No.

IN THE
Supreme Court of the United States

ALEXIS GONZALEZ-BADILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARJORIE A. MEYERS
FEDERAL PUBLIC DEFENDER
Southern District of Texas

PHILIP G. GALLAGHER
ASSISTANT FEDERAL PUBLIC DEFENDER
440 Louisiana Street,
Suite 1350
Houston, Texas 77002

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Attorneys for Petitioner

QUESTION PRESENTED

In *Florida v. Jimeno*, 500 U.S. 248 (1991), this Court held that upon obtaining general consent to search an area, an officer may, consistent with the Fourth Amendment, open a closed container found within the area that might reasonably contain the object of the search. *Id.* at 251. The Court contrasted the officer's opening of the closed paper bag at issue with the "very likely unreasonable" circumstance in which an officer assumed consent to "pry open a locked briefcase found" in the area. *Id.* at 252. This case presents an important follow-up question regarding the protection that the Fourth Amendment affords to personal property entrusted to law enforcement during a consensual search.

That question is:

> Upon obtaining general consent to search a bag or other area may law enforcement, consistent with the Fourth Amendment, "pry open" or otherwise cause intentional damage to personal property found within that might reasonably hold the object of the search?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alexis Gonzalez-Badillo respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION AND ORDER BELOW

The Fifth Circuit's opinion (Pet. App. 1a-25a) is unpublished, but available at 693 F. App'x 312. The district court's order (Pet. App. 26a-27a) and the magistrate's report and recommendation (Pet. App. 28a-57a) are unpublished.

JURISDICTION

The judgment of the Fifth Circuit was entered on June 15, 2017. On August 23, 2017, Justice Alito granted Petitioner's timely request to extend the time to file a petition for certiorari to November 13, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> 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 a fundamental question regarding the protection the Constitution affords to personal property that is entrusted to law enforcement during the course of a consensual search.

In the decision below, the Fifth Circuit held that, upon obtaining Petitioner's general consent to search his bag, an officer was entitled to pull apart the sole of Petitioner's footwear, without requesting further consent and without a warrant. In dissent, Judge Elrod correctly observed that this holding is "deeply flawed" and effects an "erosion of Fourth Amendment protections" that the Framers intended. Pet. App. 10a & n.1, 11a; *see also* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 987, 991 (2016) (explaining that the Bill of Rights was adopted out of specific concern for the government's "damaging or mishandling" of personal property in pursuant of evidence, which, at the time, "was often analogized to . . . the breaking of a door to a home").

Judge Elrod also correctly observed that the decision below conflicts with other circuits, which are in acknowledged disagreement over whether general consent to search can ever justify intentional damage to personal property and, if it can, how much damage. The government's and Petitioner's own concessions on this record make it an unusually good vehicle to resolve that conflict.

The Court should grant certiorari.

STATEMENT OF THE CASE

I. Officer Nevarez Obtains General Consent To Search And Pulls Apart The Sole Of Petitioner's Footwear.

On April 10, 2015, officers of the Laredo Police Department were conducting criminal interdiction efforts at the Americanos Bus Station in Laredo, Texas.[1] ECF No. 67 at 7-8. The officers were "check[ing] the buses, talk[ing] to people that are arriving and departing, asking them where they're coming from." *Id*. at 8. Officer Rogelio Nevarez was standing outside in the garage area, where a line of passengers was forming to board a bus when he made contact with Petitioner. *Id*. at 9-10.

As Petitioner waited in line to board the bus to Houston, he commented to Officer Nevarez that it was humid outside. *Id.* at 10-11. Officer Nevarez agreed and asked Petitioner where he was headed. *Id*. at 11. Petitioner replied that he was from California and trying to travel to Houston, but had boarded the wrong bus. *Id*. Officer Nevarez found this response strange because he had never heard of someone taking the wrong bus and ending up in Laredo. *Id*.

Officer Nevarez asked Petitioner to step aside to continue their conversation to avoid impeding the other passengers attempting to board the bus, and Petitioner agreed to do so. *Id*. at 12. Officer Nevarez

---

[1] The facts recited herein are undisputed and based upon the government's own recitation before the Fifth Circuit, *see* Govt. 5th Cir. Br. at 4-7, or Officer Rogelio Nevarez's account at Petitioner's suppression hearing, *see* ECF No. 67 at 6-53.

asked Petitioner for his identification and Petitioner produced a California identification card. *Id*. at 14.

Officer Nevarez told Petitioner that he was looking for anything illegal traveling through the bus station and asked Petitioner for consent to search his bag. *Id*. at 14, 51. Petitioner consented and handed his bag to Officer Nevarez. *Id*. at 14-15.

According to Officer Nevarez, upon opening the bag, he smelled a chemical odor that he recognized as a masking agent used in drug smuggling. *Id*. at 15, 37. Inside the bag, Officer Nevarez found a pair of used work boots. ECF No. 67 at 15. When he held the boots, he "could feel [that] the soles of the boots were real lumpy." *Id*. at 15, 38. As he brought the boots closer to his face for inspection, the odor emitting from the boots grew stronger. *Id*. at 15. Officer Nevarez told Petitioner that he was "99% sure" that there were drugs inside the boots and put the boots up for Petitioner to smell them. *Id*. at 16, 50. According to Officer Nevarez, Petitioner began to sweat more and made a surprised face. *Id.* at 16.

Officer Nevarez observed a "slit" on the side of one of the boots that was about the size of a quarter. *Id*. at 17, 39. By manipulating the boot, without increasing the size of the slit, Officer Nevarez was able to see plastic inside the sole of the boot. *Id*. at 17, 40, 49. Though Officer Nevarez believed that there were drugs in the plastic, he could not see anything illicit and did not know what kind of drugs were inside. *Id.* at 37, 49-50.

Without asking for any further consent, Officer Nevarez "opened up the boot" by using his fingers to

"pull [the sole] apart" from the existing slit. *Id.* at 17, 40-41, 49-50. Upon pulling apart the sole of the boot, Officer Nevarez was able to see that the plastic inside contained a brown rocky substance. *Id.* at 18. Officer Nevarez placed Petitioner under arrest and subsequently confirmed that the substance was heroin. *Id.*

II. The District Court Upholds The Pulling Apart Of Petitioner's Footwear Based On Probable Cause.

Petitioner was charged with possession with intent to distribute, and conspiracy to possess with intent to distribute, 100 grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846.

Petitioner moved to suppress the drug evidence obtained from the sole of his footwear, arguing that Officer Nevarez violated the Fourth Amendment by prying open his footwear. ECF No. 15 at 9-10, 15.[2]

Both the magistrate judge and the district court "went out of their way to *avoid*" holding that Petitioner's general consent justified intentional damage to his footwear. Pet. App. 11a (Elrod, J., dissenting) (emphasis in original). The magistrate credited Officer Nevarez's testimony that Petitioner "gave general consent to search his bag" and that Officer Nevarez "did not ask for additional consent to search the boots specifically." Pet. App. 44a, 45a. It

[2] Petitioner also contended that his initial encounter with Officer Nevarez was an unlawful seizure and that his general consent was involuntary. He does not reassert either challenge before this Court.

further found that although Officer Nevarez was able to see plastic through a pre-existing slit in the heel of the boot without widening the slit, he was able to see the brown rocky substance only after he "used his fingers to pull open the boot." Pet. App. 32a.

The magistrate judge concluded that the circumstances known to Officer Nevarez prior to pulling apart Petitioner's boot amounted to probable cause, and were sufficient to justify opening up the boot under the exigent circumstances or plain view exceptions to the warrant requirement. Pet. App. 47a-48a, 49a-50a. Relying upon Eighth Circuit precedent, the magistrate judge also suggested that probable cause might have been sufficient to justify the opening of Petitioner's footwear, "even absent another exception to the warrant requirement or explicit consent to destroy the boots." Pet. App. 48a-49a.[3]

Petitioner objected to each of the magistrate judge's conclusions and further argued that general consent to search his bag did not permit intentional damage to his boots. ECF No. 32 at 15-18.

---

[3] As discussed below, the Eighth Circuit is an outlier in holding that probable cause alone is sufficient to justify damage to personal property, even in the absence of consent or any other exception to the warrant requirement, based upon an unexplained extension of the automobile exception. *See infra* at p. 16-17 & n.6. Other circuits agree that the existence of probable cause is not reason to forego the warrant requirement, but is the showing that must be made to a neutral magistrate in order to obtain a warrant. Perhaps for that reason the government abandoned this rationale on appeal.

The district court overruled Petitioner's objections and adopted the magistrate judge's report and recommendation. Pet. App. 27a. The court did not conclude that Petitioner's general consent authorized damage to his boot, but instead reasoned, in full: "Even if the scope of [Petitioner's] consent did not extend to searching inside the boots that contained the drugs, that latter search was supported by probable cause in part due to the police officer smelling a chemical masking agent." *Id.*

Petitioner thereafter entered a conditional guilty plea, in which he expressly reserved his right to appeal the denial of his motion to suppress. ECF No. 42 at 5.

III. The Fifth Circuit Holds That General Consent To Search Permitted Officer Nevarez To Pull Apart The Footwear.

On appeal, neither party disputed the facts found by the magistrate judge and district court. The government did not dispute that Officer Nevarez was not able to see the drugs contained within Petitioner's boot until after he pulled open the sole.

The government abandoned the district court's and magistrate judge's rationale that the boot could be opened up based upon the existence of probable cause alone. The government contended that Petitioner's general consent to search the bag justified pulling open the sole of his boot or, in the alternative, the plain view doctrine or exigent circumstance exception to the warrant requirement justified the search. Gov't 5th Cir. Br. at 12.

The Fifth Circuit affirmed in a 2-1 decision. In a per curiam opinion, the majority accepted the facts as articulated by the magistrate judge: Officer Nevarez "could see plastic inside the sole of the boot by manipulating the boot to look through the slit in the side of the sole," but could not see any drugs until he "used his fingers to pull open the boot." Pet. App. 3a. The majority concluded that Officer Nevarez was justified in pulling open the sole of the boot based upon Petitioner's general consent to search the bag.

Referring to this Court's distinction between an open container and a locked briefcase in *Florida v. Jimeno*, 500 U.S. 248, 251-52 (1991), the majority reasoned that Petitioner's boot should not "be considered akin to a locked container simply because Officer Nevarez opened up the boot sole to recover drugs." Pet. App. 9a. "Given that [Petitioner's] boot was not akin to a locked container, the district court did not err." *Id.* Relying upon a case in which officers had cut a piece of tape to open a closed box during a consensual search, the majority reasoned that "'a reasonable person would have understood [his] consent for the search of his luggage to include permission to search any items inside his luggage which might reasonably contain drugs.'" Pet. App. 5a (quoting *United States v. Maldonado*, 38 F.3d 936, 940 (7th Cir. 1994)). Because "Officer Nevarez explicitly informed [Petitioner] that he was looking for anything illegal traveling through the bus station," Petitioner should have expected that Officer Nevarez might pry open the sole of his boot. Pet. App.6a-7a. The court further reasoned that "Officer Nevarez reasonably concluded that the boots were inherently suspicious" under the

circumstances, Pet. App. 6a, and Petitioner failed to object when Officer Nevarez began opening up his boot, Pet. App. 7a.

The panel rejected Petitioner's reliance upon the Tenth Circuit's decision *United States v. Osage*, 235 F.3d 518 (10th Cir. 2000), which held that a defendant's provision of general consent could not justify the opening of a sealed can within his bag. *Id* at 522. ("[B]efore an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed."). The majority explained that "[f]irst, *Osage* is not binding authority" in the Fifth Circuit. Pet. App. 8a. Second, the majority inferred that opening up the sole of Petitioner's boot indicated that Officer Nevarez "inflicted minimal damage" to a boot whose sole had previously been glued back together, and did not "destroy" or "render [the boot] any less useful." Pet. App. 9a.

Having concluded that the search was justified by Petitioner's general consent, the majority did not reach the government's arguments based on the plain view or exigent circumstances exceptions to the warrant requirement. *See* Pet. App. 21a (Elrod, J., dissenting) ("The majority opinion decides this appeal exclusively on the scope-of-consent issue.").

In dissent, Judge Elrod sharply criticized the majority's decision as effecting an "erosion of Fourth Amendment protections." Pet. App. 11a. Drawing on the Framers' express justification for the Bill of

Rights, Judge Elrod warned that the majority's opinion sanctioned the very "arbitrary and oppressive interference by government officials" that the Fourth Amendment was designed to protect. Pet. App. 10a & n.1.

According to Judge Elrod, "[t]he majority opinion's holding that general consent to search a bag includes authorization to damage property found within it is deeply flawed." Pet. App. 11a. She recounted the undisputed facts in the record:

> Officer Nevarez did not find drugs in an unsealed container, a bag, or any other item that opens and closes as part of its normal function; he found the drugs in the sole of [Petitioner's] boot, which—but for a quarter-sized slit—was sealed shut. In order to retrieve the plastic bag from the boot, Officer Nevarez inflicted damage by forcibly tearing the sole from the boot.

Pet. App. 13a. She explained that she "simply [could not] agree with the majority opinion that a 'typical reasonable person' would understand or intend consent to a search of a bag to include consent to forcibly dismantle footwear." *Id.* She criticized the majority's apparently implicit, subjective impression of the value or condition of the boots: "[I]t makes no difference that this case involves work boots that can be glued back together, rather than high-end Christian Louboutin pumps: Fourth Amendment protections do not wax and wane based on the monetary value of a citizen's property." *Id.*

Judge Elrod also observed that the majority's decision conflicts with the decisions of other circuits,

which "have held that while consent to search a space includes consent to search unlocked containers within that space, the consent does *not* extend to damaging property found within." Pet. App. 12a-13a (emphasis in original); Pet. App. 13-14a (discussing *United States v. Strickland*, 902 F.2d 937, 942 (11th Cir. 1990); *United States v. Osage*, 235 F.3d 518 (10th Cir. 2000); *United States v. Jackson*, 381 F.3d 984, 988-89 (10th Cir. 2004)); Pet. App. 17a n.4 (collecting additional cases). "Under this standard, [Petitioner's] consent to let Officer Nevarez search his bag did not authorize Officer Nevarez to separate the sole from his boot." Pet. App. 13a. "The sole of [Petitioner's] boot was not removed without inflicting damage—everyone concedes that Officer Nevarez tore the sole from the boot to some degree; nor could the boot be repaired simply by placing the sole back on the boot like a lid on a container." Pet. App. 15a.

Judge Elrod criticized the majority's alternative suggestion that the Fourth Amendment was not offended because Officer Nevarez "did not 'destroy' the boot or 'render[] [it] . . . less useful than [it] had been before the sole was pulled open from a pre-existing hole.'" Pet. App. 19a. She explained that "adopting a blanket rule requiring destruction or uselessness is inconsistent with Supreme Court precedent and gets the Fourth Amendment inquiry exactly backwards." Pet. App. 20a. Moreover, she reasoned, that test still conflicts with other circuits, as "most of the cases on which the majority opinion relies were careful to emphasize that *no damage* resulted from the searches at issue." Pet. App. 19a (emphasis in original); *see also* Pet. App. 19a-20a (explaining square conflict created

by majority's inference that opening sole of boot "inflicted minimal damage"). In any case, she reasoned, the undisputed facts compelled the conclusion that Petitioner's footwear "*was* rendered useless as footwear after Officer Nevarez pried off its sole." Pet. App. 19a (emphasis in original). "A boot with a detached, or partially detached, sole does not give the wearer a stable foundation on which to walk, nor is it effective to protect against dirt, water, and other elements." *Id.*; *see also* Pet. App. at 19a n.6 ("[A]ll shoes need soles to be useful as shoes. These work boots' lack of a signature red sole or high-dollar pricetag does not mean that they are just as useful with as without soles.").[4]

---

[4] Judge Elrod sharply disagreed with the majority's suggestion that the "suspicious" nature of Petitioner's boots or his failure to affirmatively object affected the issue of whether his general consent permitted intentional damage. She explained that the former was a "*non sequitur*": "The fact that Officer Nevarez reasonably concluded that the boot was suspicious—a point no one disputes—does not at all suggest that 'the typical reasonable person' would believe that consenting to the search of a bag would include consenting to have a boot torn open"; it "shows only that Officer Nevarez likely could have successfully obtained a warrant." Pet. App. 16a-17a n.3. Moreover, even if Officer Nevarez's actions put Petitioner "on notice" that his boot was about to be damaged, Petitioner's failure to object "says nothing at all as to whether his initial general consent authorized the damage to his property." Pet. App. 18a; *see also* 17a-18a ("As the magistrate judge found, Officer Nevarez never asked [Petitioner] if he could remove the sole" and "[t]here is no indication that [Petitioner] had any meaningful opportunity to object between the time Officer Nevarez was looking through the slit and when he separated the sole from the boot.").

Finally, Judge Elrod explained that the damage to Petitioner's footwear plainly could not be justified by any exception to the warrant requirement. According to Judge Elrod, the contention that Officer Nevarez effectively had "plain view" of the drugs because finding them was a "foregone conclusion" simply "confuses the Fourth Amendment analysis: probable cause does not, in normal circumstances, authorize a search; it is instead the key to obtaining a warrant which, in turn, authorizes the search." Pet. App. 22a. "[T]he existence of overwhelming probable cause is not a reason to ignore the warrant requirement; indeed, it is in precisely those circumstances that a warrant will be the easiest to obtain." *Id*. The government's argument of exigent circumstances was also "simply wrong," given the undisputed facts that Petitioner "had voluntarily stepped out of line at Officer Nevarez's request while the search was being conducted" and there was "absolutely no evidence or contention that [Petitioner] posed a threat to Officer Nevarez or anyone else." Pet. App. 23a-24a; *see also* Pet. App. 24a-25a (explaining that this argument was "especially unconvincing" given that Petitioner concededly could have been detained while a warrant was obtained).

REASONS FOR GRANTING THE PETITION

Federal circuits are in an acknowledged split regarding whether obtaining general consent to search a bag or other area permits law enforcement to engage in the intentional damage of personal property that might hold the object of the search, without obtaining specific consent to damage the property or a warrant.

The law enforcement practice at issue—requests to conduct consensual searches through personal possessions in transportation depots and other public places—is now a commonplace facet of crime prevention. The vast majority of consensual searches through belongings will not result in criminal or civil litigation, and this case presents an important opportunity to define the limits that the Fourth Amendment places upon personal property entrusted to law enforcement during a consensual search.

I. The Question Presented Is The Subject Of An Acknowledged And Deep Conflict.

Consistent with Judge Elrod's dissent, four circuits—the Sixth, Seventh, Eighth, and Eleventh—hold that obtaining general consent to search a bag or other area does not permit law enforcement to cause intentional damage to personal property simply because such property might hold the object of the search. Where damage is required, an officer must either obtain specific consent to damage the property or obtain a warrant.

In conflict, four other circuits hold that intentional damage to personal property may be justified by general consent, but differ as to the degree. Two circuits—the Second and Third—have adopted the extreme position seemingly adopted by the majority below: That because personal property is "not akin to" a locked brief case, law enforcement may pry it open with general consent, as it may with any other closed container. Pet. App. 9a. Two others—the Tenth and D.C. circuits—adopt the position that general consent to search permits law enforcement to damage, but not

to "completely destroy" or "render useless," personal property (a test that the majority below dismissed as "not binding" and not satisfied by pulling open the sole of footwear, Pet. App. 8a-9a).

A. Four Circuits Hold That General Consent To Search Does Not Permit Intentional Damage To Personal Property.

The Sixth, Seventh, Eighth, and Eleventh Circuits hold that an officer who obtains general consent to search a bag or other area may not, consistent with the Fourth Amendment, engage in the intentional damaging of personal property.

In the Seventh Circuit, "[i]t is well-settled that 'permission to search does not include permission to inflict intentional damage to the places or things to be searched.'" *United States v. Smith*, 67 F.3d 302, 1995 WL 568345, *3 (7th Cir. 1995) (quoting *United States v. Torres*, 32 F.3d 225, 231-32 (7th Cir. 1994)); *see also United States v. $304,980.00 in U.S. Currency*, 732 F.3d 812, 820 (7th Cir. 2013) ("Given the expressed object of the search and [the suspect's] general consent, the officers were permitted to look in any compartments where drugs or money could be found, so long as they did not cause damage."); *United States v. Saucedo*, 688 F.3d 863, 868 (7th Cir. 2012) (same). It has reasoned that opening up personal property by damaging it "is inherently invasive," *United States v. Garcia*, 897 F.2d 1413, 1419-20 (7th Cir. 1990), and thus upholds searches based upon general consent only where they do not involve intentional damage to property. *See Torres*, 32 F.3d at 231-32 (unscrewing a compartment was permitted by general consent

because it did not "inflict intentional damage"); *United States v. Calvo-Saucedo*, 409 F. App'x 21, 25 (7th Cir. 2011) (distinguishing the court's earlier decision in *Garcia* on basis that opening of car panel did not cause any damage).[5]

The Eighth Circuit similarly holds that obtaining general consent to search an area does not permit law enforcement to damage property found within. *United States v. Zamora-Garcia*, 831 F.3d 979, 983 (8th Cir. 2016) ("general consent to a search does not give law enforcement officers license to destroy property"); *United States v. Santana-Aguirre*, 537 F.3d 929, 932 (8th Cir. 2008) ("Consensual searches generally cannot be destructive"). In *Santana-Aguirre*, for instance, an officer approached the defendant in a bus terminal, obtained general consent to search his bag, and cut open a candle found within the bag. The Eighth Circuit explained that such damage could not be justified based upon general consent because "[c]utting or destroying an object during a search requires . . . explicit consent for the destructive search." *Id.* It has similarly explained that general consent to search a car would not permit law enforcement to drill holes into the floor of a trunk, *Zamora-Garcia*, 831 F.3d at 983, or to cut a vehicle's spare tires, *United States v. Alverez*, 235 F.3d 1086, 1088-89 (8th Cir. 2000). However, the Eighth Circuit

---

[5] The Seventh Circuit distinguishes between intentional damage to personal property and merely opening a box that has been taped shut, which it holds may be searched as with any ordinary closed container. *See United States v. Maldonado*, 38 F.3d 936, 940 (7th Cir. 1994).

appears to be alone in holding that damage to property may be justified by probable cause in the absence of consent or a warrant. *Santana-Aguirre*, 537 F.3d at 932-33 (recognizing that cutting into personal property requires explicit consent, but can alternatively be upheld based upon probable cause). [6]

The Sixth and Eleventh Circuits similarly recognize that "general permission to search does not include permission to inflict intentional damage to the places or things to be searched." *United States v. Martinez*, 949 F.2d 1117, 1119 (11th Cir. 1992); *United States v. Strickland*, 902 F.2d 937, 941-42 (11th Cir. 1990) ("[A] police officer could not reasonably interpret a general statement of consent to search an individual's vehicle to include the intentional infliction of damage to the vehicle or the property contained within it."); *United States v. Garrido-Santana*, 360 F.3d 565, 576 (6th Cir. 2004)

---

[6] The automobile exception to the warrant requirement allows certain automobile searches to be justified by probable cause, *United States v. Ross*, 456 U.S. 798, 823 (1982); however, the Eighth Circuit has extended that exception to circumstances that have no relation to automobiles. 537 F.3d at 933; *id.* at 933-34 (Beam, J., dissenting) (criticizing court for upholding damage to property based on automobile exception in the absence of any automobile). As mentioned above, the magistrate judge relied upon Eighth Circuit cases to suggest that pulling apart Petitioner's boot could be justified based on probable cause, and the district court adopted that holding. *See supra* at p. 6-7. As Judge Elrod observed, however, that reasoning confuses Fourth Amendment analysis: Probable cause is the requisite standard for obtaining a warrant, not a basis for foregoing one. Pet. App. 22a. Likely for this reason, the government abandoned that basis for affirmance on appeal.

(explaining that "[a] reasonable person likely would have understood his consent to exclude a search that would damage his property" and upholding removal of bolts under *Jimeno* because it did not cause any damage).

The United States has routinely acknowledged that the circuits described above do not permit intentional damage based upon general consent.[7]

B. Two Other Circuits Hold That General Consent Permits Damage To Personal Property That Might Hold The Object Of The Search.

In accord with the Fifth Circuit's primary rationale below, the Second and Third Circuits hold that damaging personal property is not akin to "pry[ing] open a locked briefcase," *Jimeno*, 500 U.S. at 248, and thus, general consent to search permits law enforcement to open up property by damaging it if the object of the search may be found within.

---

[7] *See, e.g.*, Br. of United States at 2, 13-14, *United States v. Calvo-Saucedo*, 409 F. App'x 21 (7th Cir. 2011) (No. 10-3019), 2010 WL 5808800 (recognizing that the Seventh Circuit "has limited the opening of containers when entry is destructive" and only "allowed non-destructive opening"); Br. of United States at 11, *United States v. Zamora-Garcia*, 831 F.3d 979 (8th Cir. 2016) (No. 15-2994), 2015 WL 9412173 ("[T]he government agrees that . . . something more than general consent is needed before officers can conduct a destructive search[.]"); Br. of United States at 26, *United States v. Lee*, 220 F.3d 589 (11th Cir. 2000) (No. 98-06746) 2000 WL 34012932 (citing Eleventh Circuit's decision in *Strickland* for the proposition that "general permission to search does not include permission to inflict intentional damage to places or things that are to be searched").

The preeminent case for this position is the Third Circuit's decision in *United States v. Kim*, 27 F.3d 947 (3d Cir. 1994). There, an officer aboard an Amtrak train asked for and obtained the defendant's general consent to search his bags for drugs. *Id.* at 950. Upon opening one of the bags, the officer found factory-sealed cans. *Id.* Without seeking further consent or obtaining a warrant, the officers opened the sealed cans and determined they contained drugs. *Id.*

In a 2-1 opinion, the Third Circuit rejected the defendant's (and dissent's) argument that opening up the factory sealed cans was akin to prying open a locked briefcase and thus beyond the scope of general consent. *Id.* at 956-57; *see id.* at 968 (Becker, J., dissenting). The majority reasoned that factory-sealed cans were "not similar to locked briefcases" and "d[id] not defeat the principle underlying the *Jimeno* ruling that when one gives general permission to search for drugs in a confined area, that permission extends to any items within that area that a reasonable person would believe to contain drugs." *Id.* at 956. Because the officer "indicated that he was looking for illegal drugs" and the cans "may be thought by a reasonable person to contain drugs," the defendant's general consent extended to opening the factory-sealed cans. *Id.*

In a dissenting opinion, Judge Becker opined—as Judge Elrod did below—that "[c]onsent to search property cannot reasonably be construed to mean consent to damage the property." *Id.* at 968. He agreed that, given *Jimeno*, "the question ultimately posed by this case is whether the factory sealed canister is more

like a locked briefcase or a folded paper bag." *Id.* at 967. "In [his] opinion, the difference between the folded paper bag in *Jimeno* and the locked briefcase . . . has to do with the owner's greater expectation of privacy in the contents of the briefcase than in a paper bag, and in the owner's greater property interest in not having the lock on his briefcase broken than in not having his paper bag opened." *Id.* "[A]lthough the locked nature of the briefcase is strong evidence of the owner's intent to keep its contents private, it does not follow that a key or lock is necessary for a box or container to be outside the scope of a consensual search of this kind." *Id.* at 968. Rather, "a heightened expectation of privacy can be evidenced by something other than a lock," including that "there is a strong property interest in sealed packages, and opening them often damages the value of that interest." *Id.* at 967-68. Judge Becker would have held that "once the police officer has looked at the item and it is . . . sealed, it is unreasonable for the police officer to think that the consent to search the luggage gives him license to damage the item by opening it without asking permission." *Id.* at 968.

The Second Circuit has adopted the same rule as the *Kim* majority, on facts remarkably similar to this case. In *United States v. Mire*, 51 F.3d 349 (2d Cir. 1995), officers in a bus station approached the defendant and obtained consent to search his tote bag. *Id.* at 351. Within the bag, the officers found a pair of sneakers, and suspected that the thicker sole on one of the sneakers contained drugs. *Id.* The Second Circuit rejected the defendant's argument that his

general consent "was not broad enough to include the finding of drugs in the oversized sole of the sneakers." *Id.* at 352. Like the Third Circuit, the Second Circuit held that under *Jimeno*, "[i]t was objectively reasonable for [the searching officer], who suspected that drugs were contained in the sneaker, to conclude that the sneaker was within the scope of his authorized search." *Id.*

The United States has routinely acknowledged that these circuits permit intentional damage to property that may contain the object of the search.[8]

C. Two Circuits Hold That General Consent Permits Damage To Property Absent Complete Destruction Or Rendering It Useless.

The Tenth and D.C. circuits hold that, upon obtaining general consent, law enforcement violates the Fourth Amendment only insofar as it engages in "complete and utter destruction" of personal property or "render[s] [it] useless." *United States v. Jackson*, 381 F.3d 984, 988-89 (10th Cir. 2004) (quoting *United*

---

[8] *See, e.g.*, Br. of United States at 20, *United States v. Santana-Aguirre*, 537 F.3d 929 (8th Cir. 2008), (No. 07-3706), 2008 WL 6170798 (relying upon the Third Circuit's decision in *Kim* to justify damage to property and for the proposition that general consent to search an area extends to any property that might contain the object of the search); Br of United States at 25, *United States v. Pinnock*, 194 F.3d 175 (D.C. Cir. 1999) (No. 96-3062), 1999 WL 34835208 (citing Second Circuit decision in *Mire* for the proposition that general consent to search permits law enforcement to "to peel apart sole in a pair of sneakers").

States v. Osage, 235 F.3d 518, 521, 522 n.2 (10th Cir. 2000)).

The leading case for this position is the Tenth Circuit's decision in *Osage*. There, an officer approached the defendant in a train and obtained general consent to search his bag, which contained sealed cans labeled "tamales in gravy." 235 F.3d at 519. The Tenth Circuit held that opening the sealed cans exceeded the scope of general consent. It expressly rejected the Third Circuit's conclusion in *Kim* that prying open a sealed can "is more like [opening] a brown paper bag than a locked briefcase." *Id.* at 521. According to the Tenth Circuit, the relevant inquiry was whether the defendant's property "was destroyed or rendered useless after being opened." *Id.* at 521; *see also id.* at 520 ("[A] police search which destroys or renders completely useless the item searched exceeds the scope of any consent given for the search."). Because opening a sealed can "render[s] it useless and incapable of performing its designated function, [it] is more like breaking open a locked briefcase than opening the folds of a paper bag." *Id.* at 521.

The Tenth Circuit summarized: "We therefore hold that, before an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed." *Id.* at 522. It has applied this complete-destruction test on numerous subsequent occasions. *See, e.g.*, *United States v. Marquez*, 337 F.3d 1203, 1206, 1209 (10th Cir. 2003) (search of compartment lawful under

Jimeno because opening its nailed-down cover fell "well short of the type of 'complete and utter destruction or incapacitation' that was the focus of our concern in *Osage*"); *Jackson*, 381 F.3d at 989 (upholding opening of baby powder bottle because it was "well short of the type of 'complete and utter destruction or incapacitation' that was the focus of our concern in *Osage*").[9]

The D.C. Circuit has adopted the same test. *See United States v. Springs*, 936 F.2d 1330, 1332, 1335 (D.C. Cir. 1991) (rejecting the defendant's argument that forcing open a baby powder bottle was similar to breaking open a locked briefcase because it "did not depend upon possession of a key, [or] knowledge of a combination" and did not "render it useless, anymore than the opening of the folds destroyed the usefulness of the paper bag in *Jimeno*"); *United States v. Battista*, 876 F.2d 201, 207-08 (D.C. Cir. 1989) ("penetration with the nail-file component of a pocketknife" of packages was within scope of general consent).

The United States has routinely acknowledged that these circuits permit intentional damage to pro-

---

[9] As discussed, the Fifth Circuit panel dismissed the Tenth Circuit's decision in *Osage* as "not binding" and purported to distinguish it. Pet. App. 8a-9a. Sitting en banc, the Fifth Circuit previously considered a similar question of whether an individual's general consent to search his home permitted law enforcement to use a sledgehammer to forcibly dismantle the attic floor. *United States v. Ibarra*, 965 F.2d 1354, 1355-46 (5th Cir. 1992) (en banc). Further evidencing the need for this Court's guidance, the full court divided evenly, 7-7, with one half of the court arguing, similar to the Tenth Circuit, that general consent cannot justify "structural demolition." *Id.* at 1357-58.

perty, provided that it is short of complete destruction or rendering it useless.[10]

II. This Case Is Worthy Of This Court's Review.

A. This Question Is Important And Recurs Frequently.

Requests for voluntary consent to search through belongings at bus stations, train stations, and other places has become a routine law enforcement practice. This case concerns an important question regarding the respect that law enforcement must afford to personal property that is entrusted to them in the course of such searches. That respect is, of course, also critical to an individual's decision whether to consent in the first place. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) ("[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime[.]").

As the cases above indicate, this question recurs frequently, often in circumstances nearly identical to

---

[10] *See, e.g.*, Br. of United States at 19, *United States v. Santana-Aguirre*, 537 F.3d 929 (8th Cir. 2008), (No. 07-3706), 2008 WL 6170798 ("The Tenth Circuit reviewed *Osage* on the narrow issue of 'whether Mr. Osage's failure to object to a search of a sealed can permitted the officer, in the course of conducting his search, to destroy the can or render it completely useless for its intended function.'"); Br of United States at 24 & n.15, *United States v. Pinnock*, 194 F.3d 175 (D.C. Cir. 1999) (No. 96-3062), 1999 WL 34835208 (relying upon D.C. Circuit's decision in *Springs* for proposition that test is whether opening property "render it useless").

this case. *See, e.g.*, *Santana-Aguirre*, 537 F.3d at 930-31 (arising from request for consent in bus terminal); *Mire*, 51 F.3d at 350-52 (same); *Osage*, 235 F.3d at 519 (same, on Amtrak train); *Kim*, 27 F.3d 949 (same). But the import of a clear rule is greater than any number of cases can demonstrate: The vast majority of consensual searches will never lead to civil or criminal litigation, even where law enforcement wrongly inflicts damage upon personal property.

Moreover, at the heart of the question presented is a question about the relevant values underpinning the Fourth Amendment, and which caused this Court to distinguish between the protection afforded to an ordinary container and a locked briefcase. *Jimeno*, 500 U.S. at 252. Is the animating principle that a locked briefcase "depend[s] upon possession of a key, knowledge of a combination," *Springs*, 936 F.2d at 1335, or can the relevant "heightened expectation of privacy . . . be evidenced by something other than a lock," *Kim*, 27 F.3d at 967 (Becker, J., dissenting)? If the latter, does that expectation arise from the fact that prying open the item requires "rendering it useless and incapable of performing its designated function," *Osage*, 235 F.3d at 521, or simply that "[t]here is a strong property interest in [personal effects], and opening them often damages the value of that interest," *Kim*, 27 F.3d at 968 (Becker, J., dissenting)?

The arguments on each side of this issue have been fully aired not only in the express disagreement between the circuits, but also in the several divided deci-

sions within circuits.[11] The issue can be resolved only by this Court.

B. This Case Is An Ideal Vehicle.

The Fifth Circuit affirmed on the sole basis that Officer Nevarez was permitted to pull apart the sole of Petitioner's footwear because he had obtained general consent to search his bag for illicit materials. Pet. App. 21a (Elrod, J., dissenting) ("The majority opinion decides this appeal exclusively on the scope-of-consent issue."). Its decision thus squarely presents the question presented.

Even if the government were to reassert its (rather absurd) arguments based upon the plain view doctrine or exigent circumstances exception, this Court's ordinary procedure would be to decide the issue resolved by the court below and leave such residual arguments for the Fifth Circuit to consider in the first instance on remand. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("[W]e typically remand for resolution of any claims the lower courts' error prevented them from addressing."); *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 456-457 (2009); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *United States v. Rutherford*, 442 U.S. 544, 559 n.18 (1979).[12]

---

[11] *See, e.g.*, Pet. App. 10a-25a (Elrod, J., dissenting); *Kim*, 27 F.3d at 961-68 (Becker, J., dissenting); *Santana-Aguirre*, 537 F.3d at 933-34 (Beam, J., dissenting); *Ibarra*, 965 F.2d 1354 (dividing evenly en banc, 7-7, over whether consent justified damage).

[12] As Judge Elrod pointed out, the government's alternative arguments are easily rejected as meritless—or, in her words, "simply wrong," "especially unconvincing," and "confus[ing] the Fourth Amendment analysis." Pet. App. 22a-24a. Petitioner

There are several aspects of this record that make it particularly attractive to resolve this issue. In most cases raising issues related to scope of general consent, for instance, there will be ongoing disputes regarding whether or how consent was given. Here, the pertinent facts are undisputed: The parties agree that Officer Nevarez requested general consent to search Petitioner's bag for "illegal materials"; that Petitioner provided such consent; and that Officer Nevarez never requested specific consent before pulling apart the sole of the boot.

This petition also arrives at the Court without several other obstacles typical in cases like this. Petitioner does not challenge whether his initial encounter or his general consent were voluntary. He does not challenge that, at the time Officer Nevarez pried open his boot, there existed probable cause to obtain a warrant. And the government has not raised (and thus forfeited) any argument that exclusion would not be warranted in the event of a Fourth Amendment violation, such as the good faith exception.

III. The Fifth Circuit Majority Is Wrong.

The provision of general consent to search does not give law enforcement "carte blanche to do whatever they please." Wayne R. Lafave, 4 Search & Seizure § 8.1(c) (5th ed.). "Even within [the express] limits"

---

nonetheless believes the appropriate course of action would be to grant and decide the question resolved by the majority, and leave for remand questions that "are outside the scope of the question presented and were not addressed by the Court of Appeals in the decision below." *Pac. Bell Tel. Co.*, 555 U.S. at 457.

imposed by an individuals' consent, it is a basic (and easily followed) tenet that "an officer may not engage in search activity involving the destruction of property." *Id.*; *see Kim*, 27 F.3d at 968 (Becker, J., dissenting) ("Consent to search property cannot reasonably be construed to mean consent to damage the property.").

This Court recognized as much when it explained that law enforcement would be "very likely unreasonable" to assume that the provision of general consent to search means an individual "has agreed to the breaking open of a locked briefcase within." *Jimeno*, 500 U.S. at 251-52. Even when individuals entrust their belongings to law enforcement for the purposes of a search, they maintain a strong interest in maintaining the integrity of their personal property—and they do so irrespective of law enforcement's assessment of the value of the property.

Moreover, as Judge Elrod explained, permitting the intentional infliction of damage to personal property handed over for a consensual search would effect an "erosion of Fourth Amendment protections" as they were intended by the Framers. Pet. App. 10a & n.1, 11a. Indeed, the Fourth Amendment attaches specific significance to "effects," which were included in the constitutional text at least in part due to specific concern for "the risk of mishandling or damage generally associated with interferences with personal property." Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 987

(2016).[13] Moreover, as Judge Elrod observed, articles of clothing deserve the broadest protection, Pet. App. 20a-21a; *see also* Brady, *supra*, at 987-88 (explaining that clothing was one of the specific categories of property that Madison sought to protect in the Bill of Rights, that "orators gave impassioned speeches about," and had "special status" in the law).

Petitioner does not contest that, in undertaking the consensual search of Petitioner's bag, Officer Nevarez gained suspicion that Petitioner's boot contained drugs. But Officer Nevarez was not entitled to unilaterally pull apart Petitioner's property—he was required to obtain explicit authorization, seize Petitioner (as he could concededly have done) and obtain a warrant, or have some other lawful basis to intentionally damage the property.

---

[13] The protection of personal property from damage at the hands of the government was a significant motivation for the Bill of Rights. Indeed, during its passage, "much of the rhetoric surrounding searches and subsequent seizures of personal property described" specifically the fear that "wrongful searches and seizures could result in the damaging or mishandling of goods." Brady, *supra*, at 991. "After the Revolution was won, Anti-Federalists raised the specter that without protection from unreasonable searches and seizures, the government would be free to damage chattels in pursuit of evidence." *Id.* Patrick Henry, for instance, "argued that a Bill of Rights was necessary in part because the first Constitution failed to protect personal property from prying eyes; under it, '[e]very thing the most sacred [might] be searched and ransacked by the strong hand of power.'" *Id.* at 990. Indeed, the violence associated with "trespassing on personal property" was so significant that it "was often analogized to violence to real property, like the breaking of a door to a home." *Id.* at 991.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARJORIE A. MEYERS
FEDERAL PUBLIC DEFENDER
Southern District of Texas

PHILIP G. GALLAGHER
ASSISTANT FEDERAL PUBLIC DEFENDER
440 Louisiana Street,
Suite 1350
Houston, Texas 77002

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[filed June 15, 2017]

No. 16-40418

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ALEXIS GONZALEZ-BADILLO,
Defendant-Appellant

Appeal from the United States District Court for the
Southern District of Texas
USDC No. 5:15-CR-399

Before REAVLEY, ELROD, and GRAVES, Circuit Judges. PER CURIAM:*

Appellant Alexis Gonzalez-Badillo appeals the district court's denial of his motion to suppress evidence. He contends that a Laredo police officer exceeded the scope of his consent when the officer, while searching a travel bag, opened the sole of a boot to find illegal drugs. Because Gonzalez-Badillo's consent extended to the boot sole, we AFFIRM the district court's judgment.

---

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

BACKGROUND

Police searched Gonzalez-Badillo's boot sole as part of a criminal interdiction effort at the Americanos Bus Station in Laredo, Texas on April 10, 2015. Gonzalez-Badillo had been in line to board a bus to Houston when he made several "strange" comments about his itinerary to Laredo police officer Rogelio Nevarez. Officer Nevarez subsequently asked and received permission to search Gonzalez-Badillo's travel bag. Before searching the bag, Officer Nevarez took Gonzalez-Badillo's California identification card, apparently keeping it throughout the encounter. He then informed Gonzalez-Badillo that he was looking for anything illegal traveling through the bus station.

The magistrate judge's report and recommendations describe the specifics of the search:

> As soon as Officer Nevarez opened the bag, he smelled a strong chemical odor that he recognized as a masking agent used in drug smuggling. Officer Nevarez further observed a pair of used work boots inside of translucent plastic shopping bags. When Officer Nevarez grasped the bags containing the boots, he could feel that the soles of the boots were lumpy. Officer Nevarez compared it to the feeling of soles full of sand instead of the normal hard soles of work boots. Officer Nevarez further testified that he had felt boots like this before that were being used to smuggle drugs and had

> seen this method of drug smuggling during trainings. At this point, Officer Nevarez informed Defendant that he was "99% sure" that there were drugs in the boots and put the boots up for Defendant to smell them. Officer Nevarez testified that Defendant then began sweating more and made a surprising face.
>
> When Officer Nevarez removed the boots from the plastic bags, he observed a small opening on the side of one of the boots where it appeared that the sole wasn't glued all the way shut. Officer Nevarez could see plastic inside the sole of the boot by manipulating the boot to look through the slit in the side of the sole without increasing the size of the opening. At that point, Officer Nevarez used his fingers to pull open the boot from this opening, which revealed a plastic bag containing a brown rocky substance, later confirmed to be heroin. Defendant was then placed under arrest and read his Miranda rights.

Gonzalez-Badillo initially invoked his constitutional right to remain silent. But he later agreed to make inculpatory statements, first to Laredo police, and then to Drug Enforcement Administration ("DEA") agents. While in DEA custody, Gonzalez-Badillo also signed written waivers of his rights and provided a written statement.

Gonzalez-Badillo subsequently moved to suppress all physical evidence seized by police and

statements made while in custody. The magistrate judge held a suppression hearing on July 6, 2015. He recommended that the district court deny Gonzalez-Badillo's motion to suppress the physical evidence, but grant it regarding the inculpatory statements. After independently reviewing the facts of the case and relevant case law, the district court adopted the magistrate judge's recommendation on January 15, 2016. Gonzalez-Badillo timely appeals from the district court's judgment.

STANDARD OF REVIEW

"When we review a district court's denial of a motion to suppress, we view the facts in the light most favorable to the prevailing party, accepting the district court's factual findings unless clearly erroneous and considering all questions of law de novo." *United States v. Menchaca-Castruita*, 587 F.3d 283, 289 (5th Cir. 2009).

DISCUSSION

Gonzalez-Badillo claims that the district court erred when it denied his motion to suppress evidence found in the boot sole. First, he argues that his consent to search the travel bag did not extend to a search of the boot sole. Second, he asserts that no other exceptions to the Fourth Amendment's warrant requirement apply here. Because we find that Gonzalez-Badillo consented to the search, we need not address his other arguments.

"A search conducted pursuant to consent is one of the well-settled exceptions to the Fourth Amendment's warrant requirement." *United States v. Tomkins,* 130 F.3d 117, 121 (5th Cir. 1997). "The standard for measuring the scope of a suspect's

consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

As stated above, Gonzalez-Badillo does not contest that he consented to the search of his travel bag. Instead, he argues that Officer Nevarez's search of the boot sole exceeded the scope of his initial consent. To determine the scope of consent, the following factors inform our analysis: First, "a reasonable person would have understood [his] consent for the search of his luggage to include permission to search any items inside his luggage which might reasonably contain drugs." *United States v. Maldonado*, 38 F.3d 936, 940 (7th Cir. 1994). For example, in *Maldonado*, the Seventh Circuit concluded that the scope of the defendant's consent extended to a closed juicer box that was taped shut, even though "Maldonado testified that he told Agent Boertlein that he did not want to open the juicer boxes because the items inside were gift wrapped."[1] *Id.* at 938. The court reasoned that

---

[1] The dissent argues that we "attempt[] to downplay the significance of the officer's testimony in *Maldonado* that the suspect consented to the search of his bag" even though "the Seventh Circuit's decision expressly relied on" the testimony. However, counter the dissent's argument, the officer's testimony in *Maldonado* did not play a critical role in the Seventh Circuit's analysis. While it noted that "the district court never discredited [the officer's] testimony," it based its holding on "all the surrounding circumstances" including the district court's finding that "Maldonado did not withdraw his consent, nor did he limit the scope of his consent in the sense of refusing to allow Agent Boertlein to look inside the juicer boxes." *See Maldonado*, 38 F.3d at 940-41. Furthermore, the Seventh

Maldonado should have expected drug enforcement officers would open the boxes because they told him that "they were looking for individuals traveling with large quantities of illegal drugs." *Id.* at 940. Furthermore, "[t]he juicer boxes found in Maldonado's luggage had been repackaged and closed with tape, and such boxes may be thought by a reasonable person to contain drugs." *Id.*

Similarly, Officer Nevarez explicitly informed Gonzalez-Badillo that he was looking for anything illegal traveling through the bus station and asked for consent to search the bag. *See Jimeno*, 500 U.S. at 251 ("The scope of a search is generally defined by its expressed object."). In addition, Officer Nevarez reasonably concluded that the boots were inherently suspicious: (1) Gonzalez-Badillo's bag and boots smelled of drug-masking agent; (2) the boots were unlike normal boots: the soles were "lumpy" as if they were "full of sand instead of the normal hard soles of work boots;" (3) the boot soles were already damaged and had "plastic" clearly visible inside; and (4) similar boots had been used as vehicles for drug smuggling. Furthermore, given that Officer Nevarez explicitly informed Gonzalez-Badillo that he believed the boots contained drugs and "put the boots up for [him] to smell" before opening the

---

Circuit stated that "[d]etermining the parameters of a consensual search is an issue of fact that must be distilled from the totality of the circumstances surrounding the search; moreover, the resolution of such factual questions is entrusted to the district court and will not be lightly overturned on appeal." *Id.* at 941. The district court acknowledged that Maldonado disputed the officer's testimony and "made no explicit determination as to which testimony it found more credible[.]" *Id.* at 938.

sole, Gonzalez-Badillo "should have expected that [Officer Nevarez] would examine the[ir] contents." *See Maldonado*, 38 F.3d at 940 (quoting *United States v. Berke*, 930 F.2d 1219, 1223 (7th Cir. 1991)).

Second, "courts can look at the defendant's conduct to help determine the scope of a consensual search." *Id.* For example, "[a] failure to object to the breadth of the search is properly considered an indication that the search was within the scope of the initial consent." *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 670 (5th Cir. 2003). Here, we find that Gonzalez-Badillo's conduct during the search suggests that the scope of his consent extended to the boot sole. Importantly, Gonzalez-Badillo did not revoke or limit his consent to search his bag, even when Officer Nevarez indicated that he believed the boots contained drugs and offered them to Gonzalez-Badillo to smell. Instead, "Defendant . . . began sweating more and made a surprising face." Gonzalez- Badillo also did not limit the search as Officer Nevarez continued to examine the boots, eventually using his fingers to pull open the sole from the already present hole.[2] *Id.*

---

[2] The dissent argues that "Gonzalez-Badillo's failure to object when Officer Nevarez began prying the sole from the boot is of little probative value" because "[a]ll parties agree that the search was within the scope of consent up until the point of separating the sole from the boot" and "[t]here is no indication that Gonzalez-Badillo had any meaningful opportunity to object between the time Officer Nevarez was looking through the slip and when he separated the sole from the boot." We disagree. When Officer Nevarez informed Gonzalez- Badillo that he believed the boots contained drugs, Gonzalez-Badillo was clearly on notice that Officer Nevarez intended to search them. *See Maldonado*, 38 F.3d at 940. Consequently, Gonzalez-Badillo had the opportunity to limit his consent at any point

Gonzalez-Badillo correctly points out that, although a general consent to search encompasses unlocked containers, locked containers require special consent or a warrant. *See Jimeno*, 500 U.S. at 251-52 ("It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk . . . ."). He also claims that this case is very similar to *United States v. Osage*, 235 F.3d 518, 520 (10th Cir. 2000), where the Tenth Circuit found that searching inside a sealed can of tamales exceeded the scope of the defendant's consent to search his luggage. In that case, the court "conclude[d] that the opening of a sealed can, thereby rendering it useless and incapable of performing its designated function, is more like breaking open a locked briefcase than opening the folds of a paper bag." *Id.* at 521. It also stated: "[B]efore an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed." *Id.* at 522. Analogizing to *Osage*, Gonzalez-Badillo suggests that Officer Nevarez's search of the boot sole was "more like breaking open a locked briefcase" because he had to pull open the sole to recover the drugs inside. *Id.* at 521.

However, Gonzalez-Badillo's argument is not persuasive. First, *Osage* is not binding authority, and furthermore, the facts there are distinguishable from those here. Unlike in *Osage*, the record does

---

between the time when Officer Nevarez made his suspicions known and when he actually opened the sole.

not show that Officer Nevarez "destroy[ed]" the already-damaged boots or rendered them any less useful than they had been before the sole was pulled open from a pre-existing hole. *Id.* at 520. Moreover, we are not persuaded that Gonzalez-Badillo's boot should be considered akin to a locked container simply because Officer Nevarez opened up the boot sole to recover drugs. Here, Officer Nevarez's actions inflicted minimal damage on the boot, the sole of which had previously been pried open and glued down to insert drugs. *Compare United States v. Marquez*, 337 F.3d 1203, 1209 (10th Cir. 2003) (stating that [i]f damage to the compartment did occur" as the result of officers' prying open a nailed-down plywood covering, "it was de minimis in nature"), *with United States v. Ibarra*, 965 F.2d 1354, (5th Cir. 1992) (en banc) (7-7 decision) ("We would hold that a typical reasonable person would not have interpreted Chambers' consent to extend to breaking the boards securing the attic entrance."), *and United States v. Strickland*, 902 F.3d 937, 942 (11th Cir. 1990) ("[I]t is difficult to conceive of any circumstance in which an individual would voluntarily consent to have the spare tire of their automobile slashed."). Given that Gonzalez-Badillo's boot was not akin to a locked container, the district court did not err. *See Jimeno*, 500 U.S. at 251-52.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

JENNIFER WALKER ELROD, Circuit Judge, dissenting:

The Fourth Amendment enshrines our Constitution's commitment to "protect liberty and privacy from arbitrary and oppressive interference by government officials." *United States v. Ortiz*, 422 U.S. 891, 895 (1975). Our Founders knew that "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government," and "[a]mong deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart" as unreasonable government intrusion into individual privacy. *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).[1]

Here, an individual's privacy right presents itself as the sole of a work boot. The majority

---

[1] Writing of James Otis's famous 1761 argument to the Massachusetts Superior Court against writs of assistance, John Adams concluded: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *See* Thomas K. Clancy, *The Framer's Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1005 (2011). Drawing on Otis's arguments, Adams drafted Article 14 of the Massachusetts Declaration of Rights—later a model for the Fourth Amendment—which declared that "[e]very subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions." *See* Clancy, *The Framer's Intent*, at 1027–28; *see also* 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 748 (1833) ("[The Fourth Amendment] seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property.").

opinion holds that general consent to search a bag encompasses consent to pry the sole off of a boot found within the bag. This holding does not comport with the Fourth Amendment, and none of the Government's other arguments render the search lawful. Because I cannot approve of this erosion of Fourth Amendment protections, I respectfully dissent.

I.

This appeal raises two core questions: First, did Gonzalez-Badillo's consent to have his bag searched include consent to pry open the sole of his boot? Second, if it did not, does any exception to the warrant requirement render the search lawful? I would hold that the Fourth Amendment answers "no" to both questions.

A.

The majority opinion proceeds as if this is a run-of-the-mill appeal in which an individual, having clearly consented to a search, now regrets the decision and seeks to ignore that consent. It is not. While the majority opinion concludes that Gonzalez-Badillo consented to the search of his boot, neither the district court judge nor the magistrate judge found the issue so easy; in fact, both judges went out of their way to *avoid* deciding this issue and instead rested their suppression decisions on other grounds. And for good reason. The majority opinion's holding that general consent to search a bag includes authorization to damage property found within it is deeply flawed and has not been accepted by any decision on which the majority opinion or the Government relies.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend IV. As a general matter, a warrant is necessary for an involuntary search to be reasonable under the Fourth Amendment, but it is also well-established that a search is reasonable if a citizen voluntarily consents to the search. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *Florida v. Jimeno*, 500 U.S. 248, 250–51 (1991). Where consent has been given, disputes regarding the constitutionality of a search often focus on the scope of the consent.

To discern this scope, we apply a standard of "objective reasonableness": "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Jimeno*, 500 U.S. at 251. Thus, even where there has been general consent to search, the extent of an officer's search within an area (*e.g.*, a car or a bag) "is not limitless" and always depends on the objective reasonableness of searching the particular item involved. *United States v. Ibarra*, 965 F.2d 1354, 1358 (5th Cir. 1992) (en banc) (7–7 decision); *see also Jimeno*, 500 U.S. at 251–52 (holding that consent to search a car included consent to open and search a paper bag hidden beneath a seat but noting that "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk"). Accordingly, courts have held that while consent to search a space includes consent to search unlocked containers within that space, the consent does *not* extend to damaging property found within. *Compare United*

States v. Strickland, 902 F.2d 937, 942 (11th Cir. 1990) (holding that consent to search a vehicle did not include consent to slash a spare tire and look inside), *with United States v. Jackson*, 381 F.3d 984, 988– 89 (10th Cir. 2004) (holding that consent to search a bag included consent to search a baby powder container where no damage was inflicted to the container).

Under this standard, Gonzalez-Badillo's consent to let Officer Nevarez search his bag did not authorize Officer Nevarez to separate the sole from his boot. Officer Nevarez did not find drugs in an unsealed container, a bag, or any other item that opens and closes as part of its normal function; he found the drugs in the sole of Gonzalez-Badillo's boot, which—but for a quarter-sized slit—was sealed shut. In order to retrieve the plastic bag from the boot, Officer Nevarez inflicted damage by forcibly tearing the sole from the boot. I simply cannot agree with the majority opinion that a "typical reasonable person" would understand or intend consent to a search of a bag to include consent to forcibly dismantle footwear. *See Jimeno*, 500 U.S. at 251. And it makes no difference that this case involves work boots that can be glued back together, rather than high-end Christian Louboutin pumps: Fourth Amendment protections do not wax and wane based on the monetary value of a citizen's property.

Other circuits' decisions support this conclusion. For example, in *Strickland*, the Eleventh Circuit addressed whether a suspect's consent to search his car included consent to slash the spare tire and look inside. 902 F.2d at 939, 941-42. Though

concluding that one who consents to a search can expect that search to be thorough can "expect that search to be thorough," the Eleventh Circuit drew the line at the destruction of property: "[U]nder the circumstances of this case, a police officer could not reasonably interpret a general statement of consent to search an individual's vehicle to include the intentional infliction of damage to the vehicle or the property contained within it." *Id.* at 941–42; *see also id.* at 942 ("[I]t is difficult to conceive of any circumstance in which an individual would voluntarily consent to have the spare tire of their automobile slashed.").

The Tenth Circuit in *United States v. Osage*, 235 F.3d 518 (10th Cir. 2000), likewise concluded that general consent to search does not authorize damage to property. There, a suspect consented to an officer's request to search his bag. *Id.* at 519. Upon finding what appeared to be a sealed can of tamales inside, the officer proceeded to open the can and found methamphetamine. *Id.* The Tenth Circuit held that "destroying" or rendering property "completely useless" is not included within general consent to search and so the officer's search of the tamale can was not authorized. *Id.* at 521–22; *see also Cross v. State*, 560 So. 2d 228, 230 (Fla. 1990) (holding that consent to search tote bag "did not extend to cutting into or breaking open sealed containers located therein").

By contrast, where the contents of a container can be accessed without damaging the container itself, courts have held that general consent to search includes authorization to search the container. For example, in *Jackson*, a suspect consented to the

search of his bag, which held a container of baby powder. 381 F.3d at 987. The officer removed the top of the container without damaging it and, after finding a clear plastic bag concealed within, replaced the lid. *Id.* The Tenth Circuit concluded that the suspect's consent to search his bag extended to the search of the container, noting in particular that the search "did not destroy or render the container useless," *id.* at 988, that the officer "easily removed the lid" without inflicting any damage, *id.* at 987, and that "the lid [could be] placed back onto the container, [which] . . . worked properly," *id.* at 988–89; *see also United States v. Stewart*, 93 F.3d 189, 191–92 (5th Cir. 1996) (holding that consent to search a bag and look at a medicine bottle authorized an officer to open the medicine bottle).

As in *Strickland* and *Osage* and unlike in *Jackson*, Officer Nevarez's search physically damaged the property being searched. The fact that Gonzalez-Badillo consented to a search of his bag no more authorized Officer Nevarez to damage his boot than the consents to search in *Strickland* and *Osage* authorized the officers in those cases to damage the suspects' property. *Cf. Strickland*, 902 F.2d at 939, 941–42; *Osage*, 235 F.3d at 519, 521–22. In these cases, consent to search did not include consent to damage. For the same reason, this case is distinct from *Jackson*. The sole of Gonzalez-Badillo's boot was not removed without inflicting damage—everyone concedes that Officer Nevarez tore the sole from the boot to some degree; nor could the boot be repaired simply by placing the sole back on the boot like a lid on a container. *Cf. Jackson*, 381 F.3d at 988 (lid to the baby powder container was "placed back onto the container" so it "worked

properly").

None of the majority opinion's contrary arguments is persuasive. The majority opinion first relies on the Seventh Circuit's decision in *United States v. Maldonado*, 38 F.3d 936 (7th Cir. 1994). In that case, the Seventh Circuit held that the suspect's consent to search his bag included consent to search boxes within the bag, relying in part on its conclusion that "a reasonable person would have understood [the suspect's] consent for the search of his luggage to include permission to search any item inside his luggage which might reasonably contain drugs." *Id.* at 940. To begin with, this decision did not rely on that reason exclusively, instead grounding its holding in "all the surrounding circumstances," including the suspect's conduct and the officer's testimony that the suspect *actually consented* to opening the boxes.[2] *Id.* More importantly, neither *Maldonado* nor any other decision relied on by the majority opinion holds that consent to search a bag (or a similar item) would be understood by "the typical reasonable person" to include consent to dismantle or damage an article of clothing in order to look inside it.[3] *Cf. Jimeno*, 500 U.S. at

---

[2] The majority opinion attempts to downplay the significance of the officer's testimony in *Maldonado* that the suspect consented to the search of his bag because the district court did not make an "explicit determination as to which testimony it found more credible." *See Maldonado*, 38 F.3d at 938. Whatever may be true of the district court's decision in that case, the Seventh Circuit's decision expressly relied on the fact that "the district court never discredited . . . testimony" that the defendant "nodded his head in response to [a] request for further consent to search the juicer boxes." *Id.* at 940.

[3] The majority opinion relies further on its position that "Officer Nevarez reasonably concluded that the boots were inherently

251.[4]

The majority opinion next relies on Gonzalez-Badillo's failure to object to Officer Nevarez's search when he first began to pry the sole from the boot. It is true that a suspect's failure to object to the breadth of the search is "an indication that the search was within the scope of the initial consent." *Mendoza-Gonzalez*, 318 F.3d at 670. Here, however, Gonzalez-Badillo's failure to object when Officer Nevarez began prying the sole from the boot is of little probative value. All parties agree that the search was within the scope of consent up until the point of separating the sole from the boot, including Officer Nevarez's manipulation of the quarter-sized slit in an effort to look inside the sole. There is no indication that Gonzalez-Badillo had any

---

suspicious." This is a *non sequitur*. The fact that Officer Nevarez reasonably concluded that the boot was suspicious—a point no one disputes—does not at all suggest that "the typical reasonable person" would believe that consenting to the search of a bag would include consenting to have a boot torn open. The fact that the "boots were inherently suspicious" shows only that Officer Nevarez likely could have successfully obtained a warrant.

[4] *See also United States v. Mendoza-Gonzalez*, 318 F.3d 663, 666–72 (5th Cir. 2003) (holding that consent to search within trailer included consent to search within cardboard boxes within the trailer where no damage was inflicted on the boxes); *United States v. Flores*, 63 F.3d 1342, 1362 (5th Cir. 1995) (holding under plain error standard of review that consent to search a vehicle authorized "merely unscrew[ing] two screws and remov[ing] two vent covers" that could be replaced without damage); *United States v. Marquez*, 337 F.3d 1203, 1209 (10th Cir. 2003) (holding that consent to search RV for drugs and guns included consent to search under bench seat where the district court found removal of plywood did not cause any damage).

meaningful opportunity to object between the time Officer Nevarez was looking through the slit and when he separated the sole from the boot. As the magistrate judge found, Officer Nevarez never asked Gonzalez-Badillo if he could remove the sole.

The majority opinion responds that Gonzalez-Badillo was "on notice" that Officer Nevarez was going to dismantle the boot when he expressed his belief that the boot contained drugs and invited Gonzalez-Badillo to smell it. Even if this were true, the fact that Gonzalez-Badillo may have *then* realized that Officer Nevarez might dismantle his boot says nothing at all as to whether his initial general consent authorized the damage to his property. Because a "typical reasonable person" would not anticipate that her general consent to a search authorizes damage to her property, any alleged "notice" to Gonzalez- Badillo just before Officer Nevarez dismantled the boot offers little insight as to the scope of Gonzalez-Badillo's general consent.[5]

---

[5] I agree that a suspect's failure to limit the scope of a search can be probative of whether that suspect's initial, general consent authorized the search. However, the factual circumstances "are highly relevant when determining what the reasonable person would have believed to be the outer bounds of the consent that was given." *Mendoza-Gonzalez*, 318 F.3d at 667. Thus, there are undoubtedly situations where the scope of an officer's search exceeds the bounds of what a "typical reasonable person" might expect her general consent to authorize, such that the suspect's failure to affirmatively limit that consent after the fact is not informative. For example, the fact that a suspect authorizes an officer to search her person would not be thought to authorize a body-cavity search, regardless of whether the suspect subsequently attempted to limit the scope of the search.

Distinguishing the Tenth Circuit's decision in *Osage*, the majority opinion argues that Gonzalez-Badillo's consent authorized the dismantling of his boot because Officer Nevarez's search did not "destroy" the boot or "render[] [it] any less useful than [it] had been before the sole was pulled open from a pre-existing hole." To begin with, the majority opinion cites no case of ours holding that destroying or rendering property useless is necessary—not merely sufficient—to finding a search outside the bounds of general consent. Indeed, most of the cases on which the majority opinion relies were careful to emphasize that *no damage* resulted from the searches at issue. *See supra* at n.4. In any event, Gonzalez-Badillo's boot *was* rendered useless as footwear after Officer Nevarez pried off its sole. A boot with a detached, or partially detached, sole does not give the wearer a stable foundation on which to walk, nor is it effective to protect against dirt, water, and other elements.[6]

Relying on *United States v. Marquez*, the majority opinion argues further that the search was lawful because Officer Nevarez "inflicted minimal damage on the boot." To begin with, unlike in this case, the district court in *Marquez* expressly "found" that the suspect's property was not "damaged or destroyed" as a result of the search. 337 F.3d at 1209. Even assuming *arguendo* that damage was minimal, that should not change the outcome of this case. In *Osage*, for example, the can of

---

[6] Indeed, although some footwear derives a significant amount of its value from the soles (the aforementioned Christian Louboutins), all shoes need soles to be useful as shoes. These work boots' lack of a signature red sole or high-dollar pricetag does not mean that they are just as useful with as without soles.

tamales—like Gonzalez-Badillo's boot—had already been opened by the suspect in order to insert drugs and then resealed. *See Osage*, 235 F.3d at 519, 520–21. Nonetheless, the Tenth Circuit concluded that the suspect's general consent to search did not authorize the officer to reopen the tamale can—even though the suspect could have easily resealed the tamale can just as he had done after inserting the drugs. Thus, contrary to the majority opinion's approach, the Tenth Circuit held a search unconstitutional despite the "minimal" damage to the suspect's property.[7]

In any event, adopting a blanket rule requiring destruction or uselessness is inconsistent with Supreme Court precedent and gets the Fourth Amendment inquiry exactly backwards. The Fourth Amendment requires us to determine the scope of consent from the standpoint of "the typical reasonable person," *Jimeno*, 500 U.S. at 251, not by imposing a one-size-fits-all rule. As to this inquiry, the factual circumstances "are highly relevant when determining what the reasonable person would have believed to be the outer bounds of the consent that was given." *Mendoza-Gonzalez*, 318 F.3d at 667 (citing *Ibarra*, 965 F.2d at 1357). So, even if destruction and uselessness were the appropriate rule to apply to a box or other container, a broader rule should apply to an article of clothing (such as a boot), which is different in

---

[7] Under the majority opinion's theory, a search of a locked briefcase would be constitutional if the briefcase could be subsequently rendered functional—and yet the Supreme Court has cautioned that "[i]t is very likely *unreasonable* to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk." *See Jimeno*, 550 U.S. at 251–52 (emphasis added).

kind: its intended use is not storage, nor is it designed to be opened and closed like a container.

Accordingly, I would hold that Gonzalez-Badillo's consent to a search of his bag would not be understood by the "typical reasonable person" to authorize Officer Nevarez to remove the sole of his boot. *See Jimeno*, 500 U.S. at 251.

B.

The majority opinion decides this appeal exclusively on the scope-of-consent issue. Because I do not agree that Gonzalez-Badillo's general consent authorized Officer Nevarez to disassemble the boot, I address the Government's other arguments for affirmance. The Government argues that the suppression ruling can be affirmed on the bases relied on by the magistrate judge and the district court judge: (1) the search was reasonable because it was authorized by the "plain view" exception to the warrant requirement; and (2) the search was reasonable because of exigent circumstances. We review whether the plain view doctrine applies *de novo*, and we review a determination of exigent circumstances for clear error. *See United States v. Williams*, 41 F.3d 192, 196 (4th Cir. 1994); *see also United States v. Blount*, 123 F.3d 831, 837 (5th Cir. 1997).

1.

Under the "plain view" doctrine, "[l]aw enforcement officers may seize anything they find in plain view without a search warrant." *United States v. Munoz*, 150 F.3d 401, 411 (5th Cir. 1998). This exception applies where: (1) the officers "are lawfully in a position" to view the object; (2) "its

incriminating character is immediately apparent"; and (3) "the officers have a lawful right of access to it." *Id.*; *see also United States v. De Jesus-Batres*, 410 F.3d 154, 159 (5th Cir. 2005).

The "plain view" exception to the Fourth Amendment plainly does not render the search of Gonzalez-Badillo's boot constitutional. As just explained, Gonzalez-Badillo's general consent to search his bag did not authorize Officer Nevarez to pry open the sole of his boot, and so Officer Nevarez did not have a "lawful right of access" to the contents of the boot. *Munoz*, 150 F.3d at 411.

The Government contends, however, that the search was justified by the plain view exception because, in its view, it was a "foregone conclusion" that there was contraband in the sole of the boot because of all the other evidence pointing this direction. This argument confuses the Fourth Amendment analysis: probable cause does not, in normal circumstances, authorize a search; it is instead the key to obtaining a warrant which, in turn, authorizes the search. *Vernonia Sch. Dist. 47J*, 515 U.S. at 653 ("Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant," and "[w]arrants cannot be issued, of course, without the showing of probable cause."). Contrary to the Government's position, the existence of overwhelming probable cause is not a reason to ignore the warrant requirement; indeed, it is in precisely those circumstances that a warrant will be the easiest to obtain. The Government cites no binding authority

to support its argument.[8]

2.

Nor is the warrantless search justified by an exigent circumstance. It is well-established that a warrantless search may be lawful where circumstances requiring immediate action are present. *See United States v. Rico*, 51 F.3d 495, 500–01 (5th Cir. 1995). For example, we have recognized that a warrantless search may be lawful where: (1) there is "the possibility that evidence will be removed or destroyed"; (2) officers are in "pursuit of a suspect"; or (3) there is an "immediate safety risk[ ] to officers and others." *United States v. Newman*, 472 F.3d 233, 237 (5th Cir. 2006).

The Government, following the magistrate judge's reasoning, argues that exigent circumstances existed in this case because Gonzalez-Badillo was preparing to board a bus. This is simply wrong. Gonzalez-Badillo was no longer in line to board the bus; he had voluntarily stepped out of

---

[8] The Government's reliance on *United States v. Corral*, 970 F.2d 719 (10th Cir. 1992) is unpersuasive. In that case, the Tenth Circuit held that the plain view doctrine authorized the warrantless search of a brick of cocaine (*i.e.*, to cut the wrapping around the cocaine) because of the "virtual certainty" that the packaging contained cocaine, and so no further expectation of privacy was invaded by physically searching the brick. *Id.* at 725–26. There, however, the "certainty" followed from the fact that an undercover police officer had previously cut into the packaging and confirmed that it contained cocaine and then subsequently communicated this fact to his colleagues who conducted the search. *Id.* at 722–23, 725–26. Whatever the merits of this decision—which is not binding—the basis for virtual certainty in that case does not exist here.

line at Officer Nevarez's request while the search was being conducted. Nor was any other exigent circumstance present. There is absolutely no evidence or contention that Gonzalez-Badillo posed a threat to Officer Nevarez or anyone else. It is conceded that he did not possess a weapon, and there is no suggestion that Officer Nevarez suspected him of possessing a weapon. Far from signaling potential danger, Gonzalez-Badillo cooperated fully with Officer Nevarez's every request. Further, there was no potential for destruction of evidence as Officer Nevarez was in possession of the bag and the boot.

The Government relies on our decision in *United States v. Johnson*, 862 F.2d 1135 (5th Cir. 1988), but that decision is readily distinguishable. There, the warrantless search was conducted when the police officers had been informed that the two suspects "could be armed," where the officers would have "needed to use both surprise and superior force in effecting the arrest," where there were "many innocent citizens . . . waiting in the bus station," and where the "suspects were preparing to leave within minutes." *Id.* at 1138–40; *see also id.* at 1141. It was based on these factors—"and in particular the reasonable concerns for safety presented by this arrest"—that the warrantless search was upheld in *Johnson*. *Id.* at 1139. None of these factors is present here.

The Government's argument is especially unconvincing given that Gonzalez-Badillo has conceded that Officer Nevarez had probable cause (or at least reasonable suspicion) to detain him while awaiting a warrant authorizing a search of the boot.

To find exigency in these circumstances would invite law enforcement to forego taking steps lawfully available to them.

* * * * *

I would therefore hold that the magistrate judge and the district court judge wrongly applied the plain view doctrine and clearly erred in finding exigent circumstances.

II.

To ensure that our constitutional liberties endure, the judiciary must resist any invitation to ease the Fourth Amendment's reins on government action—especially in cases like this one, as the parameters of Fourth Amendment protection are constantly litigated in drug cases. *See, e.g.*, Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 435 (2012). Unfortunately, the majority opinion has let down its guard. According to the majority opinion, law enforcement is now free to construe general consent to search a bag to include consent to pull apart, pry open, or otherwise dismantle property found within— all on the implausible premise that a reasonable person would contemplate such damage to property when giving general consent to search a bag. This ruling "does not implement the high office of the Fourth Amendment to protect privacy." *Georgia v. Randolph*, 547 U.S. 103, 127 (2006) (Roberts, C.J., and Scalia, J., dissenting).

Because Gonzalez-Badillo did not consent to the warrantless search of his boot and because the Government offers no other valid basis for justifying the search, I would reverse the denial of the motion to suppress and vacate his conviction and sentence. I respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

[filed January 15, 2016]

UNITED STATES OF AMERICA	§	
	§	
vs.	§	CRIMINAL ACTION NO.
	§	5:15-CR-399
ALEXIS GONZALEZ-BADILLO	§	

MEMORANDUM AND ORDER

Pending before the Court are Defendant Alexis Gonzalez-Badillo's objections (Dkt. 32) to the Report and Recommendation of Magistrate Judge J. Scott Hacker (Dkt. 29) on Defendant's Motion to Suppress Evidence (Dkt. 15).

The Motion asked that two pieces of evidence be suppressed: (1) the fruits of an initial search of Defendant and (2) inculpatory statements made by Defendant after he invoked his right to counsel. (Id.) The Report and Recommendation recommended that Defendant's Motion be granted with regard to the inculpatory statements and denied with regard to the fruits of the search. (Dkt. 29). Defendant objected to Report and Recommendation's denial. (Dkt. 32). The Court reviews Defendant's objections de novo. 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59(b)(3).

The Court thoroughly reviewed of the facts of this case, as well as the relevant opinions from the Fifth Circuit and Supreme Court. After doing so, this Court recognizes that the question of whether Defendant's initial encounter with police was consensual is a close call. The Court agrees with the Magistrate Judge,

however, that Defendant's encounter was consensual. Because the encounter was consensual, the Magistrate Judge's analysis concluding that the search of Defendant's bag was knowing and voluntary is correct. See United States v. Galberth, 846 F.2d 983, 987 (5th Cir. 1988). It is well-settled that consent is an exception to the warrant requirement for searches. United States v. Tomkins, 130 F.3d 117, 121 (5th Cir. 1997). Even if the scope of Mr. Gonzalez-Badillo's consent did not extend to searching inside the boots that contained the drugs, that latter search was supported by probable cause in part due to the police officer smelling a chemical masking agent. See United States v. Pierre, 958 F.2d 1304, 1310 (5th Cir. 1992) (recognizing a "plain smell" exception to the warrant requirement); United States v. Trejo, 378 F. App'x 441, 449 (5th Cir. 2010) (acknowledging the smell of masking agents as contributing to probable cause).

Accordingly, the Court OVERRULES Defendant's objections (Dkt. 32) and ADOPTS the Magistrate Judge's Report and Recommendation (Dkt. 29). Defendant's Motion to Suppress (Dkt. 15) is therefore DENIED to the extent that Defendant seeks to suppress the fruits of the search and GRANTED to the extent Defendant seeks to suppress his confessions.

DONE at Laredo, Texas, this 15th day of January, 2016.

/s/ George P. Kazen
George P. Kazen
Senior United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

[filed August 6, 2015]

UNITED STATES OF AMERICA	§	
	§	
vs.	§	CRIMINAL ACTION NO.
	§	5:15-CR-399
ALEXIS GONZALEZ-BADILLO	§	

REPORT & RECOMMENDATION

Defendant ALEXIS GONZALEZ-BADILLO, who stands charged in this case with conspiracy to possess with intent to distribute, and possession with intent to distribute, 100 grams or more of heroin (Dkt. No. 8), has filed a Motion to Suppress (Dkt. No. 15). Defendant moves to suppress both the fruits of a search of his bag and the inculpatory statements he made following a police encounter at a bus station. Defendant alleges that (1) the encounter constituted an illegal seizure; (2) his consent to search his belongings was not validly obtained; (3) Defendant's subsequent inculpatory statements were made involuntarily; and (4) there was an impermissible delay in presentment. *(See id.).* The Government has filed a response to the pending motion, arguing that (1) the encounter was consensual; (2) Defendant gave valid consent to the search; (3) Defendant gave a knowing and intelligent waiver of his rights before giving statements to law enforcement; and (4) Defendant's confession occurred within the safe harbor period for presentment. (Dkt. No. 18).

Pursuant to the District Judge's referral, the undersigned conducted a suppression hearing on July 6, 2015. Defendant was in attendance and represented

by appointed counsel. The Government presented law enforcement agents present during the initial encounter with Defendant and his subsequent interviews. First, the Government called Laredo Police Department Officer Rogelio Nevarez, who engaged Defendant in the initial encounter and conducted the search of Defendant's bag.[1] The Government then called Drug Enforcement Administration ("DEA") Special Agent Mike Higgins, who participated in Defendant's subsequent interviews and processing of Defendant.[2] Defendant also testified.

Having considered the record, the law, and the parties' arguments, the undersigned will recommend that Defendant's Motion to Suppress be GRANTED in part and DENIED in part.

Factual Findings

On April 10, 2015, Officer Nevarez was conducting criminal interdiction efforts at the Americanos Bus Station in Laredo, along with his partner, Officer Armando Aguilar. (July 6 Hr'g at 9:26 - 9:27 a.m.). Officers Nevarez and Aguilar were standing inside the bus station lobby until boarding was called for a bus bound for Houston. *(Id.* at 9:48, Def. Ex. 1 at 10:09 - 10:24).[3] At that point, the officers went out to the

---

[1] Officer Nevarez has served with the Laredo Police Department for nine years. He currently serves as a criminal interdiction officer in the Pipeline Unit and has previous experience with drug cases. Officer Nevarez has worked criminal interdiction at the bus station for four years.

[2] Special Agent Higgins has been a DEA Agent for three years and has been stationed in Laredo, Texas for the last two years.

[3] Both Defendant's and the Government's briefing on this Motion indicate that these events occurred around 9:20 to 9:30 a.m. However, the surveillance video from the bus station is time stamped, showing that the officers began to work the boarding

garage area where the line of passengers was forming to board the bus. Officer Aguilar stood at the front of the line next to the bus entrance, and Officer Nevarez stood further back, near passengers toward the end of the line. (July 6 Hr'g at 9:29). Surveillance video from the bus station shows that the officers were not engaging every individual in the line, and indeed, some passengers were proceeding to board without talking to the officers. (Def. Ex. 2 at 10:25). The testimony of Officer Nevarez and that of Defendant differed significantly as to how the encounter began and details of the subsequent interactions with Defendant-these competing versions of events will be laid out separately.

Officer Nevarez testified that, as Defendant neared him on the line to board the bus, Defendant commented to him that it was humid outside. *(Id.* at 9:30). Officer Nevarez inquired as to where Defendant was headed. When Defendant replied that he was going to Houston, Officer Nevarez advised Defendant that it would likely be more humid there. Officer Nevarez asked Defendant about his travel itinerary, to which Defendant replied that he was from California and had boarded the wrong bus trying to travel to Houston. *(Id.).* Officer Nevarez found this response strange as he had never heard of someone taking the wrong bus and ending up in Laredo. *(Id.* at 9:31). At this point, Officer Nevarez asked Defendant to step to the side of the passenger line to continue the conversation and to not impede the other passengers attempting to board the bus. *(Id.* at 9:31). Officer

---

line at 10:24. (Def. Ex. 1, 2 at 10:24). When the Court inquired about this discrepancy at the suppression hearing, counsel for Defendant indicated that the video may be delayed, but could not clarify the correct time. (July 6 Hr'g at 10:51 a.m.).

Nevarez further observed that Defendant's travel bag still had a price tag attached to it. *(Id.* at 9:32). The surveillance video shows that Officer Nevarez and Defendant moved a few steps away to a nearby trash can. (Def. Ex. 2 at 10:25). At the same time, the surveillance video also shows Officer Aguilar moving further away from the line to conduct a search of another passenger, which continues for several minutes. *(Id.* at 10:25 - 10:29).

At some point immediately before, during, or after the request to move off the line, Officer Nevarez asked Defendant for his identification in order to call in a dispatch check for any warrants. (July 6 Hr'g at 9:34 a.m.). At that point, Defendant produced a California identification card which Officer Nevarez seems to have retained for the remainder of the encounter. *(Id.* at 10:42). Officer Nevarez informed Defendant that he was looking for anything illegal traveling through the bus station and asked for consent to search Defendant's bag. *(Id.* at 10:22 - 10:23). Defendant consented to the search and handed his bag to Officer Nevarez. *(Id.* at 9:34). As soon as Officer Nevarez opened the bag, he smelled a strong chemical odor that he recognized as a masking agent used in drug smuggling. *(Id.* at 10:24). Officer Nevarez further observed a pair of used work boots inside of translucent plastic shopping bags. *(Id.* at 9:34, 10:25). When Officer Nevarez grasped the bags containing the boots, he could feel that the soles of the boots were lumpy. *(Id.* at 9:34). Officer Nevarez compared it to the feeling of soles full of sand instead of the normal hard soles of work boots. *(Id.* at 10:40). Officer Nevarez further testified that he had felt boots like this before that were being used to smuggle drugs and had seen this method of drug smuggling during trainings. *(Id.*

at 9:35, 10:43). At this point, Officer Nevarez informed Defendant that he was "99% sure" that there were drugs in the boots and put the boots up for Defendant to smell them. *(Id.* at 9:35). Officer Nevarez testified that Defendant then began sweating more and made a surprised face. *(Id.).*

When Officer Nevarez removed the boots from the plastic bags, he observed a small opening on the side of one of the boots where it appeared that the sole wasn't glued all the way shut. *(Id.* at 9:36). Officer Nevarez could see plastic inside the sole of the boot by manipulating the boot to look through the slit in the side of the sole without increasing the size of the opening. *(Id.,* at 9:36, 10:41). At that point, Officer Nevarez used his fingers to pull open the boot from this opening, which revealed a plastic bag containing a brown rocky substance, later confirmed to be heroin. *(Id.* at 9:38, 10:28). Defendant was then placed under arrest and read his Miranda rights. *(Id.* at 9:37). Toward the end of the search, Officer Aguilar walked over to join Officer Nevarez, and Officer Aguilar handcuffed Defendant at the point of the arrest. (Def. Ex. 2 at 10:29 - 10:30). The entire encounter between Officer Nevarez and Defendant, leading to his arrest, lasted about five minutes. *(Id.* at 10:25 - 10:30). Once Defendant was taken to the officers' squad car, Defendant invoked his right to not speak without an attorney present. (July 6 Hr'g at 9:39 a.m.). Defendant was then transported to the Laredo Police Department.

After arriving at the police department, Defendant was placed in an interrogation room with recording equipment. *(Id.* at 9:38). The officers engaged the recording equipment, read Defendant his Miranda rights again, and asked him where he was coming

from. *(Id.).* At that point, Defendant invoked his right to counsel again and the officers turned off the recording equipment. *(Id.* at 9:39). Officer Nevarez testified that this was done in order to preserve a video record of Defendant being read his Miranda rights and that he did not expect Defendant to make a statement at that time, given that he had previously invoked his right. *(Id.* at 10:30, 11 :05). Less than a minute after the officers turned off the recording equipment, Defendant indicated that he was willing to talk to them. *(Id.* at 10:30). Defendant proceeded to give an inculpatory statement about how and why he came to carry drugs through Laredo. *(Id.* at 9:40 - 9:41).

During the interview, the officers advised Defendant that they worked closely with the DEA and that the DEA may be able to do more to help Defendant. *(Id.* at 9:41). Defendant agreed to speak with DEA agents. *(Id.).* Officer Nevarez then called DEA Special Agent Roy Ham. *(Id.).* Agent Higgins testified that he and Agent Ham arrived at the Laredo Police Department to interview Defendant at approximately 11 :30 a.m. *(Id.* at 10:46). Agents Ham and Higgins obtained background information from Defendant and read him his Miranda rights again at approximately 12:00 p.m. *(Id.* at 10:47). Defendant then gave an inculpatory statement to the DEA agents in an interview lasting approximately one hour. *(Id.).* The DEA agents then left the Laredo Police Department. Someone from the Laredo Police Department called Agent Ham shortly thereafter, advising that federal prosecution was preferable and asking the DEA agents to take custody of Defendant. *(Id.* at 10:48). Around 2:00 p.m., the DEA agents returned to the Laredo Police Department, retrieved Defendant, and brought him back to the DEA office.

(Id.). Defendant was processed, fingerprinted, signed written waivers of his rights, and gave a written statement to the DEA agents. *(Id.* at 10:48 - 10:49). Defendant's written waivers and written statement were signed around 4:30 p.m. *(Id.* at 10:56 - 10:59).

Defendant's testimony of these events differs in several ways. Defendant testified that he did not initiate conversation with Officer Nevarez at the bus station and that Officer Nevarez said hello to him first. *(Id.* at 11:12 - 11:13). Defendant further testified that he did not feel free to refuse to answer Officer Nevarez's questions or to board the bus without talking to the officer. *(Id.* at 11:15, 11:19). Defendant testified that Officer Nevarez did not ask him, but told him to step out of line to continue their conversation. *(Id.* at 11:17, 11:43). Defendant acknowledged that he consented to the search of his bag, although he testified that he felt like he didn't have a choice to refuse. *(Id.* at 11 :22). Defendant testified that if he had known he could refuse, he would have refused consent to search his bag because he knew there were drugs in the bag. *(Id.* at 11:21). Defendant claimed not to have smelled any odor coming from his bag or his boots. *(Id.* at 11:20). Defendant further testified that there was no hole or opening in the side of the boot. *(Id.* at 11:21). Notably, Defendant testified that Officer Nevarez specifically asked him for consent to open the boot, and Defendant claimed to have told Officer Nevarez that he did not consent to the boot being searched. *(Id.* at 11:22). Defendant further testified that Officer Nevarez asked his partner for a knife to cut open the boot and instead used a handcuff key to slice it open. *(Id.* at 11:22 - 11:23).

Defendant further testified about his invocation of his right to counsel at both the squad car and in the

interrogation room. Defendant testified that after the video equipment was turned off, Officer Nevarez told him that it would be better for him if he cooperated and that the cartels run the jails. *(Id.* at 11:25, 11:48). Defendant testified that he was afraid and felt under pressure to confess. *(Id.* at 11:26, 11:30). After Defendant confessed to the police officers, he testified that he felt obligated to continue to waive his rights and give inculpatory statements to the DEA agents as well. *(Id.* at 11:29). Defendant further testified that he did not finish the twelfth grade in high school and that he had never had a police interaction like this before. *(Id.* at 11:10, 11:18 - 11:19). The Court notes from the outset that it found much of Defendant's testimony to be unbelievable.

Discussion

A. Legal Standard

The Fourth Amendment to the United States Constitution guarantees "[t]he 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." U.S. Const. amend. IV. However, "[l]aw enforcement officers do not violate the Fourth Amendment prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton,* 536 U.S. 194, 200 (2002). A consensual encounter between an officer and a citizen will ripen into a seizure, thereby triggering the Fourth Amendment and requiring the officers to articulate reasonable suspicion or probable cause, "only when the officer, by means of physical force or show of authority, has in

some way restrained the liberty of [the] citizen." *United States v. Mask,* 330 F.3d 330, 336 (5th Cir.2003) (quoting *Terry v. Ohio,* 392 U.S. 1, 19 (1968)). Thus, "[i]f a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *Drayton,* 536 U.S. at 200.

The Fourth Amendment generally requires law enforcement to obtain a warrant before searching an individual, subject to certain exceptions. A search pursuant to consent is an exception to the warrant requirement. *United States v. Tompkins,* 130 F.3d 117, 121 (5th Cir. 1997). The Government must prove that consent was freely and voluntarily given by a preponderance of the evidence. *United States v. Santiago,* 410 F.3d 193, 198-99 (5th Cir. 2005). Once taken into custody, individuals are entitled to be read certain rights before being subject to interrogation, including their right to remain silent and their right to counsel. *Miranda v. Arizona,* 384 U.S. 436, 479 (1966). Once an individual indicates that they wish to remain silent or otherwise invoke these rights, the interrogation must end. *Id.* at 4 73-74. If the individual requests an attorney, the interrogation must end until an attorney is present. *Id.* at 474. Further, "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of [law enforcement] (other than those normally attendant to arrest and custody) that [law enforcement] should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode lslandv. Innis,* 446 U.S. 291, 301 (1980).

Additionally, once an individual has invoked their Fifth Amendment rights, they cannot be subject to further interrogation "unless the accused himself initiates further communication, exchanges, or

conversations with [law enforcement]." *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981). In order for an individual's conduct to "initiate[] further conversation," it must "evince[] a willingness and a desire for a generalized discussion about the investigation; ... not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Oregon v. Bradshaw,* 462 U.S. 1039, 1045-46 (1983).

B. Analysis

Defendant alleges that his encounter with Officer Nevarez constituted a seizure. Defendant also argues that he did not give voluntary consent to the search of his belongings. Defendant further argues that he did not voluntarily waive his Fifth Amendment rights before giving inculpatory statements to law enforcement. Finally, Defendant contends that his confession was made outside of the safe harbor for prompt presentment.

1. Initial Encounter

Defendant's entire encounter with Officer Nevarez, up to the point that he was arrested, was consensual. As an initial matter, Officers Nevarez and Aguilar's criminal interdiction techniques when working the bus boarding line do not constitute a seizure of the passengers attempting to board the bus. In *Drayton,* the United States Supreme Court found that an encounter was consensual where police officers boarded a bus and questioned some individual passengers. 536 U.S. at 203. The Supreme Court found it persuasive that "[t]he officers gave the passengers no reason to believe that they were required to answer the officers' questions" and the officers "did not brandish a weapon or make any intimidating

movements." *Id.* at 203-204. The Fifth Circuit has similarly held that even when law enforcement board a bus and systematically request identification from every occupant, the encounters are still consensual. *United States v. Mendieta-Garza,* 254 F. App'x 307, 312 (5th Cir. 2007) (per curiam). In *Mendieta-Garza,* the Fifth Circuit found that this conduct "did not constitute a seizure because it would not have convinced a reasonable person that he was not free to terminate the encounter or decline the request." *Id., see also United States v. Montano,* 505 F. App'x 299, 300 (5th Cir.) (per curiam), *cert. denied,* 133 S. Ct. 2367 (2013) (finding no seizure where border patrol agents stopped every passenger before boarding a bus at a bus station); *United States v. McCurdy,* 444 F. App'x 817, 818 (5th Cir. 2011) (per curiam) (finding no seizure where officer boarded bus and spoke to passengers at bus station); *United States v. Facen,* 135 F. App'x 734, 736 (5th Cir. 2005) (per curiam) (same).

Here, Officers Nevarez and Aguilar did not systematically stop every passenger before permitting them to board the bus. The officers instead engaged in conversations with a couple individual passengers as they waited in line, while other passengers were free to board the bus without acknowledgment from the officers at all. The surveillance video shows that some passengers boarded the bus while both officers were standing near the line conversing with separate individuals. It also shows that when Officer Nevarez was talking with Defendant, the bus driver motioned for other passengers to continue boarding, and while both officers were conducting individual searches, the passengers continued to board the bus without any interaction with the officers. Further, the passengers were outside of the bus when they came in contact with

the officers, with more freedom of movement than they would have had on board the bus. The law enforcement interactions here are certainly less restrictive than those held not to constitute seizures in *Drayton* and *Mendieta-Garza.* To the extent that Defendant argued at the suppression hearing that the bus line stopped when Officer Nevarez was talking with Defendant, this seems more attributable to politeness than a seizure, with the remaining passengers hesitating to go in front of Defendant. Indeed, the passengers standing behind Defendant did move to board the bus when they were waived forward by the bus driver, not after receiving any approval from law enforcement. Further, the passengers in line in front of Defendant continued to board the bus without talking to either officer. Therefore, there was no general seizure of the bus passengers generally, or Defendant in particular, merely by the officers engaging in their interdiction duties along the line.[4]

Even though these initial interdiction efforts did not constitute a seizure, Defendant also seems to argue that he was subject to a seizure when he and Officer Nevarez stepped away from the line. In *United States v. Williams,* the Fifth Circuit held that an officer's request for the defendant to follow him from a bus boarding area back into the bus station was a consensual encounter. 365 F.3d 399, 404-05 (5th Cir.

---

[4] Defendant relies upon *United States v. Bowles,* 625 F.2d 526 (5th Cir. 1980) to argue that Officer Nevarez's interdiction efforts and interaction with Defendant constituted a seizure. (Dkt. No. 15 at 6-8). The undersigned finds *Bowles* clearly distinguishable from the present case. In *Bowles,* the Fifth Circuit found that the officer engaged in a show of force akin to "flashing lights or sirens" by physically blocking the defendant's path and brandishing a badge. 625 F.2d at 532. Here, Officer Nevarez engaged in no such show of force.

2004) (per curiam); *see also Facen,* 135 F. App'x at 735 (same). In *Williams,* the Fifth Circuit found it persuasive that the area where the defendant was requested to move was still an open area with other bystanders nearby. 365 F.3d at 404-05. Here, Officer Nevarez's request for Defendant to step to the side of the line is certainly less intrusive than the request made in *Williams*. Indeed, the security camera footage shows that Officer Nevarez and Defendant only moved a few steps away, still in the same open bus boarding area surrounded by other passengers and bus station employees. The Court finds that a reasonable person in this circumstance would still feel at liberty to terminate the encounter or deny the request.

Finally, at the suppression hearing, Defendant seemed to argue that he was subject to a seizure when Officer Nevarez retained his identification. "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *INS v. Delgado,* 466 U.S. 210, 216, (1984). When determining whether a seizure occurred, the Court must examine "the coercive effect of police conduct, taken as a whole, rather than . . . focus on particular details of that conduct in isolation." *Michigan v. Chesternut,* 486 U.S. 567, 573 (1988).

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 554 (1980) (internal citation omitted). Further, the Supreme Court has stressed that a Fourth Amendment analysis requires a consideration of all circumstances, and that there are no "litmus-paper" tests for determining a seizure. *See Ohio v. Robinette,* 519 U.S. 33, 39 (1996) (examining "the totality of the circumstances").

Here, the undersigned cannot conclude that Officer Nevarez's retention of Defendant's identification during the very brief period of time between when he called in a dispatch check and when he got Defendant's consent to search his bag constituted a seizure. The Court has found no Fifth Circuit precedent for a consensual encounter being converted to a seizure by the mere fact that the law enforcement officer held the defendant's identification. The Court recognizes the many cases where a *Terry* stop became a consensual encounter only after the defendant's identification was returned.[5] However, such situations are clearly distinguishable from the present case. Here, Defendant was already engaging with the officer in a consensual encounter and did not need a signal, such as a return of identity documents, that a seizure was completed and he was now free to go as in the *Terry* stop context. Defendant was free to go the entire time.

---

[5] *See, e.g., United States v. Gurrola,* 301 F. App'x 337, 341 (5th Cir. 2008) (holding that encounter was consensual after officer returned driver's license, issued a warning, and the driver turned to walk away); *United States v. Bessolo,* 269 Fed. App'x 413, 419 (5th Cir. 2008) (holding that ongoing detention was consensual after police officer returned driver's license and issued a traffic citation, but retained driver's copy of a rental car agreement); *United States v. Sanchez-Pena,* 336 F.3d 431, 443 (5th Cir. 2003) (holding that the encounter was consensual and consent to canine search was valid after officer returned driver's license and insurance card and indicated to driver that he was free to go).

Under the totality of the circumstances, Officer Nevarez's retention of Defendant's identification for this short period of time does not rise to level of a seizure as defined by *Mendenhall* and subsequent cases.[6] As such, Defendant was not seized at any point up to his arrest.[7]

2. Consent to Search

Defendant gave voluntary consent to the search of his bag. It is well settled that a search conducted pursuant to consent is one exception to the Fourth Amendment's warrant requirement. *United States v. Rounds,* 749 F.3d 326, 338 (5th Cir. 2014). The Fifth Circuit examines six factors in determining whether consent to search is voluntary:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to

---

[6] In the absence of Fifth Circuit case law directly on point, the Court finds persuasive a case from the Fourth Circuit. In *United States v. Analla,* the Fourth Circuit held that a defendant was not seized, despite a police officer holding his identification, because "[the officer] necessarily had to keep Analla's license and registration for a short time in order to check it with the dispatcher" and "Analla was free at this point to request that his license and registration be returned and to leave the scene." *United States v. Analla,* 975 F.2d 119, 124 (4th Cir. 1992). Similarly here, Officer Nevarez necessarily had to hold on to Defendant's identification briefly, while he waited for the dispatch check to come back, which did not clear until he had already obtained consent and began searching Defendant's bag.

[7] The Court also notes that if the record had been developed further on this issue, Officer Nevarez could have already developed reasonable suspicion to detain Defendant on a *Terry* stop, even absent Defendant's consent.

> consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

United States v. Galberth, 846 F.2d 983, 987 (5th Cir. 1988). In examining the factors, "no one of the six factors is dispositive or controlling of the voluntariness issue." *Id.*

Here, looking at the factors under the totality of the circumstances, Defendant's consent to the search of his bag was voluntary. Most notably, Defendant was engaged in a brief consensual encounter with Officer Nevarez when he gave consent to search his bag. They had been speaking for no more than a couple minutes in an open bus terminal surrounded by other passengers, with Defendant engaging voluntarily. Defendant had further already been cooperative with Officer Nevarez, including agreeing to step to the side of the boarding line to continue their conversation. Defendant argued at the suppression hearing that he felt coerced into consenting. Officer Nevarez was still holding Defendant's identification when he asked for consent to search, which may suggest coercion.[8] However, Officer Nevarez did not engage in any physical or verbal intimidation in order to convince Defendant to consent, which are the typical hallmarks of coercive police procedures.[9] Defendant further argued that he was unaware of his rights and that his

---

[8] *See United States v. Cavitt,* 550 F.3d 430, 439 (5th Cir. 2008) (finding that "an officer's retention of identification documents suggests coercion").

[9] *See United States v. Tompkins,* 130 F.3d 117, 122 (5th Cir. 1997) (finding no coercion where "Tompkins was not handcuffed until the search revealed the presence of methamphetamine, no threats or violence were used, and there was no overt display of authority.")

limited education and intelligence should weigh in favor of involuntariness. Yet, Defendant did not present any evidence that he was less prepared for such an encounter, experientially or intellectually, than any average person.[10] Further, the Court notes that it found Defendant's testimony that he was concerned that the drugs would be found somewhat specious given his ongoing consent to engage in the encounter with Officer Nevarez and his belief that the drugs were concealed in the heels of the boots. When viewing the factors in totality, Defendant's consent to search his bag was voluntary.

Defendant gave general consent to search his bag, which to some extent, includes the contents of the bag. In conducting consent searches, "officers have no more authority to search than it appears was given by the consent." *United States v. Garcia,* 604 F.3d 186, 190 (5th Cir. 2010). Thus it is "important to take account of any express or implied limitations or qualifications attending that consent which establishes the permissible scope of the search in terms of such matters as time, duration, area, or intensity." *United States v. Green,* 388 F. App'x 375, 382-83 (5th Cir. 2010) (per curiam) (citing *United States v. Mendoza-Gonzalez,* 318 F.3d 663, 667 (5th Cir. 2003)). The scope of a consent search may also be limited by the expressed object of the search. *Garcia,* 604 F .3d at 190. Where an officer does not express the object of the search, it is the searched party's responsibility to explicitly limit the search's scope. *Id.* Absent limitation, "an affirmative response to a general request is evidence of general consent to search." *Id.* A

[10] The Court also notes that Defendant has a criminal conviction on his record, undercutting his argument that he had never had a police interaction like this before.

general consent to search does not extend to opening sealed or locked containers within the consented-to search area. *See Mendoza-Gonzalez,* 318 F .3d at 670-72 (holding that a cardboard box closed with tape was not a sealed or locked container and that general consent to search included consent to open the taped box). However, law enforcement may search any unlocked containers that could contain any type of contraband. *Id.* at 668-69.

Here, the undersigned found Officer Nevarez's testimony credible, when he testified that he did not ask for additional consent to search the boots specifically. The undersigned did not believe Defendant's testimony that Officer Nevarez separately asked for consent to search the boots. It doesn't follow reason that Defendant would have felt coerced to speak with Officer Nevarez, coerced to follow Officer Nevarez over to the trash can, coerced to consent to the search of his bag, but then emboldened to assert his rights at the search of the boots. Moreover, the undersigned also found Officer Nevarez's testimony credible to the extent that he described the pre-existing slit in the sole of the boot and his ability to see plastic inside the heel through manipulating the slit without widening the hole. Notably, the boots had clearly been opened previously to put the drugs inside. Consequently, either the boots had seemingly been resealed incompletely or, at some point in the transporting of the boot, the seal itself had opened up. As such, Officer Nevarez's manipulation of the boot so that he could see inside the slit was within the scope of the consent search. Officer Nevarez's manipulation of the boot did not widen the hole and did not require opening a sealed or locked container. Further, Officer Nevarez's training and experience

had informed him that drugs are sometimes smuggled inside of the heels of shoes. Therefore, Officer Nevarez's initial look inside the heel, through the pre-existing slit, was pursuant to Defendant's consent to search his bag, which included its contents.

Defendant's motion argues that he did not consent to Offer Nevarez "tearing apart the sole of the boots." (Dkt. No. 15 at 9). Indeed, breaking open a locked container or causing destruction or "structural demolition" is generally found to be outside the scope of a consent search. *See, e.g., Florida v. Jimeno,* 500 U.S. 248, 251-52 (1991) (finding that breaking open a locked briefcase would likely be "unreasonable"); *United States v. Ibarra,* 965 F.2d 1354, 1355-59 (5th Cir. 1992) (en banc) (per curiam) (holding unreasonable search where law enforcement used a sledgehammer to break into a boarded-up attic). However, at the point that Officer Nevarez saw the plastic inside the sole of the boot, as part of the consent search, he had probable cause to continue the search of the boot. "A police officer has probable cause to conduct a search when "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief' that contraband or evidence of a crime is present." *Florida v. Harris,* 133 S. Ct. 1050, 1055 (2013) (internal citations omitted). Again, at the point that Officer Nevarez searched the boots he had already smelled the chemical masking agent and felt the lumpy texture, all of which he was familiar with as techniques used to smuggle drugs. Officer Nevarez had observed surprise on Defendant's face at the chemical smell and that Defendant began sweating more. Further, Officer Nevarez had been able to see plastic inside the boot soles by peering through the pre-existing hole as part of the consent search. Officer

Nevarez had already stated that he was "99% sure" there were drugs in the boots. All of these factors constitute even more than the "fair probability" required for probable cause. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). Therefore, even absent specific consent to search the boots, Officer Nevarez had probable cause at this point to search them. As set out below, this probable cause supports various exceptions to the warrant requirement.

First, Officer Nevarez would have been entitled to open the boot to remove the drugs under the exigent circumstances exception to the warrant requirement. "The Fourth Amendment does not require police officers to delay in the course of an investigation to let fugitives escape once the net has been thrown, nor to endanger the lives of the police or the public while procuring a warrant." *United States v. Kreimes,* 649 F.2d 1185, 1192-93 (5th Cir. 1981) (justifying a search of luggage). In *United States v. Johnson,* the Fifth Circuit held that exigent circumstances permitted law enforcement to search suitcases at a bus station without consent and **without a warrant** where the defendants were attempting to board a bus. 862 F.2d 1135, 1138 (5th Cir. 1988) (emphasis added). In that case, the Fifth Circuit acknowledged that the officers could have arrested the defendants first and held them until a warrant could be obtained, as opposed to conducting the warrantless search, but the Fifth Circuit chose not to "undertake the metaphysical task of determining the relative intrusiveness of the two alternatives." *Id.* at 1139. Similarly here, Defendant had already take a wrong bus, unintentionally ending up in Laredo, seemingly causing a considerable delay in his travel to Houston. Officer Nevarez could have detained Defendant until he obtained a warrant, but

it seems such a course of action would have been relatively more intrusive than Officer Nevarez's warrantless search of Defendant's boots. In any event, exigent circumstances, including Defendant's imminent departure for Houston, merited Officer Nevarez's search of the boots.

Further, probable cause may support Officer Nevarez's extension of the consent search to removing the drugs from the boots, even absent another exception to the warrant requirement or explicit consent to destroy the boots. In *United States v. Santana-Aguirre,* the Eighth Circuit found that probable cause supported a destructive search of the contents of luggage. 537 F.3d 929, 932 (8th Cir. 2008). In that case, law enforcement officers got consent to search the luggage of a passenger in a bus terminal. *Id.* at 930. Inside the luggage, the officers found large, wax candles with inconsistent appearance that had clearly been repackaged. *Id.* at 931. The officer cut into the candles and discovered methamphetamine. *Id.* at 932. The Eighth Circuit assumed that this search constituted destruction of the candles, which would be impermissible based only on a consent search. *Id.* However, the Eighth Circuit held that the destructive search was permissible based on the probable cause the officers had developed. *Id.* at 932-33. Similarly here, as discussed above, Officer Nevarez had developed probable cause to search the boots, even through destructive means. Officer Nevarez had found Defendant's travel itinerary dubious, smelled the chemical masking agent, observed Defendants surprised reaction to the smell, observed Defendant's increased sweating, felt the lumpy texture of the boot soles, and saw the plastic inside the heel of the boot through the consent search. The boots that Officer

Nevarez arguably damaged were a relatively inexpensive item that already had a slit in the sole before the search began. The Court also notes that this situation is distinguishable from cases in which general consent was given and a subsequent destructive search was impermissible where probable cause had not developed yet. *See, e.g., Ibarra,* 318 F.3d at 1358. Therefore, since Officer Nevarez had already obtained voluntary general consent to search Defendant's bag, the undersigned finds that probable cause supported Officer Nevarez's continued search of the boots.

Moreover, Officer Nevarez was likely entitled to remove the drugs from the boot under the plain view exception to the warrant requirement. Warrantless seizures under the plain view exception require: 1) "that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed;" 2) that the item is in plain view; and 3) "its incriminating character must also be 'immediately apparent.'" *Horton v. California,* 496 U.S. 128, 136 (1990) (internal citations omitted). Here, Officer Nevarez came to view the plastic inside the boot through manipulating the boot pursuant to a consent search. The plastic inside was then readily viewable. Further, Officer Nevarez testified that he was 99% sure that there were drugs in the boots. Under these circumstances, where the officer has already smelled a chemical masking agent, felt the lumpy texture of the soles of the boots, saw plastic inside the heel of the boot, and has training and experience with drugs being smuggled through shoes, the undersigned believes that the incriminating

character of the boots was immediately apparent.[11] As such, Officer Nevarez was also entitled to seize the drugs inside the boot under the plain view exceptions to the warrant requirement. Overall, Officer Nevarez's search of Defendant's bag and boots was permissible.

3. Waiver of Rights

Defendant did not validly waive his Fifth Amendment rights before giving his confession to law enforcement. A waiver of *Miranda* rights must be voluntary and "constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Edwards v. Arizona,* 451 U.S. 477, 482 (1981). Under *Edwards,* once an accused invokes the right to counsel, he is not subject to further interrogation until counsel is available to him. *Id.* at 484-85. Answers Defendant gave to questions after he invoked his right to counsel would be inadmissible unless (1) Defendant initiated further discussions with police and (2) Defendant knowingly and intelligently waived his right to counsel. *Smith v. Illinois,* 469 U.S. 91, 95 (1984). If Defendant had invoked his right to counsel, his subsequent statements would be inadmissible unless the police "scrupulously honored" his right to cut off questioning. *Michigan v. Mosley,* 423 U.S. 96, 104 (1975) (holding admissibility of statements obtained after person in custody has decided to remain silent is case-by-case inquiry depending on whether police respected suspect's request).

---

[11] The undersigned believes that the incriminating character of the boots was immediately apparent as a drug container, akin to situations where law enforcement officers can see wrapped bundles, and without clearly seeing their contents, it is readily apparent that they contain drugs.

Here, Defendant invoked his right to counsel shortly after he was arrested, before being transported to the Laredo Police Department. The officers then approached Defendant for questioning again once Defendant had been placed in an interview room at the station. Although Officer Nevarez testified credibly that his only intention was to preserve a video record of Defendant being read his *Miranda* rights and that he didn't expect Defendant to give a statement at that time, Defendant was still approached for interrogation after having asserted his right to counsel. This constitutes a clear violation of the *Edwards* rule.

Defendant's subsequent inculpatory statements are only admissible if Defendant both (1) initiated the conversation, and (2) knowingly and intelligently waived his right to counsel. *Smith,* 469 U.S. at 95. The Government argues that Defendant initiated the conversation after the officers turned off the recording equipment in the interview room. However, the undersigned cannot conclude that this constituted an initiation as contemplated under *Oregon v. Bradshaw,* 462 U.S. 1039 (1983). In that case, the defendant had invoked his right to counsel and the interrogation ended. *Oregon,* 462 U.S. at 1041-42. Sometime later, the defendant was transported elsewhere and validly initiated a conversation by asking a question of a police officer. *Id.* at 1042. There, the Supreme Court held that in order for an individual's conduct to "initiate[] further conversation," it must "evince[] a willingness and a desire for a generalized discussion about the investigation; ... not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Id.* at 1045-46. Here, Defendant had just been subject to an impermissible interrogation and was still sitting in the interrogation room with the

officers. If Defendant's initial invocation of rights had been "scrupulously honored," as required, he would not be in an interrogation room undergoing an impermissible attempted interrogation. Given these circumstances, it seems unlikely that Defendant's comments could constitute an initiation under *Oregon,* as Defendant's comments came less than a minute after being subject to an impermissible interrogation. In the absence of Fifth Circuit precedent directly on point, the undersigned is persuaded by a case from the Eleventh Circuit. In *United States v. Gomez,* a defendant was subject to continued interrogation after invoking his right to counsel. 927 F.2d 1530, 1536 (11th Cir. 1991). A few minutes later, the defendant then indicated his willingness to cooperate and offered inculpatory statements. *Id.* There, the Eleventh Circuit held that:

> Once the agents have, as here, violated *Edwards,* no claim that the accused "initiated" more conversation will be heard. Indeed, *Edwards* would be rendered meaningless if agents were permitted to continue interrogation after the request for counsel, and then claim that the consequent response by the accused represented initiation and permitted a waiver of the asserted counsel right.

Id. at 1539 (internal footnotes omitted).[12] The undersigned is similarly persuaded here that any

---

[12] *See also United States v. Thomas,* 521 F. App'x 878, 884 (11th Cir. 2013) (holding that a defendant did not validly initiate conversation with law enforcement 15-20 minutes after an *Edwards* violation). *But see Hunter v. State,* 148 S.W.3d 526, 531 (Tex. App. 2004) (rejecting the *Gomez* approach and holding "the appropriate inquiry should evaluate the totality of the circumstances and determine whether the reinitiation was the

statements Defendant made in the interview room mere seconds after the *Edwards* violation could not constitute initiation.

Assuming for argument sake that Defendant's statements to the officers did constitute a valid initiation of contact, Defendant's waiver of his right to counsel was not knowing and voluntary. The standard for determining whether a confession or inculpatory statement is voluntary is whether, taking into consideration the "totality of the circumstances," the statement is the product of the individual's "free and rational" choice. *United States v. Ornelas-Rodrigues,* 12 F.3d 1339, 1347 (5th Cir. 1994). The question of voluntariness requires "an assessment of human motivation and behavior" by the court. *United States v. Martinez-Perez,* 625 F.2d 541, 542 (5th Cir. 1980). A statement is involuntarily if the government obtained it by physical or psychological coercion or by improper inducement such that the suspect's will was overborne. *Haynes v. Washington,* 373 U.S. 503, 513-14 (1963). Courts analyzing an alleged waiver of rights after an *Edwards* violation have looked to the amount of time that has passed between the violation and the waiver. *See Gomez,* 927 F.2d at 1539; *Thomas,* 521 F. App'x at 884.

Here, Defendant was subject to improper inducement through an *Edwards* violation by the

---

product of coercive pressures."). The Court recognizes, as the Court in *Gomez* did, that "[i]t may be possible for enough time to elapse between the impermissible further interrogation and the 'initiation' that the coercive effect of the interrogation will have subsided." *Gomez,* 927 F.2d at 1539 n.8. *See Hill v. Brigano,* 199 F.3d 833, 842 (6th Cir. 1999) (holding that the defendant's initiation and subsequent incriminating statements that occurred a full day after the *Edwards* violation were admissible).

officers. Defendant's alleged initiation and waiver occurred less than one minute later. Defendant had invoked his right to counsel twice and had his original invocation ignored. Defendant's alleged waiver occurred in a very brief span of time following the *Edwards* violation and in the face of coercive factors. The second *Miranda* warning of Defendant just prior to the *Edwards* violation did not somehow "sanitize" this encounter and erase his previous invocation of his right to counsel. Under the totality of the circumstances, the undersigned finds that such a waiver could not be a free and rational choice. Therefore, Defendant's confession to Officers Nevarez and Aguilar is inadmissible.

It follows, therefore, that Defendant's subsequent inculpatory verbal and written statements to the DEA agents are similarly inadmissible. If a defendant has not initiated and made a knowing and voluntary waiver of his right to counsel with one law enforcement agency, subsequent questioning by a different agency is also inadmissible. In *United States v. Webb,* a jail officer committed an *Edwards* violation when he impermissibly interrogated the defendant after he had invoked his rights. 755 F.2d at 389. After the *Edwards* violation, the defendant indicated that he would talk to FBI agents, who were subsequently summoned. *Id.* The Fifth Circuit held that "[h]owever innocent the FBI's violation of *Edwards, Edwards* was still violated when the FBI agents went to the jail to ask Webb whether he wished to speak with them." *Id.* at 390. The Fifth Circuit subsequently held that the defendant's statements were inadmissible. *Id., see also United States v. Cannon,* 981 F.2d 785, 789 (5th Cir. 1993) ("[E]ven if Land assumed that Cannon had initiated further communication, Cannon's

statements to him were inadmissible if he was contacted as the result of an improper interrogation."). Similarly here, even if the DEA agents thought that Defendant had validly initiated contact and waived his rights, Defendant's subsequent inculpatory statements are still inadmissible as resulting from improper interrogation. As such, the undersigned recommends that all of Defendant's inculpatory statements following the *Edwards* violation be suppressed.

4. *McNabb-Mallory* Violation

Defendant confessed within the safe harbor window to the Federal Rule of Criminal Procedure 5(a) presentment requirement. "[A]n arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge." *Corley v. United States,* 556 U.S. 303, 306 (2009) (citing *McNabb v. United States,* 318 U.S. 332 (1943); *Mallory v. United States,* 354 U.S. 449 (1957)). If a confession is made within six hours of arrest, it is admissible as long as it was made voluntarily. *Corley,* 556 U.S. at 322.

Here, it is undisputed that Defendant gave a confession, although inadmissible, to Officers Nevarez and Aguilar by noon and had similarly confessed to the DEA agents by 1 p.m. Depending on the accuracy of the security camera time stamp, these confessions came at most three to four hours after Defendant was arrested at the bus station. Defendant based his *McNabb-Mallory* argument on the time at which he signed a written statement at the DEA office. (Dkt. No. 15 at 15). However, the uncontroverted testimony at the suppression hearing was that Defendant offered verbal confessions well in advance of this written

statement. Counsel for Defendant indeed seemed to acknowledge at the suppression hearing that this *McNabb-Mallory* argument is without merit given Defendant's earlier verbal confessions. (July 6 Hr'g at 12:15 p.m.). In any event, Defendant clearly confessed well within the safe harbor period for proper presentment, and there was no *McNabb-Mallory* violation. As described above, the Court is already recommending that Defendant's confession be suppressed as inadmissible on other grounds.

Recommendation

To summarize, the undersigned concludes that Defendant engaged in a consensual encounter with Officer Nevarez at the bus station. The undersigned further concludes that Defendant gave voluntary consent to the search of his bag and Officer Nevarez was permitted to continue the search of the boots. However, the undersigned also concludes that Defendant did not give a valid waiver of his *Miranda* rights in offering inculpatory statements to the police officers or the DEA agents. Finally, the undersigned concludes that there was no delay in proper presentment of Defendant.

Accordingly, it is hereby RECOMMENDED that Defendant's Motion to Suppress (Dkt. No. 15) be DENIED to the extent that Defendant seeks to suppress the fruits of the search and GRANTED to the extent that Defendant seeks to suppress his confessions.

Objections

Within fourteen (14) days after receipt of the Magistrate Judge's report and recommendation, any party may serve and file written objections to the

findings and recommendations made therein. 28 U.S.C.A. § 636(b)(l). A party's failure to file written objections to the findings, conclusions, and recommendations contained in this report within fourteen (14) days after service shall bar that party from *de nova* review by the District Judge of those findings, conclusions, and recommendation and, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. *Thomas v. Arn,* 474 U.S. 140, 148 (1985); *Douglass v. United Services Auto. Ass'n,* 79 F.3D 1415, 1430 (5th Cir. 1996) (en banc).

SIGNED this 6th day of August, 2015.

/s/ J. Scott Hacker
J. Scott Hacker
United States Magistrate Judge