of a valid temporary detention, then a *Terry* pat-down analysis as an alternate way to justify the search is unnecessary. Therefore, the real issue is whether or not consent was given for the search; and if so, was it free and voluntary rather than a mere submission to a claim of lawful authority or the result of coercion or duress. (*People v. James* (1977) 19 Cal. 3d 99; see also, *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); *Schneckloth v. Bustamante*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).)

The trial court found that based upon the totality of the circumstances Mr. Aksu did in fact give consent for the search of his person and property and that the consent was free and voluntary. The trial court cited on the record the distinction between consensual encounters and temporary detentions, the length of the detention, the lack of restraints or drawn weapons, and the number of officers present. The court also discussed Mr. Aksu's level of sophistication, his cooperative behavior, and the reasons for the

cooperative behavior. Perhaps most importantly, the court cited Mr. Aksu' s lack of credibility and the court's sense that Mr. Aksu was attempting to "deflect the court from what really was going on."

The court's findings of free and voluntary consent are supported by substantial evidence. Accordingly, the trial court properly denied the suppression motion.

II. TAKING OF GUILTY PLEA

A. STANDARD OF REVIEW

The standard of review to determine if a plea is valid is whether the record affirmatively shows the plea to be voluntary and intelligent in the totality of the circumstances. (*People v. Mosby* (2004) 33 Cal.4th 353; see also, *Mills v. Municipal Court* (1973) 10 Cal.3d 288 [110 28 Cal.Rptr. 329, 515 P.2d 273]; *In Re Ronald* (1977) 19 Cal.3d 315 [137 Cal.Rptr. 781, 562 P .2d 684].)

B. ANALYSIS

On June 16, 2016, Mr. Aksu appeared in court with counsel and pleaded guilty to two counts of violating Penal Code section 647, subdivision (j)(2). In exchange, the remaining five counts were dismissed.

Prior to entering into this plea, Mr. Aksu executed a "Waiver of Constitutional Rights-General Misdemeanor" form. The plea form advised Mr. Aksu of his constitutional rights, and he acknowledged on the form that he knowingly and intelligently waived those rights. Mr. Aksu also acknowledged on the form that he had been advised of and understood the charges filed against him. Significantly, the form references with respect to the Penal Code section 290 registration that

the "DA will recommend 290; Defense will oppose; 290 discretionary not mandatory."

The minutes of June 16, 2011, reflects that Mr. Aksu was advised of the charges and his rights and that "[a]fter inquiry the court found that the defendant understood the nature of the charges, the consequences of conviction and his rights, and that he expressly, voluntarily, intelligently and understandingly waived his rights."

The transcript from the hearing reflects that the court confirmed that Mr. Aksu had read and signed the plea form. The court confirmed that Mr. Aksu had discussed with his attorney the factual basis of the charges. The court invited Mr. Aksu to ask his lawyer any questions prior to entering into his plea. Finally, the court confirmed as part Mr. Aksu's sentence that the court had the discretion to make a lifetime Penal Code section 290 registration order. Mr. Aksu indicated at the hearing that he understood all of those things.

As of the June 16, 2011, Mr. Aksu's case had been pending for 363 days. He had been represented by as many as four lawyers during the course of the case. He had just participated in an extended motion to suppress hearing. As pointed out in his appellate brief, Mr. Aksu is well-educated and at the time of the plea was employed as a civil electronics engineer for the federal government.

In light of the foregoing, it stretches credulity to believe that Mr. Aksu's plea was not voluntary and

intelligently entered into. He may now wish he had not entered into the plea, but that is a different matter.

We hold, therefore, that the trial court properly denied Mr. Aksu's motion to set aside his plea.

III. SENTENCING

A. STANDARD OF REVIEW

Although neither party has presented any authority for an appropriate standard of review, as a general principle sentencing matters are reviewed under an abuse of discretion standard. (Pen. Code, §§ 12, 13; *People v. Bolton* (1979) 23 Cal. 3d 208 [152 Cal.Rptr. 141].)

"Where, as here, a trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion. '"To be entitled to relief on appeal ... it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice ...."' (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 242, p. 4234, citations omitted.) However, 'discretion may not be exercised whimsically and, accordingly, reversal is appropriate "where no reasonable basis for the action is shown." [Citation.]' (*Marini v. Municipal Court* (1979) 99 Cal.App.3d 829, 835-837 [160 Cal.Rptr. 465]; see generally, 6 Witkin, Cal. Procedure, *supra*, § 244, pp. 4235-4236.)" (*Baggett v. Gates* (1982) 32 Cal. 3d 128 [185 Cal. Rptr. 232].)

B. ANALYSIS

The trial court exercised its discretion under Penal Code section 290.006 and imposed sex offender registration conditions upon Mr. Aksu.

As required by that code section, the court first found that Mr. Aksu's offense was committed for purposes of sexual compulsion or sexual gratification, and second, the court then stated the reasons for requiring lifetime registration.

On appeal, Mr. Aksu argues that the court abused its discretion both by considering improper information and because there was insufficient justification to impose a lifetime registration. We disagree.

The trial court succinctly articulated the reasons for its decision, and based upon those reasons, the court found that registration was necessary to protect the public from future similar offenses.

In reaching its findings, the court was entitled to give the weight it felt appropriate to the information it had before it. Clearly there was a reasonable basis for the court's ruling. The fact that a different judge may have drawn different inferences and made different orders is not an abuse of discretion.

In respect to Mr. Aksu's complaint that the court considered improper information in reaching its conclusions (and without addressing the merits of such a complaint), the People are correct that such an objection cannot be raised for the first time on appeal. (See *People v. Soto* (1997) 54 Cal.App4th l; also *People v. Scott* (1994) 9 Cal.4th 331.)

The additional objection that the court improperly considered the five dismissed charges in violation of *People v. Harvey* (1979) 25 Cal.3d 754 [159 Cal.Rptr. 696, 602 P.2d 396] is also not correct. The plea form executed by Mr. Aksu explicitly provides that "I agree that the court may consider all dismissed charges and related offenses ...."

Lastly, the arguments in respect to the sixth and eighth amendments are simply not well taken. (See *People v. Garcia* (2008) 161 Cal.App.4th 475; also, *People v. Hofsheier* (2006) 37 Cal.4th 1185; both overruled on unrelated grounds in *Johnson v. Department of Justice* (2015) 20 Cal.4th 871.)

IV. MOTION TO WITHDRAW GUILTY PLEA

A. STANDARD OF REVIEW

An order denying a motion to withdraw a guilty plea is reviewed under a clear abuse of discretion. (*People v. Breslin* (2012) 205 Cal.App. 4th 1409, 1416.)

B. ANALYSIS

On April 12, 2012, six months after his guilty plea, Mr. Aksu filed a motion to withdraw his guilty plea, pursuant to Penal Code section 1018. "Section 1018 provides, in part: 'On application of the defendant at any time before judgment ... , the court may, ... for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted .... This section shall be liberally construed to effect these objects and to promote justice.' The defendant has the burden to show, by clear and convincing evidence, that there is good cause for withdrawal of his or her guilty

plea. (*Ibid.*; *People v. Nance* (1991) 1 Cal.App.4th 1453, l457 [2 Cal. Rptr. 2d 670].) 'A plea may not be withdrawn simply because the defendant has changed his [or her] mind.' (*People v. Nance*, *supra*, 1 Cal.App.4th 1453, at p. 1456.) The decision to grant or deny a motion to withdraw a guilty plea is left to the sound discretion of the trial court. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 [69 Cal. Rptr. 2d 784, 947 P.2d 1321]; *Nance*, at p. 1457.) A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion." (*Nance*, at p. 1456; see *Fairbank*, at p. 1254 ["A decision to deny a motion to withdraw a guilty plea ... is final unless the defendant can show a clear abuse of [the trial court's] discretion."].) "Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them." (*Fairbank*, at p. 1254.)

"To establish good cause to withdraw a guilty plea, the defendant must show by clear and convincing evidence that he or she was operating under mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1207-1208 [38 Cal. Rptr. 2d 592].) The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake. (*In re Moser* (1993) 6 Cal.4th 342, 352 [24 Cal. Rptr. 2d 723, 862 P.2d 723].)" (*People v. Breslin* (2012) 205 Cal.App. 4th 1409, 1416.)

Mr. Aksu's Penal Code section 1018 motion was heard over a period of three days. The court heard from four former attorneys of Mr. Aksu: a criminal law

specialist critical of Mr. Aksu's former attorneys, his psychologist, his girlfriend, and a witness who testified about various video images.

At the conclusion of the hearing, the court divided its ruling into two parts. The court first addressed the issue of whether the plea was made knowingly, intelligently, and voluntarily. Then the court addressed the issue of the competence of counsel.

In respect to the issue of the plea, the court found that Mr. Aksu's plea was entered knowingly, intelligently, and voluntarily. The trial court stated its reasons on the record. In addition, the court found an absence of fraud, duress, or undue influence. The court specifically considered and rejected the suggestion that Mr. Aksu only pleaded guilty because of bad advice or lack of preparation for trial by his attorneys. A review of the record abundantly supports this conclusion.

On the issue of competence of counsel, the court in detail addressed the two-part test of *Strickland v. Washington* (1984) 466 U.S. 668. Per *Strickland*, Mr. Aksu was required to show two things. First, that the advice he received from his attorneys fell below an objective standard of reasonableness. Second, that but for the errors of his attorneys, there was a reasonable probability that the results of the proceedings would have been different. (*Strickland*, at p. 693.)

As is the case in many criminal prosecutions, the dilemma presented to Mr. Aksu and his attorneys was whether to proceed to trial on all seven counts and face significant jail time or, in the alternative, to plead guilty to a reduced number of counts and focus their

available energy and resources on sentencing. Particular to this case, the real and significant issue was the Penal Code 290 registration.

The trial court received evidence about the advice Mr. Aksu received from his attorneys concerning the pros and cons of proceeding to trial. The court also heard and considered the testimony of the criminal law expert, Mr. Vogel, who was critical of Mr. Aksu's trial attorneys and opined that their advice was below the standard of reasonably competent attorneys.

After receiving and considering the evidence, the trial court in great detail discussed on the record how Mr. Aksu's attorneys evaluated the case and the likelihood of prevailing at trial. The court then cogently applied the evidence to the law, as set forth in the cases of *People v. Breslin*, *supra*, 205 Cal.App. 4th 1409, *In re Cudjo* (1999) 20 Cal.4th 673, and *In re Lucas* (2004) 33 Cal. 4th 682.

In its final analysis, the court acknowledged that the investigation conducted by Mr. Aksu's attorneys "was less than complete" in some respects; but overall, the court found that "it seems as though counsel were very well justified in being concerned that this case could not be defended successfully…" On that basis, the court concluded that Mr. Aksu did in fact have the benefit of competent counsel whose representation did not fall below an objective standard of reasonableness.

Lastly, during the hearing the trial court appropriately limited evidence of factual innocence and evidence on the issue of whether there would have been a reasonable probability of success but for the plea.

Evidence of factual innocence is not relevant in this type of proceeding (see *People v. Turner* (1985) 171 Cal.App.3d 116; also, *People v Kunes* (2014) 231 Cal.App.4th 1438) and evidence of reasonable probability of success became irrelevant and subject to a finding of harmless error in light of the finding that Mr. Aksu was not able to establish the first prong of the *Strickland* test.

Based upon the foregoing and a review of the record, the trial court's ruling was well-thought out and amply supported by substantial evidence. Mr. Aksu's appeal is denied.

DISPOSITION

The judgment of conviction and sentence is hereby AFFIRMED.

Dated: August 10, 2016

/s/ Rocky J Baio
ROCKY J. BAIO
Judge of the Superior Court

WE CONCUR:

/s/ Frederick H. Bysshe
FREDERICK H. BYSSHE
Judge of the Superior Court

/s/ Matthew P. Guasco
MATTHEW P. GUASCO
Judge of the Superior Court
Presiding Appellate Judge

Appendix C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff - Respondent vs. MURAT AKSU, Defendant - Appellant	Superior Court No. 2010021861

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY
HONORABLE DAVID M. HIRSCH, PRESIDING
HONORABLE BRIAN J. BACK, PRESIDING
HONORABLE BRUCE A. YOUNG, PRESIDING
TRANSCRIPT ON APPEAL

APPEARANCES

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* * * * *

[271] MR. GORIN: Yes, sir. Yes, sir.

THE COURT: Okay. Anything else?

MR. GORIN: No.

THE COURT: The -- I'll state this at the outset because it permeates the Court's consideration here. Even before I state what I'm about to state, reading the motions and even us going through the hearing, very legitimate issues. And well argued, legally. To the point where the Court, you know -- some of them, as we all know, we don't have to think too hard on. This one the Court has to -- had to think hard on. Obviously, I needed the entire hearing to be concluded before we could -- before the Court could make a ruling.

Now what I want to say at the outset is with regards to Mr. Aksu's testimony and his statements to Detective Rhods, permeating the Court's consideration here is the lack of credibility of Mr. Aksu. Let me put it this way. Very cooperative, certainly on its face. Cooperative to the extent that it appeared it would serve his interests.

But in terms of the lack of credibility, this is what I mean. Professing that he was concerned about being late to work, and maybe in some manner appearing as though, obvious concern someone is late to work, he is here normally. He was late to work already. This occurred at about 8:30 to 8:45, by all the testimony.

And he testified -- and if he didn't testify on the stand, he indicated it in his exchange with Mr. Rhods that he typically started work at 8:30. The Court has to

wonder [272] then, what the heck he was doing over here. In the absence of anything else, if he was so concerned about being late to work, why wasn't he at work already? That was what the Court sees as sort of deflecting maybe some attention as to why he was really here.

The repeated questions about what else -- you know, what was the purpose of this video tape or of the use of this camera and the prolonged exchange we got with counsel attempting to ask Mr. Aksu why didn't you tell the officers right from the beginning that there was this other use of the camera. That is in addition to conferring with his family in a Skype type setting, I mean, that's not why he was here. Again, attempts to deflect the Court from what was really going on.

His attempts to again, I would call it -- I just came up with the word -- the deflecting on the pornographic pictures. I heard on the stand multiple times -- I didn't keep count, but the use of terms humiliation and embarrassment. Apparently in an attempt to, again, deflect away from what was going on. His -- while he was cooperative in some, if not many respects, he chose selectively in other areas, which the Court finds renders his testimony quite uncredible.

Now I say that because it does permeate what the court needs to walk through and find here. Was there probable cause, or more importantly, was there the ability to approach Mr. Aksu in the first place because a deputy had a reasonable suspicion that he was, is, or about to be [273] engaged in criminal activity.

Well, what we did hear is at that briefing, or even before the briefing, there had been reports of somebody approaching the Government Center, acting frankly, in a pretty bazaar way with this briefcase in hand. I never heard that Mr. Aksu actually came into the Government Center or even the Administrative Center to make contact with either of these two people. I never heard that in testimony. Maybe that happened, but instead what I heard was approaching the Government Center and then rapidly turning away. Particularly when -- I think there was the one deputy that Egnatchik testified to who observed this behavior. I can't remember the deputy. If I looked at it, I'd probably find it.

Then we have the briefing this very day with not just this information being imparted to the deputies, but I think a sketch or a picture. I can't -- there was something. Fifteen minutes later, Deputy Egnatchik observes the very person that they had just been briefed on. When you've got somebody approaching the Government Center with a briefcase, acting in a bazaar manner over a period of time, whether it was three times a day or three times a week, it doesn't matter -- over a period of months, just listening to the testimony, one can conclude that Deputy Egnatchik wasn't looking for someone who was taking camera shots up some woman's skirt.

He was looking for a potential terrorist attack or some type of situation that would put one or more persons, [274] or potentially the building, in jeopardy of some type of injury or damage. There was ample reason for the deputy to conclude that the Defendant

was or was about to be involved in criminal activity. So that approach was very appropriate.

Now the reason I started off saying that Mr. Aksu's testimony on the stand was not very credible was, for example, with regards to the consent. The other thing we heard when he testified to the consent, he pointedly adding the word unwillingly or unwilling when he described the consent, which he had given to the deputies. Now, contrast that to his conversation with Detective Rhods, which the Court would characterize as not a confrontational situation.

I listened to the CD several times. It was pretty low-key in terms of the emotions exchanged. True, Mr. Aksu did break down at times. He was obviously very concerned and scared. He did cry at times. But when he related to Detective Rhods about the permission he gave to the deputies, there was no use of the word unwilling. There was no use of anything other than yes, I did, I gave them permission. And there was no conditional explanation or anything else that now, the Court would hear on the stand what he clearly wanted to make a point of and that was to use the word unwillingly or unwilling repeatedly.

So I know Egatchik testified that when he approached, he felt that it was a detention. And in terms of legally concluding, the Court can't conclude that we were at a [275] legal detention, at that point. Instead, it would have been a complete abdication of the responsibility of the officer to put his hands in his pockets and shrug and say, oh well. He had an absolute obligation, in addition to reasonably believing that someone was or was about to be engaged in criminal

activity, to approach Mr. Aksu and engage in an appropriate investigation. And that's what he was doing.

Now let's talk about, you know, allegedly Egnatchik didn't testify about, you know, when he did the search and he grabbed Mr. Aksu's hands and put them behind him. I don't know. I haven't listened to his original testimony, but I'm not sure that's accurate in terms of original testimony because, you know, all I know -- and I guess I should've been more specific here in my notes. I put down that when he was testifying, Deputy Egnatchik basically, searched his person. I put down as a note to me, described a standard search.

Now, if Deputy Egnatchik didn't at that time or at any time, specifically talk about holding Mr. Aksu's hands, that's because he wasn't specifically asked by either counsel. But I'm not so sure he didn't say something about that in his initial testimony. In any event, the type of restraint that we would all be concerned about, in terms of cuffing or surrounded by officers or somebody having a drawn weapon. That was not something that's implicated by the search he did; therefore, it's not something that's implicated in the ruling that the Court has to do.

[276] There was a lot of legitimate consent, not forced consent, by Mr. Aksu. And I think it was directed consent. He wanted to get out of there. He wanted to consent because it was his perception that consenting would allow him to just move on. He was humiliated. There were probably other reasons to be humiliated. It is not believable that for some reason, his embarrassment and humiliation did not extend

beyond just the pornographic pictures, instead to what he was feeling.

We know that at least at one point, I can't remember who he told, but he said he may have mistakenly filmed, without intending to do so, under a woman's dress or skirt. Well, let's talk about where we are. We've got a guy with a briefcase with a camera that's attached to it that you can barely see that's pointing up. Those officers had every appropriate reason to contact him.

Grabbing his phone and putting it away. Grabbing everything in his pockets and putting it away. You bet. Egnatchik still thinks he's looking at a potential terrorist. And in terms of any type of triggering device, let's separate that from the man from the briefcase. He's not under arrest at that time. Interestingly, he never was arrested for being a terrorist because the police were conducting an appropriate investigation to determine whether or not he should be and obviously made a determination that he should not be.

Now, the length of the detention, had the officers engaged in something that had extended that detention [277] inappropriately, then we'd have a detention issue. But because of Mr. Aksu's own evasive answers, although seemingly cooperative, to the officers and because of the nature of what was going on and the need to know, for example, in order to clear him as Sergeant Arthur said. The need to know what was in that camera.

The need to follow-up on his statements that, hey, he was just there to see two women. Okay. Let's contact the two women and find out if that's a real reason. And then to find out that the two women, or at least one of them, I can't remember if he ended up speaking to both of them, they were not necessarily concerned at that point about him. They also had no idea that he was showing up that day, which remember, he was already late to work because it was already 8:30 and he told everybody that his work started at 8:30. So that wasn't a reason he had any angst at that time just because he was going to be late for work because he wasn't going to get there before 9 o'clock anyway, which would have made him late.

The court finds again, based upon in part on his own testimony and lack of credibility and listening to the CD -- the court finds that his consent was willingly given, was not forced. I know there was testimony by Mr. Aksu as to where he feels Egnatchik was standing at the time, preventing Mr. Aksu's path to depart, if in fact, he had chosen to depart. But the Court finds that the Deputy's testimony was credible in that regard. That Mr. Aksu's is not.

[278] And before I forget, I will also cite the case of Yarbough versus Alvarado. It's a 2004 case, 541 US 652, which basically says consideration of a suspect's age and inexperience with law enforcement is in appropriate. So there's been some argument that he's not savvy enough to know what was going on in his encounter with the police officers, or the deputies.

Well, it can't be denied that by his own testimony, he has a Master's of Science, which he secured from

Long Beach State, all the classes were taught in English. He's obviously an intelligent man. He apparently is -- well, not apparently, but he is bilingual. He testified that English is his second language. I heard no problems with it here and I heard no problem with it during the course of the interview with Detective Rhods. But I did hear the use of it in the manner that made his responses to the officers, frankly, evasive in many respects.

Example, what else have you got in the camera? What do you mean? What do you mean was essentially the response. I don't know. You know, it was -- c'mon. He knows what he's got in that camera. And it was just -- the evasiveness of his encounter here, I mean, it was his own undoing in many respects with some of the issues that the Court has to be concerned about.

The Court finds that the consent -- and this is really more of a nature of a consensual contact at the beginning. We're at the courtyard of the Government Center, out in the public. This investigation needed to be done. Had he been [279] cleared, as Sergeant Arthur indicated in his testimony, that's what they were trying to do. They just wanted to make sure that there was no problem.

The Court does not find -- so in terms of the 1538.5 and considering, as we must, in all of these hearings, which is a great phrase, the totality of the circumstances, which is mandatory. Nothing is suppressed as the result of some kind of Fourth Amendment violation because the officers were appropriate as I just described and as is indicated in testimony. It builds -- it does build to a point. The

consent for the briefcase, the consent for the camera, the consent for the car, the Court finds willingly given, not compelled.

And the exchange with the written -- with him not wanting to sign the written consent form, if anything, that confirms a degree of sophistication legally, that he has, you know. Don't sign things unless you know precisely what you want to have included in that. And, yes, I heard that Sergeant Arthur offered, and in fact, did delete the word residence, put in some specific language, but he still would not sign. That did not counter, however, the verbal consent he had already given for the review or the search of the briefcase, the camera, and his car.

Now the search of his person was -- there would not even had to have been an agreement to search there. They -- because of the information the deputies had as they approached him, they could have -- on a Terry stop, they could have searched him without asking for it because there [280] was a legitimate concern of potential terrorist conduct.

Once they go to the car, now we start talking about -- however the Court feels, now we're somewhat in a custodial situation and this is what the court will walk through. He's obviously ln a custodial situation when he's at the David Station. The Court feels that when he's walking away from the car with Sergeant Arthur, he's in a custodial situation then because they're not walking back anywhere other than to the David Station.

The Court -- where the Court is still thinking out loud is, was he in a custodial situation at the point where they all, and by all I mean Mr. Aksu and the deputies go to the car together. The testimony there was that Mr. Aksu asked to go to the car with them, which suggests that if he didn't, I don't think the deputies would have left him alone in the courtyard.

So adding it all up, the Court does find that, although he was not yet under arrest, definitely he was in a custodial situation when Sergeant Arthur walked him from the car to the David Station. But I can conclude that he was in the detention when he was walking from the courtyard to the car. Now the Court didn't hear about any statements made from the courtyard to the car, so I don't think there's any issue there. And the Court doesn't feel that whether or not he was in detention or custody at that time, that somehow officiated the consent he had given to search the car. It's not going to impact that. They're still okay searching the car.

[281] So any statements made from the courtyard to the car and any statements made by him, by the Defendant, to Sergeant Arthur from the car to the David Station, would have had to be preceded by a Miranda invocation in order to be allowed, at this time.

Once he gets into the station, we sort of have the next challenging area and that is listening to the CD of the interview between Detective Rhods and Mr. Aksu. It started slowly. I think Mr. Aksu was pretty nervous, obviously, pretty upset at the get-go. I think, I probably heard the time period when Detective Rhods uncuffed him, there was the opening of the door so he

didn't feel as confined. The Detective got his name, his address, his phone, his driver's license.

It was about 4 minutes and 13 seconds into the interview or the exchange with Detective Rhods, as I mentioned earlier, that Mr. Aksu asked, and I think I got the words, at least close to accurate. "Do I need a lawyer or anything like that, sir?" I had mentioned it earlier. Detective Rhods' response was I don't know and he immediately, he, Detective Rhods, said something to the effect of I need to read something to you and he read him his Miranda rights.

Now the reason that I point out it was immediate, you couldn't tell in the testimony because you just didn't hear about it. It was so immediate that I don't know if he was about to give him his Miranda rights, in any event, or he, Detective Rhods, gave him his Miranda rights in response to [282] the question, do I need a lawyer or anything like that, sir.

Well, first, starting out with do I need a lawyer or anything like that, sir, the question -- the issue there is was it an unequivocal request for legal assistance, which would have stopped that -- by invoking that privilege or by making that request, it would have invoked his privilege to remain silent. And there we look at the cases that you guys are arguing about. And number one, the Court doesn't believe that any case is on all fours. They just aren't. Certainly some of them are pretty darn close, but none are on all fours.

Oh, by the way, before I forget, with regard to the suppress motion, the Court has also re-reviewed, and I don't have the cite, it's a US Supreme Court case,

Herring. H-e-r-r-i-n-g versus the United States -- oh, I do have the cite. I've just got the unofficial cite. It's 129 Supreme Court 625. And it discusses at length, the Exclusionary Rule. And based upon the discussion by the Supreme Court in that case, it would be so bold as to say whether the Supreme Court thinks we have an Exclusionary Rule any longer.

But the point is reading that case and focusing on the deterrence of inappropriate police conduct, that case also supports that -- the Court references that case in support of its denial of the 1538.5 motion. And that case warrants reading counsel.

Anyway, back to the question, do I need a lawyer or [283] anything like that, sir. What we know by the cases is that in order to have the invocation or the request for the attorney automatically invoke that right to remain silent, is that it has to be unequivocal. And the Bacon case, I mean, it is something that the Court did look at. The statement in the Bacon is as represented precisely by Mr. Wold. "I think it would probably be a good idea for me to get an attorney". And that was construed as, at best, an equivocal request. It was not construed -- it's probably accurate to say, it was not construed as an unequivocal request for counsel.

Here, it was an inquiry. The response was I don't know. And interestingly, going back to what I commented on -- what the Court commented on Mr. Aksu's testimony and his statements in the course of the interview. He was very cooperative, the Court construes, to the extent that he felt he should be cooperative. He was not compelled, not forced.

So in asking that particular question, the Court does not find that that was an unequivocal request for counsel. And therefore, it was not something which automatically invoked the privilege to remain silent. When Deputy Rhods was asking him or giving him his Miranda rights, he stated them one by one and then he asked the Defendant if he understood them. And the Defendant indicated that he did. And I believe it was the second one that Detective Rhods read to him and Mr. Aksu's response was to the effect of mm-hmm. And Deputy Rhods queried is that yes. And Mr. [284] Aksu confirmed yes. So he gave the rights. Mr. Aksu responded, not hesitantly, at all, that he understood those rights.

Now following those rights, the detective did not specifically ask if -- he didn't use the word waiver. He didn't use the words are you willing to talk to me. What he said was -- well he did sort of use those words. He said, do you want to tell me about that. And Mr. Aksu without any, if the emotion could be described, it was eagerness. His response was absolutely, what would you like to know, sir.

The Court finds that not only that he understood the rights that were given to him, but that he did waive his rights by his own words. And implied in those words, without being specifically responsive to a question about a waiver, he did waive his rights. And therefore, the further exchange with Detective Rhods is not suppressed as the result of any Miranda violation because the Court doesn't find any Miranda violation.

Now during the course of that discussion, the Court, you know, does sort of go back to it. That is when,

amongst other things, Mr. Aksu did confirm that he gave permission to the detectives. He did give them permission to look at the camera, to look at the video, to look at the briefcase. He did not give any permission with regard to his home computer, which suggests to the Court that he kind of understood things here. That was right toward the end of the interview with Detective Rhods, about 35, 36 minutes [285] into it.

And so adding it all up, legitimate issues all the way along. None of them rise to the level where anything should be suppressed, either on a 1538.5 motion, a Fourth Amendment, Fifth Amendment, Fourteenth Amendment, on an alleged Miranda violation. It just wasn't there. And as a result, both of the motions -- I think it's correctly characterized as two motions, both motions are denied.

Now you guys are -- you have a date in 13 already?

MR. WOLD: We're trailing for trial. Tomorrow's last day.

THE COURT: Okay.

MR. WOLD: And I think it was -- my recollection is Judge Young's intent was to get the case out for jury trial, but I do not believe he sent it here with the intent for the jury trial to be conducted. I think it was just motions on the hearing.

THE COURT: Actually, it shows last day is June 16th. Is that what you have? Just to make sure nobody --

MR. WOLD: Oh, yes. I'm sorry. Thursday.

THE COURT: Okay.

MR. WOLD: So I guess I'd ask that unless counsel wants to do something up here in the way of a plea, that we go back down for a jury trial time tomorrow.

MR. GORIN: Can we approach the Judge for a second?

MR. WOLD: Sure. May we approach, your Honor?

THE COURT: Sure.

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