No. 19-_____

IN THE

Supreme Court of the United States

WALTER GLENN,

PETITIONER,

v.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In September 2014, did a relief driver of a rental vehicle, driving with permission of the lessee, although contractually unauthorized, have standing to challenge evidence seized from the car, when he, the lessee, and a third occupant were stopped for an alleged traffic violation?
2. Did the defendant waive argument that the stop should never have occurred, since it was based upon a mistaken belief of state law by the officer?
3. Was the traffic stop unconstitutionally extended beyond time needed to complete the reason for the stop, and should any finding of consent to search be vitiated by the prolonged nature of the stop?
4. Was a sixteen-level increase in the Guidelines level for loss attributable to the defendant improperly calculated, instead of only eight levels, based upon the so-called "Texas trip," immediately preceding the stop, given the tenuous connection of the defendant to earlier losses, and since instrumentalities, attributed to the defendant and needed to commit the crimes, were seized in the September 2014 search, long before later losses extended into 2015?
5. Was a four level increase for leadership role improperly assessed, such that the Court would likely have imposed a sentence lower than 120 months of imprisonment?
6. Was a two level increase for obstruction of justice improperly assessed when the court failed to credit the defendant with making an honest mistake in responding to a question about travel?

PARTIES TO THE PROCEEDING

The petitioner is Walter Glenn, defendant and defendant-appellant in the courts below. The respondent is the United States, the plaintiff and the plaintiff-appellee in the courts below.

Suppression of the same, relevant evidence utilized to convict petitioner Glenn, seized from a traffic stop, was upheld in the case of codefendant, Larry Walker, in *United States v. Walker*, 706 Fed.Appx. 152 (5th Cir. 2017).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit upholding defendant's conviction and sentence, *United States v. Glenn*, 931 F.3d 424 (5th Cir. 2019), was issued on July 26, 2019. Copy at Appendix 1. Since references in that opinion are made to two earlier decisions of the district court, regarding issues of suppression, they are reproduced as Appendix 2, *United States v. Glenn*, 204 F.Supp.3d 893 (MDLA 2016); and Appendix 4, *United States v. Glenn*, et.al, Ruling and Order, Joint Supplemental Motion to Suppress Evidence (MDLA, November 13, 2017). Furthermore, (1) since suppression was granted for the codefendant lessee of the vehicle which Mr. Glenn was driving; (2) since Glenn argues parallel circumstances should dictate similar results; and (3) since that case is referenced in the Glenn appellate decision, copy is provided. *United States v. Walker*, 706 Fed.Appx. 152 (5th Cir. 2017), Appendix 3. Additionally, we note for the Court that co-defendant Thomas James' writ for certiorari was denied, *United States v. James*, 770 Fed.Appx. 700 (5th Cir. 05/24/19), cert. denied (U.S. Oct. 7, 2019)(No. 19-5670), but several significant differences exist between James' case and Glenn's case.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fifth Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. Since its decision

was rendered on July 26, 2019, this Court's jurisdiction for a petitioner seeking a writ of certiorari within 90 days is timely invoked pursuant to 28 U.S.C. § 1254(1) and Rule 13.1, Rules of the Supreme Court of the United States.

PETITION FOR A WRIT OF CERTIORARI: RULE 10 STATEMENT

Whether termed as standing or a Fourth Amendment reasonable expectation of privacy, Petitioner Glenn respectfully suggests the Fifth Circuit was incorrect in declining to find he, in fact, had such an expectation, while driving in relief of his cousin, Larry Walker, sole contractual lessee of a rental vehicle. Holding so is proper in light of *Byrd v. United States*, 138 S.Ct. 1518, 1530-31 (2018), and should result in overturning the reasoning of those circuit courts of appeals decisions denying such a Fourth Amendment expectation of privacy, captured by this Court in its rationale for having granted Byrd's petition for a writ of certiorari. *Byrd*, *supra*, 138 S.Ct. at 1526. In summary, under the facts of this case, circuit split should be resolved in favor of granting an expectation of privacy to a person, driving a rental vehicle with permission and in relief of the contractual lessee. In at least one subsequent case, *United States v. Wright*, No. 18-00058-BAJ-EWD, 2018 U.S. Dist. LEXIS 192546, at *5 (MDLA Nov. 9, 2018), a case which admittedly involved only a sole occupant-driver, we submit the judge presiding over Mr. Glenn's case acknowledged the change created by *Byrd*.

The defendant claimed in his initial suppression motion and memorandum that the highway stop was unjustified, *ab initio*. In his opening brief defendant

Glenn noted although the officer swore he could not read the license plate when the car passed him, he admitted he could do so when he drove up behind the vehicle. In footnote 1 of the related case, which resulted in the same evidence being suppressed against the codefendant lessee, the Fifth Circuit stated Louisiana law does not prohibit tinted covers on license plates. Appendix 3, *United States v. Walker*, 706 Fed.Appx. 152 (5th Cir. 2017). That should have ended the inquiry. No reason existed to justify the stop. At the trial the officer even admitted no law existed which prohibited a license plate cover on a rental vehicle. The issue of an improper stop was an important component of the defendant's Fourth Amendment claim; it was raised from the start; it was litigated below; it is worthy of this Court's consideration; and it should not be deemed to have been waived, even if counsel may have inadvertently only raised it in the reply brief on appeal. Appendix 1, *United States v. Glenn*, 931 F.3d at 428, n.1.

In *Rodriguez v. United States*, 135 S.Ct. 1609 (2015), this Court set parameters governing questions by police, unrelated to the original purpose of a traffic stop. They should not prolong the length of the stop. Here, the traffic stop was unconstitutionally extended beyond the time needed to complete the reason for the stop. Instead of completing license and insurance verifications, the officer converted the stop to a full criminal investigation. The length of time he took vitiated any subsequent consent obtained from the defendant. While the district court found reasonable suspicion to prolong the stop, he also specifically found probable cause was lacking to lawfully search the vehicle. That finding

demonstrates how important consent was to the issue of the subsequent search. The defendant's consent was involuntarily obtained, tainted by many of the same factors acknowledged by the district court which resulted in suppression of the evidence against codefendant, lessee Walker.

The loss amount in excess of $2 million, attributable to defendant Glenn, was greatly overstated, and an alleged leadership role was improperly assessed. Clear error has occurred. His purported connection to the scheme before the August 2014 trip rests upon his utilization of a thumb drive, seized during the search, for an unrelated business matter at the time of that trip. Ownership or control of the thumb drive or any other computer seized was never established. Glenn was never linked to the earlier January 2014 Massachusetts arrests of codefendants James and Walker, and a woman, when she was found possessing a counterfeit check, similar to other fraudulent checks then being presented to Walmarts. Nor was he ever connected with the other unknown individual, sometimes accompanying James as James continued to cash checks into 2015.

The thumb drive contained many of the templates and other data apparently utilized to have created the counterfeit checks before the September 2014 arrests, but little else connects Glenn to the check cashing scheme before the Texas trip. Likewise, while Walmart continued to suffer thousands of dollars after September 2014, the computer instrumentalities and other objects necessary for production had been seized then. Others assuredly continued the fraud, but little else connects Glenn. Only one, highly suspicious statement of the third codefendant,

James, after his plea, characterized Glenn as the "orchestrator" who claimed a larger share of illegal proceeds. It was made with no proof of what period of time this alleged leadership covered. The district court and court of appeals resorted to supposition of organizer and leader status by the very absence of evidence of Glenn's participation. Such findings were clearly erroneous and improperly exposed Glenn to an excessive imprisonment term.

Assessment of two offense levels for obstruction of justice was unwarranted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution is involved. It provides, in pertinent part: "*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated*...." United States Sentencing Commission Guidelines §§ 2B1.1 (loss), 3B1.1 (leadership), and 3C1.1 (obstruction) are also involved

STATEMENT OF CASE

1. Details of the vehicular stop of September 2, 2014, approximately 9:30 p.m.

The stop occurred when West Baton Rouge Parish Sheriff's deputy Donald Dawsey observed a tinted license plate cover affixed to a Chrysler 300 vehicle as it passed him while he was parked beside the interstate. ROA.1458-60. Although claiming he could not read the license plate when the car passed him, Dawsey admitted at trial he could fully read it when he drove up behind the vehicle. ROA.927-28, 938-39, 989-91.

Dawsey executed a traffic stop of the Chrysler, exited his own vehicle, and, with a flashlight shining through the front passenger door, saw either a set of screwdrivers or a "brand new screwdriver" in the driver's door console, (compare ROA.595 with trial testimony at ROA.1460, l. 15). The car contained driver Glenn, Thomas James, occupying the front passenger seat, and vehicle renter Larry Walker, sitting in the back. Dawsey secured the driver's license and insurance paperwork from driver Glenn, ROA.1461, and asked him to step to the rear of the vehicle. There, during questioning, he learned the vehicle had been rented by Glenn's cousin, Walker. ROA.596.

After questioning Glenn about their travel, Dawsey told him to remain behind the car while he went to get the rental agreement from Walker. While obtaining it, he questioned Walker about their travels, where Walker was from, and how he had gotten to Connecticut, where both men said they had come from. As noted by the district court, the only real difference in the statements between Walker and Glenn was the mode of transportation Walker took in travelling from Florida to Connecticut at the start of the trip, deemed "minor and insignificant." Appendix 2, *United States v. Glenn*, 204 F.Supp.3d at 902. About five minutes into the stop, Sgt. Dawsey was in possession of the rental agreement, insurance verification, and Glenn's driver's license, as noted by the court. Appendix 1, *Glenn*, 204 F.Supp.3d at 901 and Suppression hearing transcript, ROA.982. In fact, he never surrendered them, never intending to issue a traffic citation. Consistent with the statement that law enforcement had problems with drug trafficking on the

interstate, which he would make to Glenn over five minutes later when again exiting his vehicle, he had converted the traffic stop into a drug investigation.

Sgt. Dawsey performed a ruse when he told Glenn he was going to "run all the stuff and make sure everything is straight" and left Glenn standing at the rear of the rental car. ROA.596, and trial transcript, ROA.2251, bottom of page. Instead of running verification of driver's license and insurance information, Dawsey called for backup officers to assist him search the car, since he believed he had intercepted a drug courier. ROA.596, bottom of page. .

After an additional five minutes elapsed, ROA.1495-96, Dawsey re-emerged from his vehicle and continued to ask Glenn about the trip itinerary. Around twelve minutes into the stop, an exchange between Dawsey and Glenn occurred which demonstrated Glenn's reasonable expectation of privacy and standing to contest search and seizure of the car after *Byrd*. Glenn: (1) said he had shopped in Houston for his children, referencing some of the shopping bags in the vehicle; (2) answered that everything in the vehicle belonged to the three of them; and (3) denied anyone had asked them to bring anything on the trip that "don't belong." Trial transcript, ROA.2253. Glenn also explained he was "taking turns" driving the vehicle with renter Walker. Trial transcript, ROA.2252.

About 13 minutes and 20 seconds into the dashcam recording, Dawsey abruptly mentioned a "big problem" of people driving from Houston with "like a hundred pounds of marijuana, couple of kilos of cocaine, large amounts of U.S.

currency." Suppression hearing, ROA.957-58; Trial, ROA.2253. The district court recognized Dawsey's implicit accusation of drug trafficking when he ruled against the Government's attempt to introduce evidence that Glenn lied in responding that none of the three occupants of the car had criminal drug histories. See Document 219, Ruling and Order, ROA.766 (bottom). Immediately thereafter, Dawsey asked Glenn if he could search the car, and Glenn gave him permission. Trial transcript, ROA.2253. Believing he also needed permission of the renter to search the car, and claiming he was "trying to be conservative on Fourth Amendment rights," Dawsey told Cpl. Woody they needed to check with "the registered owner." ROA.960 and ROA.2192.

Walker's purported consent to the search was found by the appellate court to have been obtained involuntarily. Appendix 3, *United States v. Walker*, 706 Fed.Appx. 152, 157-59 (5th Cir. 2017). During the short encounter with Walker, Walker also stated a blue bag belonged to him. Trial transcript, ROA.2254.

After the first suppression hearing, the district court summarized the search as not finding any drugs, but netting: (1) a screwdriver; (2) a front license plate and bolts; (3) newly purchased items; (4) 114 blank ID cards; (5) 49 blank check sheets; (6) 45 holographic overlays; (7) a power inverter; (8) printer; (9) scissors; (10) tape; (11) an iron; (12) $95,000 cash; (13) seven white envelopes with names and social security numbers written on them; and (14) multiple computer devices. Appendix 2, Appendix 2, *United States v. Glenn*, 204 F.Supp.3d at 898. At trial, Dawsey

admitted nothing was documented regarding where each item was found in the vehicle. ROA.1478-79.

Equally clear, after a brief exchange with Walker and James about their bags, except for one instance, over a half hour into the search, no effort was made to ask Glenn to identify which bags belonged to him, nor to distinguish those belonging to the other occupants. Dawsey, trial, ROA.1502-03, ROA.1508, and confirmed by Lt. Chris Green, ROA.1602-03.

After the re-opened suppression hearing, the district court summarized that at about thirty-three minutes after the stop had been initiated, Lt. Green began to search the trunk. Green found a bag which contained three white envelopes containing money. Appendix 4, pp 597-98. At trial, even though the audio was turned off, and discounting that Glenn may have been referring to money he made in buying and selling homes, Dawsey testified Glenn claimed the money was his. ROA.1522-23. No one could tell what percentage of the approximately $95,000 in currency recovered that evening came from those three and an additional four more envelopes. See Corporal Woody, ROA.1582; Lt. Green, ROA.1595-98.

2. Judicial summaries of the stop of the rental vehicle.

The summary of the events from which this case began are contained in three judicial decisions and the audio-visual of the stop. The district court's first decision on suppression of evidence is *United States v. Glenn*, 204 F. Supp. 3d 893 (MDLA 2016), Appendix 2 and the Fifth Circuit decision forming the basis of this appeal is

found at Appendix 1, *United States v. Glenn*, 931 F.3d 424 (5th Cir. 2019). The Fifth Circuit's decision upholding suppression of all evidence as it pertained to the Walker the vehicle renter and passenger at the time of the stop, is *United States v. Walker*, 706 Fed.Appx. 152 (5th Cir. 2017), Appendix 3. The district judge's second suppression decision, Ruling and Order, November 13, 2017, after jurisdiction had been re-acquired, following the Government's loss of the suppression issue in the Walker appeal, and after the case had been dismissed against him, is Appendix 4.

The dashcam video of the traffic stop is available on the Fifth Circuit website at http://www.ca5.uscourts.gov/opinions/unpub/16/16-31045.mp4. Trial transcript of that dashcam video begins at ROA.2247.

3. Procedural History.

A Superseding Indictment charged the three occupants of the rented vehicle with conspiracy, in violation of 18 U.S.C. § 371, unauthorized access device fraud, in violation of 18 U.S.C. § 1029(a)(3), and aggravated identity theft, in violation of 18 U.S.C. § 1028A. The indictment alleged fake identifications used in over 800 transactions in attempts to cash almost $2,000,000 in counterfeit checks, resulting in retail outlets actually being defrauded out of approximately $1,218,000. ROA.44.

All three defendants filed motions to suppress. Copy of defendant Glenn's found at Appendix 5. After an evidentiary hearing, the court ruled on September 2, 2016, suppressing all evidence as it pertained to Mr. Walker, but finding defendants Glenn and Thomas James were not unlawfully seized and, in accordance with then

current precedent before *Byrd v. United States*, 138 S.Ct. 1518, 1531 (2018), finding Glenn and James had no standing to challenge the search. Appendix 2, *United States v. Glenn*, 204 F.Supp.3d 893, (MDLA 2016) and the district judge's summary of his earlier holding in Appendix 4, his subsequent Ruling and Order, pp. 4-5.

The district court also conducted its own analysis, finding probable cause to conduct the search was lacking. Nevertheless, it determined reasonable suspicion factors of a screwdriver in the door console, the rental car with a tinted license plate cover, and travelling on a known drug corridor allowed the police officer to prolong the stop to dispel suspicion. See Appendix 2, *United States v. Glenn*, 204 F.Supp.3d 893, 901-03 and 905-07.

The Government appealed the suppression of evidence against Walker, staying the district court case until the Fifth Circuit affirmation. Appendix 3, *United States v. Walker*, 706 Fed.Appx. 152 (5th Cir. 2017). Thereafter, Glenn and James were allowed to file a Joint Supplemental Motion to Suppress Evidence, since neither had addressed suppression of personal effects. Hearings occurred on October 26, 2017, and on November 2, 2107. ROA.1160-1209, 1210-1286.

In its second suppression ruling, the court found Glenn had standing to contest the search of the single bag from which the three envelopes of money had been found. Appendix 4, Ruling and Order, p.11. But in footnote 7 of its Opinion, in this pre-*Byrd* scenario, the court found no authority for suppression of personal belongings found in the trunk of a car, not only by passenger-Thomas, but also an

"*unauthorized driver*" (Glenn) of a rental car who did not have standing to challenge, unless such individual had possessory interest in closed containers like bags or suitcases. The court added: "*Merely having one's personal belongings in a trunk does not give a passenger standing to challenge the search of the trunk*." Appendix 4, Ruling and Order, p. 14, fn. 7.

Codefendant James pled guilty on the eve of trial. Glenn's trial began on December 12, 2017. Minute Entry, ROA.769. On December 15, 2017, the jury returned verdicts of guilty on all three counts. ROA.770-71.

A presentence investigation was prepared, ROA. 248. Objections to the presentence report were filed, and an Addendum was prepared on May 3, 2018. ROA. 266. The judge granted the Government's objection that leadership should be increased to four levels from two. It overruled the defendant's objection to the leadership role. Sentencing Hearing, Appendix 6, ROA.2141-46. The judge overruled the defendant's objection that loss should be limited to approximately $111,000 from the Texas trip immediately preceding the arrest in September 2014. Appendix 6, ROA.2158-2160. And the judge overruled the defendant's objection to one instance of obstruction of justice, stemming from testimony he gave at a bond revocation hearing. Appendix 6, ROA.2154-55. Granting two of the defendant's objections for criminal history resulted in a criminal history category of I. The judge calculated the total offense level at 34, for a term of imprisonment of 151-180 months on Counts One and Two and a consecutive sentence of 24 months for Count Three. Appendix 6, ROA.2161.

A variant sentence was imposed for a total of 120 months confinement, to be followed by supervised release for three years. Appendix 6, ROA.2170-71. The defendant was ordered to pay Walmart restitution in the sum of $949,587.89, He received a forfeiture money judgment of $284,856.29, and a $300 special assessment. ROA.822-29.

Glenn timely filed his notice of appeal, seeking to overturn the suppression rulings of the court and the several sentencing issues addressed herein. On July 26, 2019, the Fifth Circuit issued its decision affirming denial of the motion to suppress and, under clear error analysis, affirmed the district court's Guidelines rulings. Appendix 1.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

a. Petitioner had "standing" to contest the search and seizure of the contents of the car.

In its second suppression ruling, the court found Glenn had standing only to contest the search of the single bag from which he had claimed the three envelopes containing money were his. Appendix 4, Ruling and Order, p.11. Except for this one instance, no effort was made to identify which other bags belonged to Glenn. Dawsey, trial testimony, ROA.1502-03. According to Sgt Dawsey, ROA.1508, and confirmed by Lt. Green, ROA.1602-03, no one conducting the search tried to associate any other bag with Glenn, although Dawsey admitted some must have belonged to him. But that was not Glenn's fault. The consequences should lie with the officers, who were in total control and who failed to make any distinction.

Critical to this appeal, in footnote 7 of its Opinion, the court found no authority for the suppression of personal belongings found in the trunk of a car by a passenger (Thomas) or an "*unauthorized driver*" (Glenn) of a rental car who did not have standing to challenge the search of a car, unless such an individual had a possessory interest in closed containers like bags or suitcases. Appendix 4, Ruling and Order, p. 14, fn. 7.

After *Byrd v. United States*, 138 S.Ct. 1518, 1528-31 (2018), as the recording of the stop reveals, Glenn was not merely a passenger, but authorized by his cousin, who was the contractual renter of the vehicle, to be a relief driver. He was equally entitled to protection of the Fourth Amendment for the contents of that car, without artificial distinctions of whether items were concealed in closed containers, bags, or suitcases. To hold otherwise would be to reward the officer who essentially was found by the two courts below as having obtained consent from a person he did not believe to be legally capable of granting it (Glenn), while having illegally tricked the renter (Walker) into giving consent.

At trial, Dawsey admitted nothing was documented as to where each item was found in the vehicle. ROA.1478-79. But, as noted above on page 7, Glenn told him some of the bags were his, containing gifts for his children, purchased in Houston; he said everything in the vehicle belonged to all three of the occupants; and he denied anyone had asked them to bring anything improper on the trip. Collectively, after *Byrd*, these statements convey a reasonable expectation of privacy and standing to contest search and seizure of the contents within the car.

He has met his burden of establishing his own Fourth Amendment rights were implicated. *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978). Cases relying upon the assertion of a possessory interest in closed containers, such as *United States v. Iraheta*, 764 F.3d 455, 462 (5th Cir. 2014); *United States v. Hernandez*, 647 F.3d 216, 219 (5th Cir. 2011); and *United States v. Jaras*, 86 F.3d 383, 385 (5th Cir. 1996), should not control. But, even if they do, Glenn had an actual, subjective expectation of privacy in the contents of the car, whether or not items were in closed containers. Moreover, as both an authorized driver and a passenger, society would recognize that interest as being objectively reasonable.

Should the Court grant standing, the lower courts committed clear error in not finding Glenn's consent had been overborne by police misconduct, including an improper extension of the length of the stop, in violation of *Rodriguez v. United States*, 135 S.Ct. 1609 (2015). Citing its earlier decision, *Illinois v. Caballes*, 543 U.S. 405, 408 (2005), this Court said that in effecting the purpose of a traffic violation, the Fourth Amendment permits "ordinary inquiries incident to [the traffic] stop," including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof on insurance." *Rodriguez*, 135 S.Ct. at 1615. The stop should last no longer than necessary to effectuate its purpose. *Rodriguez*, 135 S.Ct. at 1614. Appendix 1, *United States v. Glenn*, 931 F.3d 424, 429.

Dawsey never even *began* the license check of Mr. Glenn while he had him detained. Instead, he turned the stop into an improper drug investigation, without

reasonable suspicion or probable cause. Authority for the seizure should have ended by the second time Dawsey emerged from his car, over ten minutes after the stop, and after enough time had passed for him to have verified the information he had received from the documents he had obtained and the information he had received from the car's occupants.

The district court and the court of appeals improperly found reasonable suspicion to prolong detention. Appendix 1, *United States v. Glenn*, 931 F.3d 424, 429; Appendix 2, *United States v. Glenn*, 204 F.Supp.3d 893, 901-03. Essentially the district court was correct in noting only four of the dozen factors listed by the Government even merited consideration: (1) rental cars often being a common mode for transporting drugs; (2) the rental car was found to have a tinted license plate cover; (3) a screwdriver found in the door console which the officer suspected may have been used to install the license plate cover; and (4) the defendants were traveling on a known drug corridor. Appendix 2, *Glenn*, *supra*, 204 F.Supp.3d at 903. But whether individually or collectively, these factors do not rise to the level of *reasonable suspicion* to have sustained continued detention of Glenn. And the district court was correct in determining no probable cause existed for the search, again highlighting the importance of consent to the search of the vehicle.

In *United States v. Villafranco-Elizondo*, 897 F.3d 635, 642-43 (5th Cir. 2018), in deciding to reverse the district judge's suppression of evidence, the court distinguished an unpublished circuit opinion, *United States v. Madrigal*, 626 F. Appx 448 (5th Cir. 2015), a case in which the defendant's continued detention was

found to have been in violation of the Fourth Amendment. The *Villafranco-Elizondo* opinion addressed the unique and suspicious characteristics of a trailer being towed by a defendant, compared with what the facts in *Madrigal*. The officer in *Madrigal* relied on the vehicle merely being an older and recently registered truck, which he believed created suspicion simply because many drug couriers use such vehicles. Contrast *Villafranco-Elizondo* where the court found hard to conceive a legitimate use for a large, hidden storage compartment in the vehicle. See 897 F.3d at 642-43.

In contrast, we merely have a tinted license plate cover – already noted by the Fifth Circuit in the related case as not illegal per se, Appendix 3, *United States v. Walker*, 706 Fed.Appx. 152, footnote 1, (5th Cir. 2017) – and through which the officer has admitted he could fully read the relevant data when he drove up behind the vehicle. ROA.927-28, 938-39, 989-91. Our facts are much closer to those in *Madrigal*. One can see tinted license plate covers during any daily commute, and this factor should not have contributed to reasonable suspicion.

But *Madrigal* offers even more: having driven on a drug corridor. As the Fifth Circuit said about the use of Interstate 10, the road upon which the stop in our case occurred:

> Madrigal's use of Interstate 10 similarly gives rise to little suspicion. Interstate 10 like all highways between Mexico and Houston may be used as a drug corridor, but it is also a major thoroughfare for legitimate purposes. The vast majority of traffic on Interstate 10 are law-abiding citizens who are traveling to work, home, or for other legitimate purposes. *Madrigal*, 626 F. Appx at 451.

We submit the *Madrigal* logic negates two of the four factors found by the lower court to sustain reasonable suspicion: rental cars being used to transport drugs and travelling on a known drug corridor. No mistake should be made: Dawsey had only a hunch (and he was wrong) that drug contraband was being transported in this case as evidenced by his comments about drugs just before securing consent. But the main travel route between Baton Rouge and Houston is Interstate 10. Drug traffickers may utilize the interstate, but so do mothers, fathers, plant workers, and the general law abiding public, who also sometimes travel in rental cars, instead of their own, privately owned vehicles. Note the district judge also listed *Madrigal* in his opinion discounting the claimed suspicion by Dawsey of traveling by car instead of by air. Appendix 2, *United States v. Glenn*, 204 F.Supp.3d at 902.

That leaves the license plate cover and the screwdriver, the other two factors the district judge relied upon to find reasonable suspicion. Even if Dawsey suspected the screwdriver might have been used to attach the license plate cover, a common screwdriver can simply be utilized for far too many other purposes to have the suspicion rise to a level meriting reasonable suspicion. With Sgt Dawsey admitting no law exists prohibiting a license plate cover on a rental vehicle, ROA.931, 941 (top), the only reason he articulated—that he had never seen one before on a rental vehicle—is simply a mere hunch on his behalf and insufficient to have justified the continued detention of Mr. Glenn. For these reasons, this court should find there was not reasonable suspicion to prolong the stop.

b. If continued detention is found reasonable, the eventual consent to search the vehicle was improperly obtained from Mr. Glenn.

The district judge and appellate court clearly erred in determining Glenn's consent to search was voluntary. Both courts noted six factors typically considered in determining voluntariness of consent: (1) voluntariness of custodial status; (2) presence of coercive police procedures; (3) extent and level of cooperation with police; (4) defendant's awareness of the right to refuse consent; (5) defendant's education and intelligence; and (6) his belief no incriminating evidence will be found. Appendix 1, *United States v. Glenn*, 931 F.3d at 430; Appendix 2, *United States v. Glenn*, 204 F.Supp.3d at 904; *United States v. Jenson*, 462 F.3d 399, 406 (5th Cir. 2006).

In analyzing the six factors and noting it had already ruled no illegal detention had occurred since Dawsey had reasonable suspicion to prolong the stop (findings we respectfully contest), "on balance" the district court found Glenn's consent voluntary. Appendix 4, Ruling and Order, pp. 11-14.

Regarding the first factor, voluntariness of defendant's custodial status, no reasonable person would have felt free to leave because Dawsey had Glenn's driver's license at the time consent was sought, alone indicative of coercive police conduct. *United States v. Cavitt*, 550 F.3d 430, 439 (5th Cir. 2008), citing earlier cases holding it difficult to imagine a reasonable person would feel free to leave without such vital identification. Appendix 4, Ruling and Order, p. 12. The court elicited from Dawsey that Glenn and Walker were not free to leave while he held that

documentation. ROA.1003. The judge found that in the first five minutes of the stop Dawsey had everything he needed to issue a citation and complete the stop. Appendix 2, *Glenn*, *supra*, 204 F.Supp.3d at 901-02. Despite telling Glenn he was returning to his police vehicle to run the information he had been provided, Dawsey admitted he was calling back-up to assist him trying to get consent to search the car. ROA.887-88. In fact, at that time he had everything he needed to conduct his traffic investigation; he chose not to do so; and he impermissibly prolonged the stop in violation of *Rodriguez v. United States*, 135 S.Ct. 1609, 1615-16 (2015), where this Court held unreasonable a 15 minute delay to wait for a drug detection dog.

We submit the district judge's finding and court of appeals' agreement that the presence of coercive police procedures, the second factor, weighs in favor of finding the government is clearly erroneous. Appendix 1, *Glenn*, 931 F.3d at 430, Appendix 4, Ruling and Order, pp. 12-13. Not only do the coercive police procedures of making Glenn stand on the side of a busy interstate at night for over 10 minutes closely relate to the first factor of involuntary detention, but also since both lower courts found coercive police tactics were used to suppress the evidence against renter Walker, the same should apply to Glenn. Appendix 2, *Glenn*, *supra*, 204 F.Supp.3d at 904-05; Appendix 3, *United States v. Walker*, 706 Fed.Appx. at 157.

For Walker the tipping point may have been the deceptive tactic of Dawsey telling him that Glenn had already given consent, coupled with the belief that only Walker was so authorized. All well and good, but Dawsey employed far more coercive tactics against Glenn, including (1) ordering him out of the vehicle to

observe the purported infraction of the license plate cover, (2) abruptly discounting Glenn's offer to correct the so-called infraction, (3) Dawsey's rapid-fire questioning of Glenn about the minor discrepancies and differences he found regarding the itinerary and mode of transportation of Walker to Connecticut—but failing to seek correction from the parties, (4) his retention of Glenn's driver's license and Walker's rental agreement, (5) his quick decision to convert the stop into a drug investigation, and (6) his leaving Glenn standing at nighttime beside a busy and dangerous interstate highway a full five additional minutes, while instead of running the license checks, he was plotting how to obtain consent to search. Suppression, ROA.942-44. The totality of the circumstance included coercive police tactics and preceded the unconstitutional consent obtained from Walker by only a few moments. The tactics assuredly created in the mind of Glenn the conclusion that he had better cooperate by consenting.

No emphasis should be placed on the district court's notice that Glenn gave consent twice. Trial transcript, ROA.2253. When heard on the dashcam video and seen on the transcript, the two statements are within seconds of each other. Glenn cannot have imagined the kind of search that he consented to would include a search which lasted up to an hour, and which included the use of special tools, including one for taking upholstery apart. Suppression hearing, ROA.892 and trial, ROA.1503.

Regarding the third factor, extent and level of defendant's cooperation, while Glenn was polite and compliant throughout the roadside encounter, such a response

to authority indicates acquiescence, not actual cooperation. While the Government argued Glenn was nervous, meriting consideration for reasonable suspicion to continue detention, that factor was rejected by the district judge in his analysis. To the extent any credence is to be given to Glenn's nervousness, we submit it contributed to his politeness, masked by acquiescence, rather than real cooperation. Accordingly, this third factor also militates against the Government.

As to the fourth factor, the defendant's awareness of his right to refuse consent, we agree with the lower court that this factor weighs against the Government. No one contests that he was not so informed. Appendix 4, Ruling and Order, pp. 13-14; dashcam video, ROA.2247-58. Where an officer retains possession of a defendant's personal effects and the officer fails to inform the defendant of his right to leave, this factor militate against the Government. Appendix 3, *Walker*, 706 Fed.Appx. at 158, citing *United States v. Shabazz*, 931 F.2d 431, 438 (5th Cir. 1993).

Regarding the fifth factor, the level of intelligence and education of the defendant, although lower courts found it weighed in favor of the Government, at best, we submit this factor is neutral. While the video reflects Glenn understood his conversation with Sgt. Dawsey, in the case of Walker this factor only marginally weighed in favor of voluntariness. While Walker had at least some college education, Appendix 3, *Walker*, 706 Fed.Appx. at 158, nothing in the record indicates Glenn was better educated than his cousin, or that Dawsey made any special effort to ascertain Glenn's educational level.

Regarding whether the defendant believed any incriminating evidence would be found, both lower courts correctly found this factor neutral.

Consent followed too closely on the heels of Glenn's illegal detention. He simply could not feel free to leave, because of the commanding presence and actions of Dawsey and because Dawsey continuously held his driver's license and the rental document. The causal link of the illegal detention remained at the time consent was obtained. *United States v. Jenson*, 462 F.3d 399, 406 (5th Cir. 2006). Therefore, his consent was improperly obtained.

c. Loss attributed to Glenn should have been $111,929, proceeds from the "Texas trip" immediately preceding the stop instead of over $2 million.

Mistake has occurred. The intended loss amount of over $2 million is based upon all checks cashed or intended to be cashed in the alleged conspiracy between January 13, 2014, and August 17, 2015. However, consistent with the facts presented at trial, only an intended loss amount of $111,929, representing the 88 checks either cashed or intended to be cashed between August 26 and September 2, 2014, during the "Texas trip," should count to Mr. Glenn. That was the focus of the credible evidence against him. Instead of adding 16 offense levels, 8 should be added, for a loss greater than $95,000 but less than $150,000. USSG § 2B1.1(b)(1)(F).

Loss under USSG § 2B1.1 is reviewed under a clear error standard. Appendix 1, *Glenn*, 931 F.3d at 430, citing *United States v. Dickerson*, 909 F.3d 118, 128 (5th Cir. 2018). Loss need not be established with precision, but reliable

evidence must be considered to link losses to a particular defendant. *United States v. Hearns*, 845 F.3d 641, 649-51 (5th Cir. 2017); *United States v. Bernegger*, 661 F.3d 232, 241-42 (5th Cir. 2011). To hold Glenn responsible for losses caused by others required finding he agreed to undertake the criminal activity with them; the losses caused by those others were within the scope of that agreement; and the misconduct of them was reasonably foreseeable to Mr. Glenn. See *United States v. Longstreet*, 603 F.3d 273, 278-79 (5th Cir. 2010), citing *United States v. Hammond*, 201 F. 3d 346, 351 (5th Cir. 1999); see also *United States v. Jones*, 533 Fed.Appx.448, 453 (5th Cir. 2013); *United States v. Livingston*, 344 Fed.Appx. 86, 88-89 (5th Cir. 2009).

Even under relevant conduct, a sentencing court must determine the scope of particular criminal activity the defendant agreed to jointly undertake with codefendants. Awareness that James may have continued the fraud with others after the September 2014 arrest is not enough to hold Glenn responsible for such actions. To find otherwise would result in mistake of fact. *United States v. Ekanem*, 555 F.3d 172, 175-76 (5th Cir. 2009). See also *United States v. Hagman*, 740 F.3d 1044, 1047-48 (5th Cir. 2014).

While the 120 months sentence involved a downward variance from the calculated Guidelines range, loss at $111,929 under USSG § 2B1.1, would net an Offense Level 24 and, at Criminal History Category I, a range of only 51-63 months. Even the four-offense level leadership objection Glenn lost, standing alone, would result in Offense Level 30, with 97 to 121 months, just barely within the sentence

range of his actual sentence. Accordingly, if the district court were reversed on either or both of these two objections, remand for re-sentencing would be warranted, since the district judge might impose a lower sentence.

1. Facts supporting the limited nature of participation before the Texas trip.

The United States did not have evidence regarding when Glenn joined the conspiracy, nor of his connection after September 2014. The judge noted the lack of evidence during testimony of the Massachusetts State Police officer who arrested the two codefendants, Walker and James, along with Stephanie Cartegena, on January 31, 2014. Glenn was not present to have received and distributed cash proceeds, as James would later claim to be Glenn's role, nor was he ever implicated in that misconduct. ROA.1845-47. The $7,850 recovered that day came from a wallet attributed to James.

The counterfeit check from the Massachusetts stop matched a check format found on the thumb drive during the traffic stop in September 2014. The court believed Glenn's connection was linked by limited real estate work he performed on the thumb drive when he negotiated to purchase a piece of property in South Carolina for $12,650 (ROA.2144). But data on that computer media, including numerous pictures of James on false identification documents, is far more incriminating of Walker and James to criminal conduct begun eight months earlier, long before credible evidence from the Texas trip implicates Glenn.

The limited use of the thumb drive does not advance the notion that Glenn is

responsible for an intended loss of over $2 million. Ownership or possession of the computer equipment was not individually linked to any of the three defendants arrested on September 2, 2014. We note Corporal Woody testified the thumb drive came from a laptop or duffel bag, not a clothes bag, which, from trial and suppression testimony, may have been a bag belonging to Larry Walker. ROA.1589.

At most the United States proved Glenn accompanied the two other codefendants on the trip through Texas, August 26-September 2, 2014, for which the intended loss was $111,929.

2. Facts supporting no participation after the Texas trip.

No credible facts linked the $50,000 in cash Glenn used to purchase a Mercedes automobile the following April 2015 to the post-arrest, continuing criminal conduct of James and others. The car seller assumed the money had been withdrawn by Glenn from a bank, since he was paid with crisp $100 bills, wrapped in bands with a bank logo. ROA.1961-62. Government agents never asked him to identify the other two males with Glenn on that trip because neither codefendant accompanied Glenn on that business trip. ROA.1966-67. No check involved in the fraud was cashed or attempted to be cashed within three months of that automobile sale. US exhibit 6e. ROA.2341-47. In fact, US 6e shows only one unsuccessful and one successful cashing of checks in 2015 before the April car sale. ROA.2347. Both happened on February 7, 2015, in Texas. Accordingly, no evidence links the $50,000 currency with any series of check cashings after September 2014, lending

credence to Glenn's claim on US trial exhibit 14a (texting correspondence between buyer and seller), that he was on a business trip, and could stop off in Alpharetta, Georgia, to consummate the transaction. ROA.2646.

Since virtually all instrumentalities for committing the fraud had been seized by the Government on September 2, 2014, some other means must have been utilized by James and others to have continued the fraud through August 2015. No credible evidence connects Glenn to any of this post-September 2014 arrest activity.

The Government conducted an interview of James, after Glenn's trial (copy attached as Exhibit 3 to defendant's Sentencing Memorandum, ROA.3056). Although the court utilized it mainly to support finding a leadership role, Appendix 6, pp. 38-39, the Presentence Report also relied upon it to support intended loss.

The court erred in accepting James' characterization of Glenn as "orchestrator," responsible for the total intended loss amount. The statement is not worthy of belief. And while the Memorandum of Interview contains the agent's belief, without evidence, that Glenn was the "printer," James was not asked to confirm that role.

The temptation of applying the largest intended loss to Glenn should be resisted. It assuredly applied to James, and such application in a conspiracy provides symmetry for sentencing, but does so at the expense of justice to Glenn. For James, it was based on real evidence: dozens of photographs of his conduct; he and Walker being part of the charged conspiracy as early January 2014; the

evidence of Walker's rental of many vehicles during the first part of the fraud; and the evidence of James continuing to cash checks well into 2015. These facts contrast starkly with the paucity of evidence against Glenn, regarding when he joined the conduct which led to losses to Walmart and the lack of evidence of his conduct after the arrests in September 2014.

The amount of money within the scope of the agreement, and amount of money Glenn might reasonably foresee to gain, should be restricted to the $111,929 intended loss of the "Texas trip." *United States v. Cooper*, 274 F.3d 230, 241 (5th Cir. 2001); *Araromi v. United States*, No. EP-13-CV-201, 2014 U.S. Dist. LEXIS 56891, at *63 (WDTX April 23, 2014). Insufficient evidence exists to attribute the loss amount of over $2 million to Glenn. Instead of 16 levels under USSG § 2B1.1(b)(1)(I), only 8 levels should be added under USSG § 2B1.1(b)(1)(F).

d. A four level increase for leadership role was improperly assessed.

Clear error standard governs the review of a district court's determination to apply a leadership enhancement. *United States v. Dickerson*, 909 F.3d 118, 127, n. 22 (5th Cir. 2018). Clear error occurred when the lower court applied a leadership role to Glenn. USSG § 3B1.1 and Application Note 4 govern. In *United States v. Hawkins*, 866 F.3d 344, 347 (5th Cir. 2017), Application Note 4 factors of decision-making authority, recruitment of accomplices, claimed right to a larger share of "fruits of the crime," and the degree of control and authority exercised over others are set forth. They are to be examined by the court through reliable and credible

evidence. Even if relying on contents of a presentence report, the information should have "sufficient indicia of reliability to support its probable accuracy" and should be "plausible, based on the record as a whole." *United States v. Ochoa-Gomez*, 777 F.3d 278, 282 (5th Cir. 2015).

The court credited Ms. Cartegena from the January 2014 Massachusetts arrests, along with another unidentified male, captured on Walmart videos after September 2014, as participants the defendant led, in order to hold him responsible for a four level leadership enhancement under USSG § 3B1.1(a). Appendix 1, *Glenn*, 931 F.3d at 431-32. Fundamental unfairness is created in claiming Glenn organized, lead, managed, or supervised people when no evidence exists he knew them. Glenn was never implicated in the Massachusetts investigation. No evidence exists he ever met this woman or the unidentified male, or knew of their connection to the criminal conduct.

Too much weight was given to the *absence of evidence* in noting neither Glenn's picture nor name was ever used in committing the offense. Appendix 1, *Glenn*, 931 F.3d at 431-32. Contrast this *absence of evidence* with *the proof* that Walker, James, and Cartegena were arrested in January 2014; that Walker's name was used in renting the vehicles; and that James and another unidentified male are photographed numerous times exiting Walmart stores, and their pictures appear on identification documents used in the fraud. James made a self-serving, unworthy-of-belief statement after Glenn's trial, that he "always" gave proceeds to Glenn, the "orchestrator." No credence should be given to this claim.

The purchase of the Mercedes for $50,000 in currency the next spring was without involvement of James or Walker and without any provable connection to the stream of money continuously being obtained through the fraud. Again, the *absence of evidence* was elevated to a newer, unfair standard: the lack of such evidence must mean Glenn was an organizer or leader, clever enough not to be seen.

As far as the computer equipment found in the car all that was proven was that Glenn negotiated the purchase of property in South Carolina. None of the check-making software, identification card templates, images of signatures, hundreds of SSNs, and bank routing or account numbers can be attributed to him, any more than they can be attributed to the other two codefendants. A paucity of credible evidence exists as to who actually created the checks, and it is just as plausible that one or more of the other codefendants did so. It is too simplistic to assume that since Walker rented the cars and James cashed the checks, Glenn must have been the organizer and leader. The lack of credible evidence that Glenn: (1) exercised decision-making authority, (2) recruited accomplices, (3) claimed right to a larger share of "fruits of the crime," and (4) exercised control and authority over others should preclude application of USSG § 3B1.1. Application of the leadership role was clearly erroneous.

e. Obstruction of justice enhancement was improperly applied.

A two-level increase is warranted, if, during investigation, prosecution, or sentencing of the offense of conviction the defendant "…*willfully obstructed or impeded, or attempted to obstruct or impede the administration of justice*…".

USSG § 3C1.1. The key is willfulness. The lower courts clearly erred in applying the obstruction enhancement and allowing it to stand.

The Probation Officer agreed with the defense that three allegations of obstruction he had initially assessed during the presentence investigation did not merit application of obstruction of justice. PSR Addendum, beginning at ROA.2689. Nevertheless he recommended and the court applied the two-level increase for one remaining statement Glenn made regarding needing permission to travel to Florida when he was first released on bond. Glenn had testified he did not ask permission to travel to Florida to take care of his 18-year old probation violation. ROA.1109. He was wrong. He had forgotten the magistrate judge he was appearing before knew and expected him to go to Florida to take care of that business.

It is this very statement which the appellate court admitted Glenn appeared to be confused about at the revocation hearing. Appendix 1, *Glenn*, 931 F.3d at 432. Most importantly, the entire focus of Glenn's testimony was to confess his violation of conditions of supervised release by having taken two more recent trips without authorization from his pretrial supervising officers. Ultimately, the magistrate judge allowed the defendant to remain on bond, with stricter conditions of supervision, including electronic monitoring. And the magistrate judge essentially found the earlier trip to Florida to take care of his outstanding warrant was a non-issue, since he knew Glenn would have to go to Florida to take care of it. ROA.1141.

Glenn's misstatement was the type resulting from confusion, mistake, or faulty memory, and was not made with willful intent to obstruct justice. See Application Note 2, USSG § 3C1.1, and *United States v. Mudekunye*, 646 F.3d 281, 287 (5th Cir. 2011) and *United States v. Greer*, 158 F.3d 228, 235 and 239 (5th Cir. 1998). It was not a material misstatement made to hinder law enforcement as discussed in *United States v. Phillips*, 210 F.3d 345, 349-50 (5th Cir. 2000), nor was it the type of material misstatement admittedly made before a judge during a plea colloquy as discussed in *United States v. Adam*, 296 F.3d 327, 334-35 (5th Cir. 2002). Moreover, when confronted nine pages later in the transcript by the Assistant US Attorney with the fact that Probation in Connecticut had given him permission, Glenn immediately admitted he could be mistaken in his testimony. ROA.1118-19. Thus, the AUSA immediately corrected his error. This admitted and corrected mistake made by the defendant does not merit willful obstruction.

The combination of the defendant admitting he might have initially been mistaken in saying he told no one about the first trip; the clarification in argument; and the treatment by the magistrate judge of the initial Florida trip as a non-issue, should have resulted in a finding of no obstruction.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted, the judgment of the Fifth Circuit Court of Appeals vacated, and the case remanded for resentencing.

Respectfully Submitted,

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Dated: October 18, 2019

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 18th day of October, 2019, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* were served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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APPENDICES

APPENDIX 1: *United States v. Glenn*, 931 F.3d 424 (5th Cir. 2019)

APPENDIX 2: *United States v.* Glenn, 204 F.Supp.3d 893 (MDLA 2016)

APPENDIX 3: *United States v. Walker*, 706 Fed.Appx. 152 (5th Cir. 2017)

APPENDIX 4: *United States v. Glenn*, et.al, Ruling and Order, Joint Supplemental Motion to Suppress Evidence, MDLA, November 13, 2017

APPENDIX 5: Glenn Suppression Motion and Memorandum

APPENDIX 6: Sentencing Hearing transcript

APPENDIX 7: USSG § 2B1.1

APPENDIX 8: USSG § 3B1.1

APPENDIX 9: USSG § 3C1.1

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