No. 19-5429

# IN THE SUPREME COURT OF THE UNITED STATES

CANTRELL LAMONT BURWELL,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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In a case involving a consent search, there are "two layers of facts: The facts of what happened, and then the 'fact' of whether the consent was voluntary." Orin Kerr, *Voluntariness and the Law/Fact Distinction*, The Volokh Conspiracy (Dec. 5, 2013, 12:08 A.M.), http://volokh.com/2013/12/05/voluntariness-lawfact-distinction/. This case involves the latter fact, voluntariness, and whether it should be reviewed *de novo* or for clear error. The issue is "a source of widespread confusion in the circuit courts generally, and therefore is an issue that the Supreme Court would be best situated to clarify." *Id.*

The government argues that because the circuits uniformly agree that the first layer of facts, the facts of what happened, are reviewed for clear error, this Court need not be concerned that the circuits are split over the appropriate standard of review for the second layer, the fact of voluntariness. But the circuits are entrenched

in their respective, opposing positions on the second question and will remain so unless or until this Court intervenes.

The government also argues that this case is an inappropriate vehicle. But the decision below reversed the district court solely because, on *de novo* review, it disagreed with the district court's conclusion that Petitioner Burwell's consent was not voluntary. It did not identify any other ground for reversal. Under those circumstances, the case's interlocutory status should not preclude the Court from taking up a clear-cut and important issue of law that continues to divide the circuits.

**1. The Eleventh Circuit regularly applies *de novo* review to the determination of voluntariness where the circumstances of the consent are uncontested.**

The government argues that the Eleventh Circuit only applied *de novo* review in this case because it identified other legal error in the district court's opinion. This is not so. The Eleventh Circuit applied *de novo* review because in case after case, it has treated the ultimate conclusion about the voluntariness of consent as a matter of law, not fact. *See United States v. Cunningham*, 705 F. App'x 906, 910 n.6 (11th Cir. 2017) (unpublished) ("In cases where the parties do not dispute the facts and both rely solely on the testimony of government's witnesses, our review of voluntariness is *de novo*."); *United States v. Danner*, 720 F. App'x 529, 531 (11th Cir. 2017) (unpublished) ("we will review *de novo* the district court's application of the law about voluntariness to uncontested facts"); *United States v. Spivey*, 861 F.3d 1207, 1212 (11th Cir. 2017) ("[W]e will review *de novo* the district court's application of the law about voluntariness to uncontested facts."); *United States v. Joseph*, 700 F. App'x 918,

921 (11th Cir. 2017) (unpublished) ("Because the district court relied only on the uncontradicted testimony of government witnesses in assessing the voluntariness of Joseph's consent, we review *de novo* the district court's determination about voluntariness."); *United States v. Fernandez*, 58 F.3d 593, 596 (11th Cir. 1995) ("[A]n appellate court must examine the entire record and make an independent judgment of the ultimate issue of voluntariness."); *United States v. Tovar-Rico*, 61 F.3d 1529, 1535 (11th Cir. 1995) ("[W]e review the district court's findings *de novo* to determine whether Tovar's consent was voluntary."); *United States v. Valdez*, 931 F.2d 1448, 1451–52 (11th Cir. 1991) ("In an instance in which 'the decision the district court made was based solely on the circumstances described through uncontradicted testimony' . . . we review *de novo* the district court's determination of voluntariness of Valdez's consent to search."), quoting *United States v. Rioseco*, 845 F.2d 299, 302 n.5 (11th Cir. 1988); *United States v. Garcia*, 890 F.2d 355, 359–60 (11th Cir. 1989) (applying *de novo* review because "the trial court found as a matter of law, rather than fact, that . . . Garcia's consent to the search could not have been voluntary").

The Eleventh Circuit's long track record of treating voluntariness as a matter of law distinguishes it from every other circuit. (Pet. 5–8). The fact that the government has identified panels from the Seventh Circuit and the D.C. Circuit that have similarly applied *de novo* review only deepens the split, because other circuits squarely reject that approach. (Br. in Opp'n 13–14). As noted in the initial petition, the Fourth, Sixth, and Eighth Circuits have explicitly held that the clear-error standard applies even if the facts about what happened are undisputed. (Pet. 7–8).

**2. The Eleventh Circuit did not identify any legal error, yet it reviewed *de novo*.**

The government argues that the district court committed legal error, and therefore the Eleventh Circuit's application of *de novo* review was appropriate and seemingly uncontroversial. But the only "legal" error reversed by the Eleventh Circuit was the district court's finding that the consent was not voluntary. Whether that finding is properly characterized as a "legal" determination instead of a factual one is the very subject of this petition.

The district court understood the controlling law. It cited this Court's leading cases on the voluntariness of consent—*Ohio v. Robinette*, 519 U.S. 33 (1996), and *Scheckloth v. Bustamonte*, 412 U.S. 218 (1973)—and stated the correct legal standard, finding that "[u]nder the totality of the circumstances in this case, the consent was not valid." Nevertheless, the government takes issue with two aspects of the district court's opinion: (1) references to the police officer's stated intent to "sweet talk" his way into a search; and (2) references to *Miranda v. Arizona*, 384 U.S. 436 (1966), which is a case involving the Fifth Amendment right against self-incrimination, not the Fourth Amendment right against unreasonable searches.

Regarding the first contention, the district court at no point attributed the involuntariness of the consent to the officer's stated intent or subjective motivation. (Pet. App. A 12–18). Its opinion focused consistently on the effect that the officer's actions had on Petitioner Burwell's state of mind. *Id.* The court found salient that the officer "did not tell Mr. Burwell that the traffic stop was over, and after [the officer] asked for the pay-off for going easy on Mr. Burwell, he did not tell Mr. Burwell that

he was free to say 'no.'" *Id.* at 13. This was compounded by the fact that the officer "was in a position of authority during the traffic stop" and that "Mr. Burwell appreciated that." *Id.* The officer used what he described as "sweet talk." *Id.* He "used his authority to create a sense of obligation, and he used Mr. Burwell's sense of indebtedness to 'get in that car.'" *Id.* (quoting testimony of the officer). The court found that "Mr. Burwell understood that [the officer] was using restraint in selecting a warrant rather than a citation" and understood that the officer's request to search the car was "the quid pro quo for his generosity." *Id.* at 12.

To the extent that the court discussed the officer's subjective motivation, it did so because it was using the officer's own words to describe what he was doing to Mr. Burwell and the desired effect that it would have on Mr. Burwell. And the district court found that the tactic in fact had the exact effect that the officer intended. It coerced Mr. Burwell into consenting to a search of his truck. *Id.* at18. It was not the officer's intent that rendered the search invalid, it was that he carried out his intent and it worked. *See Brendlin v. California*, 551 U.S. 249, 260–61 (2007) ("The intent that counts under the Fourth Amendment is the 'intent [that] has been conveyed to the person confronted.'") (alterations in original, quoting *Michigan v. Chesternut*, 486 U.S. 567, 575 n.7 (1988)).

The district court also did not apply the wrong legal standard by citing *Miranda*. The district court briefly discussed *Miranda* to make the point that police coercion "can be mental as well as physical." (Pet. App. A 14). The district court acknowledged, however, that *Miranda* dealt with "the Fifth Amendment right to

remain silent and avoid self-incrimination." *Id.* at 14 n.6. The court in no way suggested that the *Miranda* legal analysis applied in this case. In fact, in the very next paragraph, the district court quotes from the two controlling cases that govern the voluntariness of a consent to search, *Robinette* and *Scheckloth*, to clarify that in the Fourth Amendment context, "knowledge of the right to refuse consent is one factor to be taken into account" in determining whether consent is valid. *Id.* at 15.

The government's attempt to couch the decision below as correction of legal error should be rebuffed. The Eleventh Circuit reversed the district court because, exercising *de novo* review, it weighed the relevant factors differently than the district court and came to a different conclusion about the outcome. Whereas the district court focused on the power dynamic between the police officer and Petitioner Burwell and the fact that Petitioner Burwell was never informed that he could refuse consent or that he was free to leave, the Eleventh Circuit focused on the facts that Petitioner "Burwell was not seized, handcuffed, or in custody," that he was "an adult with no apparent intellectual difficulties," and that he "had been fully cooperative" during the exchange. (Pet. App. B 15–16). It also disagreed with the district court on the matter of coercion, finding "no evidence of any inherently coercive tactics, either from the nature of [the officer's] questioning or the environment in which it took place." *Id.* at 17.

After spending six paragraphs explaining why it disagreed with the district court on the facts, the Eleventh Circuit devoted one paragraph to explaining that the district court may have reached a different conclusion because it credited the officer's

own statements that he intended to "sweet talk" his way into a search and improperly analogized the police conduct in this case to coercive tactics discussed in *Miranda*. (Pet. App. B 18–19). Nowhere in this dicta, however, does the Eleventh Circuit state that the district court committed legal error, and it certainly didn't use either as the basis for reversing the district court's opinion. *Id.* The only reversible legal error the Eleventh Circuit identified was the district court's determination that consent was not voluntary. And that determination—in any other circuit—is a determination of fact, not law.

**3. The standard of review determines the outcome of this case.**

Under a clear error standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Besssemer*, 470 U.S. 564, 573–74 (1985). The only question for the appellate court, on clear error review, is whether the evidence was "adequate to support the District Court's finding." *United States v. Mendenhall*, 446 U.S. 544, 558 (1980).

The factual question at issue in this case was whether Petitioner Burwell's consent was voluntary under the totality of the circumstances. Finding that it was not, the district court pointed to the fact that, from Mr. Burwell's perspective, he felt obligated to let the officer search his truck as "the quid pro quo" for the officer's generosity in letting Mr. Burwell off with a warning. The officer was in a position of

authority during the traffic stop, used that authority to imply that Mr. Burwell was obligated to him, and never informed Mr. Burwell that he was free to go or that he could refuse a search of his car.

These facts were "plainly adequate to support the District Court's finding," as evidenced by the fact that a number of courts have come to the exact same conclusion in materially similar circumstances. *See State v. Pals*, 805 N.W.2d 767, 783 (Iowa 2011) ("we agree with the cases and commentators that view the setting of a traffic stop on a public road as inherently coercive" and "[i]n this setting, police plainly have the upper hand and are exerting authority in a fashion that makes it likely that a citizen would not feel free to decline to give consent for a search even though the search is unrelated to the rationale of the original stop"); *Brown v. State*, 182 P.3d 624, 626 (Alaska Ct. App. 2008) ("As shown by the facts of the present case, and as shown by the experiences of other states, motorists who have been stopped for traffic infractions do not act from a position of psychological independence when they decide how to respond to a police officer's request for a search. Because of the psychological pressures inherent in the stop, and often because of the motorist's ignorance of their rights, large numbers of motorists—guilty and innocent alike—accede to these requests."); *State v. Robinette*, 685 N.E.2d 762, 771 (Ohio 1997) ("While [the officer's] questioning was not expressly coercive, the circumstances surrounding the request to search made the questioning impliedly coercive. Even the state conceded, at an oral argument before the United States Supreme Court, that an officer has discretion

to issue a ticket rather than a warning to a motorist if the motorist becomes uncooperative.").

The Eleventh Circuit reached a different, equally permissible, conclusion by weighing the voluntariness factors differently. This is appropriate on *de novo* review, but not on review for clear error. Because there were two permissible views of the evidence in this case, "the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 573–74.

**4. This case is ripe for the Court's review.**

Certiorari should be granted despite this case's interlocutory posture. It presents a clear legal issue that needs resolution by this Court and that will likely determine the case's outcome. The suppression issue is dispositive in this case because, should Petitioner Burwell prevail, the bulk of the government's evidence against him will be suppressed. If the district court is affirmed, therefore, the case against Petitioner will likely be dismissed. If the Eleventh Circuit is affirmed and the evidence is admitted, the case is very likely to be resolved by plea. And if it is resolved by plea, Petitioner will lose the opportunity to challenge the admissibility of the evidence because a valid guilty plea "renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered." *Class v. United States*, 138 S. Ct. 798, 805 (2018); *see also Haring v. Prosise*, 462 U.S. 306, 320 (1983) ("a guilty plea results in the defendant's loss of any meaningful opportunity he might otherwise have had

to challenge the admissibility of evidence obtained in violation of the Fourth Amendment").

In a case such as this one, where the question presented is important and dispositive, there is no reason to decline review based on the case's interlocutory status. Where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stephen M. Shapiro et al., *Supreme Court Practice* 283 (10th ed. 2013); *see also Estelle v. Gamble*, 429 U.S. 97 (1976) (reviewing interlocutory judgment reinstating petitioner's civil rights complaint). This is such a case.

## CONCLUSION

The petition should be granted.

Respectfully Submitted,

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