No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MIGUEL ANGEL VEGA-TORRES
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the standards for traffic stops articulated in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), apply to immigration checkpoint stops?

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

None.

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PRAYER

Petitioner Miguel Angel Vega-Torres prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Westlaw version of opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Vega-Torres's case is attached to this petition as Appendix A. The district court's written order is attached to this petition as Appendix B.

JURISDICTION

The Fifth Circuit's judgment and opinion was entered on August 8, 2019. *See* Appendix A. This petition is filed within 90 days after entry of the judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution 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[.]

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. The questioning and search of Mr. Vega-Torres at the immigration checkpoint.

On May 26, 2017, Border Patrol Agent David Gonzalez was stationed in a primary inspection lane at the Falfurrias checkpoint and was inspecting a bus. Per normal procedure, Agent Gonzalez started at the front of the bus questioning the occupants, and another agent started at the back doing the same. The agents identified themselves and asked the passengers to have their identification ready for inspection. The goal of their immigration inspection was to establish citizenship.

According to Agent Gonzalez, it was normal for a person that he questioned to make eye contact, but eye contact does not in any way help him to determine citizenship. In his experience, people who are doing other things when he approaches them normally stop what they are doing and focus their attention on him. Although an inspection of a person usually takes 90 seconds, Agent Gonzalez's inspection of Mr. Vega-Torres through the pat-down of his person took about 3 to 5 minutes.

Agent Gonzalez approached Mr. Vega-Torres who was sitting in the middle of the front area of the bus. When Agent Gonzalez asked Mr. Vega-Torres whether he was a United States citizen, Mr. Vega-Torres had his identification ready and handed the agent his United States Permanent Resident Card. Agent Gonzalez saw that the card was valid. Agent Gonzalez did not give the card back to Mr. Vega-Torres, however, because Mr. Vega-Torres had only looked at him for a short time, and he was unable to determine whether the picture on the card matched Mr. Vega-Torres's face.

Instead of just asking Mr. Vega-Torres to look at him so he could compare his face

to the photo on the card, Agent Gonzalez extended the interview of Mr. Vega-Torres to ask him a series of question so that he could see his face and compare it to the card. Agent Gonzalez asked Mr. Vega-Torres where he was from, and Mr. Vega-Torres replied that he was from Brownsville, Texas. Agent Gonzalez next asked Mr. Vega-Torres where he was going, and Mr. Vega-Torres responded that he was going to San Antonio. Agent Gonzalez then asked Mr. Vega-Torres what his purpose was in going to San Antonio. Mr. Vega-Torres responded that it was to visit his family. Agent Gonzalez further questioned Mr. Vega-Torres about what part of San Antonio he was heading to, and Mr. Vega-Torres seemed like he did not know or did not have an answer for it and stated San Antonio once again. ROA.116-17. In between all of the questions that Agent Gonzalez asked, Mr. Vega-Torres would look at him and answer and then go back to using his phone.

At this point, Agent Gonzalez believed that Mr. Vega-Torres was actually the person on the Permanent Resident Card and was "okay for immigration purposes," but "believed that something else was off." Because Agent Gonzalez expected Mr. Vega-Torres to have an answer for what part of San Antonio he was going to and because people who are trying to enter the country illegally or smuggle drugs are coached but do not have enough answers for questions, Agent Gonzalez asked Mr. Vega-Torres for consent to pat him down.

When Mr. Vega-Torres consented to the pat-down, Agent Gonzalez patted down the back side of Mr. Torres-Vega's thighs because there had been a trend of people smuggling drugs on the back of their legs or thighs while wearing baggy shorts, and Mr. Vega-Torres was wearing baggy shorts. Agent Gonzales felt bundles on the back of Mr.

Vega-Torres's thighs, and, at that point, Mr. Vega-Torres became jittery or nervous. Agent Gonzalez then had Mr. Vega-Torres step off the bus so that a more thorough pat-down could be conducted.

B. Indictment, motion to suppress, and the district court's ruling.

On June 22, 2017, Mr. Vega-Torres, was charged by a 1-count indictment with possessing with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). On July 17, 2017, Mr. Vega-Torres filed a motion to suppress evidence that was discovered hidden on his person at the Falfurrias, Texas, Border Patrol checkpoint because the seizure and search of his person exceeded the permissible scope and programmatic purpose of an immigration inspection. A suppression hearing was held on August 18, 2017. On September 1, 2017, the district court entered an order denying Mr. Vega-Torres's motion to suppress, ROA.57-63, finding that, "[b]ased on Vega-Torres's behavior, [Agent Gonzalez] persisted with appropriate questions and quickly developed reasonable suspicion of criminal activity and that his "immigration inspection was of a permissible duration and scope under the circumstances." The Court also found that Mr. Vega-Torres's consent to search was voluntary. *See* Appendix B.

C. Plea, sentencing, and appeal.

On October 5, 2017, Mr. Vega-Torres entered a conditional guilty plea to the indictment preserving his right to appeal the denial of his motion to suppress. On May 2, 2018, the district court sentenced Mr. Vega-Torres to serve 60 months in the custody of the Bureau of Prisons and a 4-year term of supervised release. The court also imposed a $100 special assessment, but did not impose a fine. Mr. Vega-Torres timely filed notice of

appeal on May 3, 2018.

On appeal, Mr. Vega-Torres contended, as he had in the district court, that Agent Gonzalez unlawfully prolonged the immigration stop by extending the stop beyond the "brief question or two and possibly the production of a document evidencing the right to be in the United States" permitted by *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and embarking on the type of "detour" that "adds time to the stop," which is prohibited by *Rodriguez v. United States*, 135 S. Ct. 1609, 1615-16 (2015). In particular, he argued that under this Court's opinion in *Rodriguez* Agent Gonzalez's interview of Mr. Vega- Torres had to be carefully tailored to its underlying justification, could last no longer than necessary to effectuate that purpose, had to end when the tasks tied to the justifying purpose were or reasonably should have been completed, could not be prolonged even for a *de minimis* amount of time by unrelated questions, and could extend only for the amount of time reasonably required to diligently and expeditiously conduct it. Mr. Vega-Torres further contended that Agent Gonzalez violated these requirements by launching into a litany of questions unrelated to the issue instead of merely making the simple request to see his face. Moreover, such a request would have satisfied the programmatic purpose of the stop because Agent Gonzalez testified that, once he was able to view Mr. Vega-Torres's face, he was satisfied that he was the person in the photo on the card. Mr. Vega-Torres also contended that his consent to the search did not dissipate the taint of the Fourth Amendment violation, as there were no intervening circumstances between the violation and the consent (and, therefore, the consent was not an "independent act of free will").

The Fifth Circuit rejected these arguments, relying on its long-standing rule that "'it

is the length of the detention, not the questions asked, that makes a specific stop unreasonable.'" *United States v. Vega-Torres*, No. 18-40441, 2019 WL 3761643, at *2 (5th Cir. Aug. 8, 2019) (unpublished) (quoting *United States v. Machuca-Barrera*, 261 F.3d 425, 432 (5th Cir. 2001)). Relying on its recent published decision in *United States v. Tello*, 924 F.3d 782 (2019), *cert. denied*, No. 19-5600, 2019 WL 4923395 (U.S. Oct. 7, 2019), the Fifth Circuit rejected Mr. Vega-Torres's argument that this Court's opinion in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) "foreclosed the length-based approach in *Machucca-Barrera*." *Vega-Torres*, 2019 WL 3761643, at *3. The Fifth Circuit additionally reiterated that it would not "'scrutinize the particular questions a Border Patrol agent choses to ask as long as in sum they generally relate to determining citizenship status.'" *Vega-Torres*, 2019 WL 3761643, at *3 (quoting *Machuca-Barrera*, 261 F.3d at 433). Because the Fifth Circuit found that Mr. Vega-Torres's detention was not unconstitutional, it also found that his consent was not unconstitutionally tainted. *Vega-Torres*, 2019 WL 3761643, at *3.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to decide an important question of federal law—the standards governing the scope of checkpoint seizures—that has not been decided by this Court and that has been resolved by the Fifth Circuit in a way that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10(c).

A. This Court approved of warrantless, suspicionless seizures at fixed interior checkpoints only because the stops are brief, minimally intrusive, and limited to the narrow programmatic purpose of conducting an immigration inspection.

More than four decades ago, this Court held that warrantless, suspicionless seizures at fixed interior checkpoints comported with the Fourth Amendment. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). At issue were two fixed checkpoints, one in San Clemente, California, and the other in Sarita, Texas. At the San Clemente checkpoint, all vehicles were stopped for an agent to visually screen them, but most drivers were allowed to leave without any questioning or careful visual examination. *Id.* at 546. Agents, without any articulable suspicion, referred a small number of vehicles "to a secondary inspection area, where their occupants [were] asked about their citizenship and immigration status." *Id.* The average secondary inspection lasted three to five minutes. *Id.* at 546-47. At the Sarita checkpoint, nearly all drivers were stopped for brief questioning, except local inhabitants recognized by the agents were waved through. *Id.* at 550.

To evaluate the constitutionality of the warrantless, suspicionless stops, the Court weighed the public interest in controlling illegal immigration near the border against the limited nature of the intrusion upon individuals resulting from the checkpoint stops. *See id.* 556-60. Previous cases on Border Patrol traffic-checking operations provided background

for the Court's balancing in *Martinez-Fuerte*. The Fourth Amendment prohibits Border Patrol from searching vehicles for illegal aliens while conducting roving patrols, absent probable cause that the vehicle contains illegal aliens or a warrant, because "searches by roving patrols impinge[] so significantly on Fourth Amendment privacy interests." *See id.* at 555 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973)). The same limits govern searches of vehicles at fixed checkpoints. *United States v. Ortiz*, 422 U.S. 891, 893-97 (1975); *see Martinez-Fuerte*, 428 U.S. at 555. Roving patrols may stop, but not search, a vehicle based on mere reasonable suspicion that the vehicle contains illegal aliens, however, because "the interference with Fourth Amendment interests involved in such a stop was 'modest.'" *Id.* at 555-56 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).

Against that backdrop, the Court concluded that no suspicion was needed for stops at fixed interior checkpoints. Unlike the intrusive searches in *Almeida-Sanchez* and *Ortiz*, at checkpoints "all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Martinez-Fuerte*, 428 U.S. at 558 (cleaned up) (quoting *Brignoni-Ponce*, 422 U.S. at 880). "Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search." *Martinez-Fuerte*, 428 U.S. at 558. Selectively diverting drivers to secondary inspection at the San Clemente checkpoint, without any suspicion, passed constitutional muster as well because the intrusion was "sufficiently minimal" and involved "brief questioning." *Id.* at 563-64.

The checkpoints' brevity and limited purpose of curbing illegal immigration are

critical to their constitutionality. The Court reinforced the constitutional significance of the limited purpose and brevity many years later in its decision concluding that fixed checkpoints to stop drivers without individualized suspicion for the purpose of interdicting illegal drugs violated the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (describing *Martinez-Fuerte* as approving of "brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens"). The key distinguishing feature that rendered Border Patrol immigration checkpoints constitutional but not drug-interdiction checkpoints was the difference in the checkpoints' "primary purpose." *Id.* at 38. Because drug-interdiction checkpoints advanced the government's "'general interest in crime control'" and operated "primarily for the ordinary enterprise of investigating crimes," they were unconstitutional. *Id.* at 40 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.19 (1979)).

B. The Fifth Circuit evaluates the constitutionality of checkpoint seizures based on their duration and refuses to scrutinize the questions Border Patrol agents ask during the seizures.

Since its seminal decision in *Martinez-Fuerte*, the Court has provided no further guidance on the permissible scope of Border Patrol agents' activities at fixed interior checkpoints. The Fifth Circuit, however, has developed a body of case law evaluating the reasonableness of a checkpoint stop based on "the length of the detention, not the questions asked." *United States v. Machuca-Barrera*, 261 F.3d 425, 432 (5th Cir. 2001). This is because, says the Fifth Circuit, "the Fourth Amendment prohibits only unreasonable seizures, not unreasonable questions." *Id.*

In *Machuca-Barrera*, the Fifth Circuit acknowledged that an immigration stop's

brevity was "a principal rationale" for this Court's conclusion that the checkpoints were constitutional. *Id.* at 433. The court decided, however, that it would "not scrutinize the particular questions a Border Patrol agent chooses to ask as long as in sum they generally relate to determining citizenship status." *Id.* Instead, the court concluded that policing the duration of stops was the most practical way to enforce the limited purpose of the stop. *Id.* at 434. "To scrutinize too closely a set of questions asked by a Border Patrol agent would engage judges in an enterprise for which they are ill-equipped and would court inquiry into the subjective purpose of the officer asking the questions." *Id.*

Applying its length-based test to the case before it, the Fifth Circuit found that the agent's "few questions took no more than a couple of minutes; this is within the permissible duration of an immigration checkpoint stop." *Id.* at 435. The agent asked about drugs and guns, which clearly has nothing to do with citizenship status. The court, however, would "not second-guess [the agent's] judgment" in asking those questions. *Id.*

The Fifth Circuit's traffic-stop decision in *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993), inspired its policy of not scrutinizing questions at checkpoints. There, the court explained that "detention, not questioning, implicates the Fourth Amendment" in the context of a traffic stop based on reasonable suspicion where the officer "asked a motorist questions about contraband *while waiting for the results of a computer check* of the motorist's license and registration." *Machuca-Barrera*, 261 F.3d at n.21 (emphasis added) (citing *Shabazz*, 993 F.2d at 437). But the Fifth Circuit did not acknowledge the lack of a simultaneous on-purpose computer check during off-purpose questioning at a checkpoint.

Since *Machuca-Barrera*, the Fifth Circuit has repeatedly held that the

reasonableness of checkpoint stops turns on their length, not the agent's questions. In *United States v. Jaime*, 473 F.3d 178 (5th Cir. 2006), for example, the court explained *Machuca-Barrera* as holding that a "suspicionless detention at the checkpoint was legal *because* its *duration*, up to the time [the driver] gave his consent to search, was objectively reasonable." 473 F.3d at 184 (emphasis in original). As a result, the 30-second stop in *Jaime*, which was less than the two-minute stop in *Machuca-Barrera*, was of a permissible duration, even though the agent asked questions unrelated to citizenship. *Id.* at 184-85.

Numerous other checkpoint cases have applied the Fifth Circuit's length-based analysis. A 30-to-40-second stop is permissible because it is "an objectively reasonable duration," regardless of whether the agent is satisfied that the driver and passenger were United States citizens. *United States v. McMillon*, 657 Fed. Appx. 326 (5th Cir. 2016) (unpublished). A stop lasting a minute and a half "is within the time approved in *Machuca-Barrera*" and therefore "did not exceed the permissible duration of an immigration stop," without regard to the agent's questioning about proper towing equipment. *United States v. Hinojosa-Echavarria*, 250 Fed. Appx. 109, 113 (5th Cir. 2007) (unpublished). An agent's questioning about the ownership of a vehicle does not impermissibly extend a stop because the overall length of 40 to 50 seconds falls within the couple of minutes approved by *Machuca-Barrera*. *United States v. Villarreal*, 61 Fed. Appx. 119 (5th Cir. 2003) (unpublished). All that matters is the length of the stop. *See also, e.g.*, *United States v. Orozco-Vazquez*, 703 Fed. Appx. 360, 361 (5th Cir. 2017) (unpublished) (no analysis of the stop except to say that the detention "was within the permissible duration of an immigration checkpoint stop"); *United States v. White*, 701 Fed. Appx. 372 (5th Cir. Nov.

13, 2017) (unpublished) (same); *United States v. Maldonado*, 241 Fed. Appx. 198, 201 (5th Cir. 2007) (unpublished) (a stop of no more than one minute is within the "permissible duration of a checkpoint stop"); *United States v. Ibarra-Loya*, 174 Fed. Appx. 861, 862 (5th Cir. 2006) (unpublished) (a stop of less than one minute was of a permissible duration).

C. This Court rejects the Eighth Circuit's length-based analysis of traffic stops in *Rodriguez*.

Similar to the Fifth Circuit's length-based treatment of checkpoint stops, the Eighth Circuit measured the constitutionality of traffic stops against a length-based benchmark created by its prior case law. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (the Eighth Circuit approved of the seven-to-eight-minute delay as consistent with previous delays that court had found to be permissible). Likewise, the government advocated for comparing "the overall duration of the stop" to "the duration of other traffic stops involving similar circumstances." *Id.* at 1616.

This Court expressly rejected those approaches based on several important principles regarding the limitations on a stop made for a particular investigatory purpose. First, the Court emphasized that the permissible duration of any non-arrest detention is firmly linked to its justifying purpose, and is limited to "the time needed to handle the matter for which the stop was made." *Rodriguez*, 135 S. Ct. at 1612. "The scope of the detention must be carefully tailored to its underlying justification" and "may last no longer than is necessary to effectuate that purpose." *Id.* at 1614 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)); *see also Terry v. Ohio*, 392 U.S. 1, 20 (1968) (an officer's action must be "justified at its inception" and "reasonably related in scope to the circumstances

which justified the interference in the first place"). Authority for the seizure ends when tasks tied to the original purpose of the stop "are—or reasonably should have been—completed." *Rodriguez*, 135 S. Ct. at 1614.

Second, this Court held that an officer may not investigate crimes different from the original purpose of the stop in a way that extends the stop. *See Rodriguez*, 135 S. Ct. at 1615-16. Instead, "[o]n scene investigation into other crimes," different from the original justification for the stop, "detours from that mission" and renders a stop unlawful if such a detour "adds time to the stop." *Id.* at 1615. Although an officer may perform unrelated tasks during an otherwise lawful stop, "he may not do so in a way that prolongs the stop," absent independent reasonable suspicion to do so. *Id.* at 1615. Importantly, this no-detour principle applies regardless of the length of the time added to the stop. *See id.* at 1615-16.

Lastly, the Court specifically rejected the idea that the reasonableness of the length of a stop could be judged by reference to some objective standard of the length of time a particular stop should take, but rather must be judged by the officer's actual diligence in pursuing the purpose of the stop. *See id.* at 1616. The Court rejected the Eighth Circuit's approach, which approved of traffic stops as reasonable regardless of what actions the officer took unrelated to the purpose of the stop, so long as the overall stop lasted approximately as long as other stops of that kind and treated any additional intrusion as "de minimis." *See id.* at 1615-16. Instead, the Court emphasized that an officer "always has to be reasonably diligent" in his investigation, and held that "[t]he reasonableness of a seizure . . . depends on what the police in fact do." *Id.* at 1616 (citing *Knowles v. Iowa*, 525 U.S. 113, 115-17 (1998)).

In rebuffing the government's approach, the Court explained that, if an officer can complete inquiries about the underlying justification for the stop "expeditiously," then "that is the amount of 'time reasonably required to complete the stop's mission.'" *Rodriguez*, 135 S. Ct. at 1616 (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). An officer may not earn "bonus time" to investigate whatever he wants by completing the original mission of the stop more quickly than usual, and then using additional time to pursue an unrelated investigation. *See Rodriguez*, 135 S. Ct. at 1616.

D. Despite *Rodriguez*, the Fifth Circuit continues to apply its length-based analysis of checkpoint stops.

After *Rodriguez*, the Fifth Circuit reaffirmed its length-based analysis of checkpoint stops. As the Fifth Circuit explained in Mr. Vega-Torres's case, that court has "long held that the validity of an immigration stop turns on 'the length of the detention, not the questions asked.'" *Vega-Torres*, 2019 WL 3761643, at *3 (quoting *Machuca-Barrera*, 261 F.3d at 432). And, according to the Fifth Circuit, there is no conflict between its long-standing approach and this Court opinion in *Rodriguez* because "*Rodriguez* allows for stops of a 'tolerable duration'—a duration that is circumscribed by the reason for the stop" and "'an immigration stop may take up to five minutes." *United States v. Vallejo*, 772 Fed. Appx. 129, 130 (5th Cir. 2019) (unpublished) (quoting *United States v. Tello*, 924 F.3d 782, 787-89 (5th Cir. 2019), *cert. denied*, No. 19-5600, 2019 WL 4923395 (U.S. Oct. 7, 2019)), *cert. denied*, No. 19-5953, 2019 WL 5150727 (U.S. Oct. 15, 2019)). Because Agent Gonzalez's questioning of Mr. Vega-Torres "lasted no more than a couple of minutes," the Fifth Circuit held that the length of the detention was reasonable, notwithstanding the

number of unnecessary questions that the agent asked and the time that it took to do so. *Vega-Torres*, 2019 WL 3761643, at *3.

The Fifth Circuit's decision in this case relied on its earlier published opinion in *Tello*. There, the court found that the 30-second "duration of the stop was significantly less than or comparable to the time frames we have found acceptable for immigration stops." *Tello*, 924 F.3d at 787 (collecting cases). The court expressly acknowledged the argument that the length-based approach "cannot survive *Rodriguez*." *Id.* Rejecting that argument, the court distinguished *Rodriguez* as a case involving a traffic stop, and relied on this Court's *Martinez-Fuerte* decision as "recogniz[ing] that an immigration stop may take up to five minutes[.]" *Id.* at 788-89.[1] The Fifth Circuit has already applied its *Tello* decision, and its reaffirmance of the length-based approach, to three additional checkpoint stops, including in Mr. Vega-Torres's case. *See United States v. Escobar*, No. 18-40717, 2019 WL 4232957, at *1 (5th Cir. Sept. 5, 2019) (unpublished); *Vega-Torres*, 2019 WL 3761643, at *3; *Vallejo*, 772 Fed. Appx. at 130.

E. This case presents an ideal vehicle for the Court to decide an important issue of federal law and to resolve the conflict between its decision in *Rodriguez* and the Fifth Circuit's approach to checkpoint stops.

This case presents an important issue of federal law on which this Court has offered little guidance. As the Fifth Circuit itself has recognized, since authorizing warrantless, suspicionless fixed checkpoints in 1976, this Court "has not explained the constitutional

[1] *Martinez-Fuerte* reported that the "the average length of an investigation in the secondary inspection area [of the San Clemente checkpoint in 1976] is three to five minutes." *Martinez-Fuerte*, 428 U.S. at 546-47. Nothing in the Court's opinion indicates that any of those three-to-five minutes involved non-immigration-related activity.

boundaries of individual stops at immigration checkpoints." *Machuca-Barrera*, 261 F.3d at 432; *see also Rynearson v. United States*, 601 Fed. Appx. 302, 305 (5th Cir. 2015) (unpublished) (checkpoint agents were entitled to qualified immunity because an encounter lasting 34 minutes, during which the driver had produced his military identification and passports but the agents still did not allow him to leave, did not violate clearly established law). This Court said in *Martinez-Fuerte* that "[t]he principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the *scope* of the stop." *Martinez-Fuerte*, 428 U.S. at 566-67 (emphasis added). Establishing appropriate limitations is crucial, as these checkpoints "detain thousands of motorists" in "a dragnet-like procedure," and "[t]he motorist whose conduct has been nothing but innocent . . . surely resents his own detention and inspection." *Id.* at 571 (Brennan, J., dissenting). But the Fifth Circuit has said that "policing the *duration* of the stop is the most practical enforcing discipline of purpose." *Machuca-Barrera*, 261 F.3d at 434 (emphasis added).

Further guidance from this Court is especially appropriate given the "strong hints that the Constitution is being routinely violated at these checkpoints." *United States v. Soyland*, 3 F.3d 1312, 1320 (9th Cir. 1993) (Kozinski, J., dissenting) ("There's reason to suspect the agents working these checkpoints are looking for more than illegal aliens. If this is true, it subverts the rationale of *Martinez-Fuerte* and turns a legitimate administrative search into a massive violation of the Fourth Amendment . . . Given the strong hints that the Constitution is being routinely violated at these checkpoints, we owe it to ourselves and the public we serve to look into the matter."). Indeed, as was reported in *The New York Times* earlier this year,

> . . . [t]he agents at [these interior checkpoints] arrest relatively few unauthorized migrants . . . The agents at the checkpoints deal largely with seizures of marijuana and other drugs from motorists.
>
> The checkpoints have emerged as a source of contention with human rights groups, which have contended that Border Patrol agents routinely ignore their legal authority during the traffic stops to search people without warrants. By law, agents must have probable cause to search the interior of a vehicle, though an alert from a drug-sniffing dog 'legitimately' alerts to the presence of drugs, according to the American Civil Liberties Union.

Simon Romero, *Border Patrol Takes a Rare Step in Shutting Down Inland Checkpoints*, N.Y. Times (March 25, 2019), *available at* https://www.nytimes.com/2019/03/25/us/border-checkpoints-texas.html (last visited Sept. 5, 2019).

Other news sources have similarly reported that in recent years a primary use of these fixed interior immigration checkpoints has been drug interdiction. *See, e.g.*, Robert Moore, *Border Patrol Inland Checkpoints Shut Down So Agents Can Help Process Asylum Seekers*, Texas Monthly (March 23, 2019), *available at* https://www.texasmonthly.com/news/border-patrol-inland-checkpoints-shut-down-so-agents-can-help-process-asylum-seekers/ (last visited Sept. 5, 2019) ("The primary use of the checkpoints in recent years has been drug seizures . . . In fiscal year 2018, the Border Patrol reported seizing 41,863 pounds of marijuana, 2,717 pounds of cocaine[,] 405 pounds of heroin, 6,366 pounds of methamphetamine[,] and 200 pounds of fentanyl at its checkpoints.[2]"); Cedar Attanasio, Associated Press, *U.S. Shuts Interior Checkpoints to*

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[2] *See* U.S. Customs and Border Protection, *U.S. Border Patrol Nationwide Checkpoint Drug Seizures in Pounds*, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/usbp-drug-seizures-sector (last visited Sept. 6, 2019) (reporting these drug seizures).

Focus on Mexico Border, *available at* https://www.foxnews.com/us/us-shuts-interior-checkpoints-to-focus-on-mexico-border (last visited Sept. 5, 2019) ("While [interior immigration] checkpoints account for only a sliver of Border Patrol arrests—2 percent from 2013 to 2016, they also handled 43 percent of drug busts during that time, according to the GAO.[3]"); Eric Westervelt, National Public Radio (NPR), *As Migrants Stream in at the Border, Inland Checkpoints Feel the Strain*, available at: https://www.npr.org/2019/06/12/731797754/as-migrants-stream-in-at-the-border-inland-checkpoints-feel-the-strain (last visited Sept. 5, 2019) ("Agents [at the Falfurrias checkpoint in Texas] are also on the lookout for illegal drugs. The new checkpoint has more drug-detecting dogs and new state-of-the-art technology to detect contraband or people.").

This case presents an ideal vehicle for the Court to resolve the conflict between its decision in *Rodriguez* and the Fifth Circuit's approach to checkpoint stops. The issue was preserved in the district court and squarely decided by the Fifth Circuit on appeal. The facts of the case cleanly pose the question presented. The agent had no articulable doubt about Mr. Vega-Torres's legal residency in the United States after Mr. Vega-Torres handed him is United States Permanent Residence Card. Although a simple request by Agent Gonzalez for Mr. Vega-Torres to look at him would have confirmed that Mr. Vega-Torres was the person pictured on the card, Agent Gonzalez nevertheless extended the stop to pursue off-purpose questioning unrelated to citizenship. And, even after Agent Gonzalez came to

[3] *See* U.S. Government Accountability Office, Report to Congressional Requesters (GAO-18-50), *Border Patrol, Issues Related to Agent Deployment Strategy and Immigration Checkpoints* (Nov. 2017), *available at* https://www.gao.gov/assets/690/688201.pdf.

believe that Mr. Vega-Torres was the person pictured on the card, he asked for consent to pat-down Mr. Vega-Torres based on his mere hunch "something else was off."

Further percolation of the issue will not resolve the conflict. The Fifth Circuit's length-based analysis is firmly established. *See supra*, text at 16-19, 21-22. And the court has rejected the argument that *Rodriguez* governs checkpoint stops in not only a published decision, but also three unpublished opinions. *See supra*, text at 21-22.

The conflict between *Rodriguez* and the Fifth Circuit's length-based approach is glaring. This Court said in *Rodriguez*: "How could diligence be gauged other than by noting what the officer actually did and how he did it?" *Rodriguez*, 135 S. Ct. at 1616. Yet the Fifth Circuit refuses to scrutinize what questions an agent asks during a checkpoint stop. *Rodriguez* firmly rejected the Eighth Circuit's and government's length-based approach. But the Fifth Circuit uses that same approach for checkpoints and routinely approves of any stop lasting up to five minutes.

Finally, the Fifth Circuit's approach of giving less scrutiny to checkpoints than *Rodriguez* requires of traffic stops has got it backwards. If anything, checkpoint stops should be more limited and subject to more court scrutiny than traffic stops because checkpoints stops are based on no suspicion but traffic stops are based on individualized suspicion of wrongdoing. *See Martinez-Fuerte*, 428 U.S. at 560 ("some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure" but checkpoint stops "made in the absence of any individual suspicion" are constitutional because "the resulting intrusion on the interest of motorists [is] minimal."). In addition, officers conducting traffic stops have a broader mission than checkpoint agents because

traffic-stop officers are "enforc[ing] the traffic code" by "ensuring that vehicles on the road are operated safely and responsibly." *Rodriguez*, 135 S. Ct. at 1615. That broader mission permits traffic-stop officers to "check[] the driver's license, determin[e] whether there are outstanding warrants against the driver, and inspect[] the automobile's registration and proof of insurance." *Id.* A traffic-stop officer may also "need to take certain negligibly burdensome precautions in order to complete his mission safely" since traffic stops are "especially fraught with danger to police officers." *Id.* at 1616. By contrast, checkpoint agents are supposed to be limited to immigration and immigration only because that narrow focus is a major part of what makes an otherwise unreasonable, warrantless-and-suspicionless seizure constitutional. *Compare Martinez-Fuerte*, 428 U.S. at 556-59 (fixed immigration checkpoints are constitutional because the government's need to curb illegal immigration is great and the intrusion is minimal), *with Edmond*, 531 U.S. at 37-38, 41-44 (fixed checkpoints for general crime interdiction are unconstitutional). For all of these reasons, the Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: October 24, 2019

Respectfully submitted,

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See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee
v.
Miguel Angel VEGA-TORRES,
Defendant - Appellant

No. 18-40441
|
FILED August 8, 2019

Synopsis

Background: Defendant, who was charged with possession with intent to distribute more than 500 grams of cocaine, moved to suppress evidence discovered during immigration inspection. The United States District Court for the Southern District of Texas denied motion. Following entry of conditional guilty plea, defendant appealed.

[Holding:] The Court of Appeals held that border patrol agent did not exceed permissible scope of immigration checkpoint stop and, thus, did not unconstitutionally prolong defendant's detention.

Affirmed.

West Headnotes (1)

[1] Arrest

Border patrol agent did not exceed permissible scope of immigration checkpoint stop and, thus, did not unconstitutionally prolong defendant's detention; agent's questions related to defendant's citizenship status, length of detention lasted no more than a couple of minutes before agent requested and received consent to search, and agent had reasonable suspicion to extend stop based on defendant's behavior. U.S. Const. Amend. 4.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 2:17-CR-355-1

Attorneys and Law Firms

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Before HAYNES, GRAVES, and DUNCAN, Circuit Judges.

Opinion

PER CURIAM: *

*1 Miguel Angel Vega-Torres moved to suppress evidence discovered during an immigration inspection. The district court denied the motion, and Vega-Torres now challenges the district court's order. Vega-Torres argues that the district court reversibly erred in denying his motion because: (1) the agent at the immigration checkpoint stop exceeded the limited citizenship purpose of the stop and unconstitutionally prolonged his detention in violation of the Fourth Amendment, and (2) Vega-Torres's subsequent consent to search was not sufficiently attenuated from the constitutional violation. We disagree.

I.

On May 26, 2017, Vega-Torres was a passenger on a commercial bus stopped at a border patrol checkpoint in Falfurrias, Texas. Border Patrol Agent David Gonzalez boarded the bus to conduct an immigration inspection. Normally, according to Agent Gonzalez's testimony at the suppression hearing, an immigration inspection takes 90 seconds for each passenger. However, Agent Gonzalez's inspection of Vega-Torres took three to five minutes.

Agent Gonzalez asked Vega-Torres for his citizenship documentation. Vega-Torres, who was using his cell phone, handed Agent Gonzalez his Legal Permanent Resident ("LPR") card and then continued to use his cell phone. Agent Gonzalez believed the LPR card was valid, but he had a difficult time matching Vega-Torres's face with the LPR card photo because Vega-Torres only made brief eye contact between looking at Agent Gonzalez to answer questions and using his cell phone. So, Agent Gonzalez, while holding the card, extended his interview and asked Vega-Torres several questions to get Vega-Torres to sustain eye contact with him.

Agent Gonzalez asked Vega-Torres a series of questions because after each response, Vega-Torres would immediately return to looking at his phone. Agent Gonzalez asked Vega-Torres where he was from, and Vega-Torres replied Brownsville, Texas. He asked him where he was heading, and Vega-Torres replied San Antonio. He asked him what his purpose was for going to San Antonio, and Vega-Torres replied that he was visiting family. When Agent Gonzalez asked him what part of San Antonio he was heading to, he replied San Antonio. Based on Agent Gonzalez's experience, people who are attempting to illegally enter the country or smuggle drugs have been coached to give certain answers, but they are unable to answer all the agent's questions.

After Agent Gonzalez completed his questions, he believed Vega-Torres was "probably okay for immigration purposes," but "believed something else was off." At the suppression hearing, Agent Gonzalez testified that he had noticed a trend of smugglers wearing baggy shorts to conceal contraband on the back of their thighs and that Vega-Torres was wearing baggy shorts consistent with that trend. So, he asked Vega-Torres for consent to search him. Vega-Torres consented to the search.

Agent Gonzalez patted Vega-Torres's thigh and felt a solid edge consistent with a bundle of drugs. Agent Gonzalez observed that Vega-Torres became "jittery" or "nervous." Agent Gonzalez then asked Vega-Torres to step off the bus for a more thorough search. During the search outside the bus, Agent Gonzalez found four bundles of cocaine taped to Vega-Torres's thighs.

***2** Vega-Torres was charged by indictment with one count of possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B). Vega-Torres moved to suppress the evidence obtained during the search. The district court denied the motion. First, the district court found that, under the circumstances, the search did not exceed the permissible scope of the immigration stop. "Based on Vega-Torres's behavior, [Agent Gonzalez] persisted with appropriate questions and quickly developed reasonable suspicion of criminal activity." Second, the district court found that, based on the totality of the evidence, the Government satisfied its burden of demonstrating that Vega-Torres's consent was voluntary.

Vega-Torres then entered a conditional guilty plea, reserving the right to appeal the district court's denial of his suppression motion. The district court sentenced Vega-Torres to, *inter alia*, 60 months' imprisonment.

Vega-Torres now timely appeals the district court's order denying his suppression motion.

II.

"When examining a district court's ruling on a motion to suppress, we review questions of law de novo and factual findings for clear error, viewing the evidence in the light most favorable to the prevailing party." *United States v. Ganzer*, 922 F.3d 579, 583 (5th Cir. 2019) (quotation omitted). "We must defer to the findings of historical fact made by the district court unless left with the definite and firm conviction that a mistake has been committed." *United States v. Freeman*, 914 F.3d 337, 341 (5th Cir. 2019) (quotation omitted). "While this court reviews the district court's legal determination that the historical facts provided reasonable suspicion de novo, 'due weight' must be given to the 'inferences drawn from those facts by resident judges and local law enforcement officers.' " *Id.* at 341–42 (quoting *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)). "We will uphold a district court's denial of a suppression motion if there is any reasonable view of the evidence to support it." *Ganzer*, 922 F.3d at 583 (quotation omitted).

III.

Vega-Torres argues that the district court reversibly erred in denying his motion to suppress because: (1) Agent Gonzalez exceeded the permissible scope of the immigration checkpoint stop and unconstitutionally prolonged Vega-Torres's detention, and (2) Vega-Torres's consent to search

was not sufficiently attenuated from the unconstitutional extension of the immigration inspection.

A.

Relying heavily on *Rodriguez v. United States*, —— U.S. ——, 135 S. Ct. 1609, 191 L.Ed.2d 492 (2015), Vega-Torres argues that Agent Gonzalez's interview was unconstitutional because Agent Gonzalez failed to "expeditiously and diligently conduct the interview to accomplish the programmatic immigration purpose of the stop." According to Vega-Torres, Agent Gonzalez should have simply asked, "Sir, can you please look at me so that I can see your face," because Agent Gonzalez only needed to see Vega-Torres's face to ensure that it matched the person in the photo. Asking this one question, or a similar question, Vega-Torres argues, would have satisfied the programmatic purpose of the stop of confirming citizenship and would not have unconstitutionally prolonged his detention.

Under the Fourth Amendment, "Border Agents may conduct 'suspicionless seizures of motorists' for immigration checks at fixed Border Patrol checkpoints." *United States v. Alvarez*, 750 F. App'x 311, 313 (5th Cir. 2018) (per curiam) (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000)). "To determine the lawfulness of a stop, we ask whether the seizure exceeded its permissible duration." *United States v. Machuca-Barrera*, 261 F.3d 425, 432 (5th Cir. 2001). The permissible duration of an immigration stop is "the time reasonably necessary to determine the citizenship status of the persons stopped." *Alvarez*, 750 F. App'x at 313. "This includes 'the time necessary to ascertain the number and identity of the occupants of the vehicle, inquire about citizenship status, request identification or other proof of citizenship, and request consent to extend the detention.' " *Id.* (quoting *Machuca-Barrera*, 261 F.3d at 433).

***3** We have found that an immigration stop, "which determined the citizenship status of the travelers and lasted no more than a couple of minutes before [the agent] requested and received consent to search, was constitutional." *Machuca-Barrera*, 261 F.3d at 435. "Within [the] brief window of time in which a Border Patrol agent may conduct a checkpoint stop, ... we will not scrutinize the particular questions a Border Patrol agent chooses to ask as long as in sum they generally relate to determining citizenship status." *Id.* at 433. "It is the length of the detention, not the questions asked, that makes a specific stop unreasonable: the Fourth Amendment prohibits only unreasonable seizures, not unreasonable questions, and law enforcement officers are always free to question individuals if in doing so the questions do not effect a seizure." *Id.* at 432.

"[If] the initial, routine questioning generates reasonable suspicion of other criminal activity, the stop may be lengthened to accommodate its new justification." *Id.* at 434. "Thus, an agent at an immigration stop may investigate non-immigration matters beyond the permissible length of the immigration stop if and only if the initial, lawful stop creates reasonable suspicion warranting further investigation." *Id.*

Accordingly, under *Machuca-Barrera*, Vega-Torres's argument that Agent Gonzalez unconstitutionally prolonged the detention fails. First, Agent Gonzalez's questions related to Vega-Torres's citizenship status, and we will not scrutinize the particular questions Agent Gonzalez asked. Second, the length of Vega-Torres's detention lasted no more than a couple of minutes before Agent Gonzalez requested and received consent to search. Third, Agent Gonzalez had reasonable suspicion to extend the stop based on Vega-Torres's behavior. Under this Circuit's precedent in *Machuca-Barrera*, the district court did not err.

However, Vega-Torres argues that the permissible duration of the stop is controlled by *Rodriguez* and that the stop extension was unconstitutional because it went beyond the time that determining his citizenship reasonably would have been completed had Agent Gonzalez asked a specific question about seeing Vega-Torres's face. We recently rejected a similar argument in *United States v. Tello*, 924 F.3d 782, 789 (5th Cir. 2019) (rejecting defendant's argument that *Rodriguez* foreclosed the length-based approach in *Machuca-Barrera*). "*Rodriguez* does not dictate a script that agents must follow." *Id.*

Accordingly, we do not find any error in the district court's finding that the length of the stop was reasonable, and that Agent Gonzalez did not impermissibly extend the stop.

B.

Vega-Torres next argues that the evidence from the search should have been suppressed because his consent to search was preceded by a constitutional violation, and the consent was not sufficiently attenuated from that violation. Because

there was no unconstitutional detention, *see* Section III.A., we need not reach the issue of consent. *See Tello*, 924 F.3d at 789 (citing *United States v. Brigham*, 382 F.3d 500, 512 (5th Cir. 2004) (en banc) ("Absent a Fourth Amendment violation, [the defendant's] consent to search the vehicle was not unconstitutionally tainted.")).

IV.

For the foregoing reasons, the district court's judgment is AFFIRMED.

All Citations

--- Fed.Appx. ----, 2019 WL 3761643

Footnotes

* 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.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 2:17-CR-355
	§	
MIGUEL ANGEL VEGA-TORRES	§	

ORDER DENYING MOTION TO SUPPRESS

Before the Court is Defendant Miguel Angel Vega-Torres's (Vega-Torres's) Motion to Suppress Evidence (D.E. 9). Vega-Torres is charged by indictment (D.E. 5) with one count of possession with intent to distribute a controlled substance. He complains that the evidence against him was obtained in violation of the Fourth Amendment. The Government filed a response to the motion (D.E. 11), and the Court held an evidentiary hearing on August 18, 2017. After due consideration, the motion to suppress (D.E. 9) is DENIED.

FACTS

Vega-Torres was a passenger on a commercial bus that arrived at the Falfurrias Border Patrol checkpoint on May 26, 2017, at about 6:00 p.m. Border Patrol Agent David Gonzalez, in full uniform and bearing a visible service weapon, boarded the bus for the purpose of conducting an immigration inspection of each passenger. Agent Gonzalez, who has worked at the Falfurrias station for four years, testified that immigration inspections ordinarily take about 90 seconds. He asks a passenger for his or her citizenship documentation and then engages the passenger with a few questions about the passenger's home, destination, and purpose of travel while he compares the individual

to the identification photo provided. Ordinarily, the person under inspection pauses any other activity and makes eye contact with the Agent during the entire time of questioning.

Once the Agent determines that the documentation is valid and the passenger matches it, the immigration inspection is over. This is not a perfunctory process. In Agent Gonzalez's experience, the use of forged identification or documents belonging to other people is a daily occurrence. So Agent Gonzalez started at the front of the bus questioning each passenger and worked his way back.

When he came upon Vega-Torres, who was seated in the front part of the bus near the center, Agent Gonzalez asked for his citizenship document. Vega-Torres was focused on his cell phone in his lap, handed the Agent his Legal Permanent Resident card, and returned his attention to his cell phone. Because Vega-Torres was making eye contact only briefly, Agent Gonzalez was having difficulty matching him with the photo identification provided. According to Agent Gonzalez, this refusal to sustain eye contact was very unusual.

Rather than simply ask Vega-Torres to look at him to sustain eye contact, Agent Gonzalez asked additional questions, maintaining a conversational approach to the immigration inspection. While it took approximately three to five minutes—double the ordinary time—to assess whether Vega-Torres had valid identification and matched the photo, it was Vega-Torres's own unusual conduct that caused the extended time. The amount of time that elapsed was appropriate under the circumstances for an immigration inspection.

In the course of that inspection, Agent Gonzalez noted that Vega-Torres's avoidance of eye contact appeared intentional, he did not seem to want to answer any questions, and he did not really answer all questions despite having full command of the English language. When asked what part of San Antonio his family was from, he responded, "they are from San Antonio." When the Agent repeated the question seeking a specific answer, Torres-Vega did not answer at all. In his experience, the Agent testified that such non-specificity was a symptom of having been coached to answer certain questions falsely, without any depth to the answer. The Agent also noted that Vega-Torres was wearing baggy shorts (as opposed to long pants), which was a new trend among body smugglers who taped contraband to their thighs.

Agent Gonzalez concluded that "something was off" because Vega-Torres's immigration status was fine, yet he displayed a combination of lack of eye contact, inappropriate answers to simple questions, and a manner of dress consistent with narcotics smuggling. So Agent Gonzalez requested Vega-Torres's consent to pat down the underside of his thighs. Vega-Torres gave consent and, within the next ten to twenty seconds, Agent Gonzalez's hand hit a solid edge of what felt like a bundle of narcotics. Vega-Torres's hand immediately began to shake and he appeared jiggly and nervous.

With this new information—the apparent hidden bundle and Vega-Torres's reaction—Agent Gonzalez requested that Vega-Torres exit the bus for an additional search. At the time Agent Gonzalez requested the search, he was no longer concerned about an immigration violation but intended to investigate narcotics smuggling. Agent Gonzalez found four bundles of narcotics taped to the back of Vega-Torres's thighs.

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DISCUSSION

Vega-Torres asserts two arguments in support of his motion to suppress: (1) the immigration inspection exceeded its permissible scope, and (2) his consent to the search was not voluntary.

A. The Search Did Not Exceed the Permissible Scope of the Immigration Stop

The Fourth Amendment to the United States Constitution protects "[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; *see also United States v. Portillo-Aguirre*, 311 F.3d 647, 652 (5th Cir. 2002). Checkpoint stops "are 'seizures' within the meaning of the Fourth Amendment." *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976). However, the Supreme Court has found that permanent immigration checkpoints where travelers are stopped and briefly questioned about their immigration status are not unconstitutional, even if there is no individual suspicion regarding a particular traveler. *Id.* at 566-67; *Portillo-Aguirre*, 311 F.3d at 652.

"The scope of an immigration checkpoint stop is limited to the . . . purpose of the stop: determining the citizenship status of persons passing through the checkpoint." *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001). The permissible duration of such a stop is the time reasonably necessary to determine citizenship status which includes the time necessary to inquire about citizenship status, request identification or other proof of citizenship, and request consent to extend the detention. *Id.* Courts should avoid scrutinizing the particular questions asked by a Border Patrol

agent during these brief stops "as long as in sum they generally relate to determining citizenship status." *Id.*

A stop may not exceed its permissible duration unless the agent has reasonable suspicion of other criminal activity and the stop may then be lengthened to accommodate its new justification. *Id.* at 434. An extended detention or search requires consent or probable cause. *Id.* (citing *Martinez-Fuerte*, 428 U.S. at 567). An immigration stop that exceeds its permissible scope violates the Fourth Amendment even if the extension is minimal. *Rodriguez v. United States*, 135 S. Ct. 1609, 1615-16 (2015). Vega-Torres argues that the Agent should have been satisfied that Vega-Torres was a legal permanent resident of the United States when he produced his identification card. And any additional investigation was an unconstitutional extension of the immigration inspection without probable cause.

Based on Vega-Torres's behavior, the Agent persisted with appropriate questions and quickly developed reasonable suspicion of criminal activity. The Court finds that Agent Gonzalez's immigration inspection was of a permissible duration and scope under the circumstances. The motion to suppress is denied in this respect.

B. The Consent to Search Was Voluntary

A warrantless search by police constitutes a violation of the Fourth Amendment and is invalid unless it falls within one of the recognized exceptions to the Constitution's warrant requirement. *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). One exception to the warrant requirement is a search conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219

(1973) (citing *Davis v. United States*, 328 U.S. 582, 593-94 (1946))). "In order to satisfy the consent exception, the government must demonstrate that there was (1) effective consent, (2) given voluntarily, (3) by a party with actual or apparent authority." *United States v. Scroggins*, 599 F.3d 433, 440 (5th Cir. 2010).

Voluntariness is a factual determination that courts must decide from the totality of the circumstances. *United States v. Jenkins*, 46 F.3d 447, 451 (5th Cir. 1995). There are six factors that courts consider when determining whether consent was 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 consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

Id. (quoting *United States v. Olivier-Becerril*, 861 F.2d 424, 426 (5th Cir. 1988)). Although all of the factors are highly relevant, no one of them is dispositive. *Id.* Vega-Torres argues that his consent was not given voluntarily.

Vega-Torres's custodial status was an involuntary immigration stop. Its duration, three to five minutes, was not so long as to make it coercive with respect to the request for a pat-down. Agent Gonzalez was dressed in uniform with a badge and service weapon, but there is no evidence that he brandished his weapon or engaged in any other threatening conduct. When he sought consent, he did so politely and without force. While displaying some reluctance to engage in the questioning involved in the inspection, Vega-Torres was cooperative with the Agent and the encounter was not hostile.

The record is silent regarding Vega-Torres's education or intelligence, or whether he was aware of his right to refuse consent. However, "[p]roof of knowledge of the right to refuse consent is not required to show voluntariness." *United States v. Davis*, 749 F.2d 292, 296 (5th Cir. 1985) (citing *Schneckloth*, 412 U.S. at 249). There is no evidence whether Vega-Torres believed no incriminating evidence would be found, but based on the circumstances, it is likely that he believed the contraband would be found if he was searched.

Based on the totality of the evidence, the Court finds that the Government has satisfied its burden of showing that Vega-Torres's consent was voluntary. The motion to suppress is denied with respect to this challenge.

CONCLUSION

For the reasons set forth above, Vega-Torres's motion to suppress (D.E. 9) is DENIED.

ORDERED this 1st day of September, 2017.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

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