NO. _____

IN THE

Supreme Court of the United States

JESUS GOMEZ-ARZATE, ET AL.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2015, this Court decided the case of Rodriguez v. UnitedStates, 575 U.S. 348 (2015) [135 S.Ct. 1609, 191 L.Ed.2d 492], limiting the scope of traffic detentions to the period of time necessary to complete the "mission" that justified the traffic detention at its inception. At issue in the present case, in which a detention was correctly held to have been unlawfullyextended, is the interrelationship between an unlawfully extended detention, and the concept and application of an ensuing purported "consensual encounter." The questions presented are:

1. Whether a continued contact can be deemed a "consensual encounter" emanating immediately from a period of unlawfully extended detention;
2. Whether, and in what manner, the subject of an unlawfully extended detention must prove that "but for" the unlawful extension of the detention, the evidence sought to be suppressed would not have come to light;
3. Whether traditional "attenuation" from the unlawfully extended detention must be found before the concept of a "consensual encounter" can applied; and
4. Whether a valid, untainted consent to further contact, and ultimately to search the Petitioner's vehicle, was established.

PARTIES TO THE PROCEEDINGS

Petitioner, Jesus Gomez-Arzate was the Defendant, along with Co-defendant Guillermo Martinez-Torres in the District Court, and were Defendants and co-Appellants in the Tenth Circuit Court of Appeals (the two appeals were from the same suppression hearing, and were consolidated for argument in the Court of Appeals).

Sylvia Baiz, Assistant Federal Public Defender, Albuquerque, New Mexico, appeared for Defendant-Appellant Martinez-Torres in the District Court and on appeal in the Tenth Circuit.

The United States of America, represented by Nicholas Ganjei, Assistant United States Attorney (and John C. Anderson, United States Attorney, on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee; Assistant United States Attorney Jack Burkhead, Albuquerque, New Mexico, appeared for Plaintiff United States of America in the District Court.

STATEMENT OF RELATED PROCEEDINGS

United States v. Jesus Gomez-Arzate, 981 F.3d 832 (10th Cir. 2020) case no. 19-2119, opinion issued and final judgment entered on December 2, 2020. Petition for Rehearing en banc denied on January 4, 2021.

United States v. Guillermo Martinez-Torres, 981 F.3d 832 (10th Cir. 2020) case no. 19-2121, opinion issued and final judgment issued on December 2, 2020. Petition for Rehearing en banc denied on January 4, 2021.

Apart from the proceedings directly on review in this case, there are no other directly related proceedings in any court.

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I. This Court Should Decide Whether, and Under What Circumstances, a Valid "Consensual Encounter" Can Follow Immediately Upon the Purported Conclusion of a Period of Unlawfully Extended Detention.

A. This case presents an important question as to the interrelationship between this Court's holding in the case of Rodriguez v. United States, *supra*, and the potential applicability of the concept of a "consensual encounter**;**" the Court of Appeals for the Tenth Circuit found the detention unlawfully extended but denied suppression of evidence on the grounds of a lack of "but for" causation and found the onset of a period of consensual encounter which led to a consent to search;

B. As a related issue, this case also presents the question of whether or not, emanating from a period of unlawful detention, "but for" causation must be proven by the defense, and the nature of that proof, to secure suppression of evidence;

II. This Court Should Decide Whether, and to What Extent, the Government Bears the Burden of Proving Attenuation from the Unlawful Period of Detention, Before a Valid Period of Consensual Encounter, or a Valid Consent to Search a Vehicle, Can Be Found.

A. This case presents a clear question as to the necessity of a showing of attenuation from a period of unlawfully extended detention, before a period of "consensual encounter" can properly begin;

B. This case presents the very related issue of thevalidity of a consent to search a vehicle obtained after an unlawfully extended detention, followed by an invalid period of "consensual encounter," and involves questions of consent "voluntary in fact" versus a consent "tainted" by prior law enforcement conduct.

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for theTenth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals for the TenthCircuit is published, and is found at 981 F.3d 832, and is reproduced at App. 1. The District Court's Opinion is reproduced at App. 30. The denial of a Petition for Rehearing is reproduced at App. 56.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

JURISDICTION

The Court of Appeals for the Tenth Circuit issued its Opinion and Judgment on December 2, 2020. This Court has jurisdiction pursuant to 28 U.S.C.S. section 1254(1).

STATEMENT OF THE CASE

On May 18, 2018, Defendant/Appellant Jesus Gomez-Arzate was charged in a criminal complaint in the District Court, District of New Mexico, with a violation of 21 U.S.C.sections 841(a), 846.

On June 13, 2018, a Redacted Indictment was filed, charging Defendant/Appellant Jesus Gomez-Arzate and co- defendant Guillermo Martinez-Torres with violations of 21 U.S.C. section 841(a)(1) and (b)(1)(A) (Count 1), and 21 U.S.C. section 2 (count 2).

On August 17, 2018, Defendant/Appellant Jesus Gomez-Arzate filed a Motion to Suppress Evidence.

On August 23, 2018, Defendant/Appellant Jesus Gomez-Arzate filed an Appendix/Supplement re Motion to Suppress Evidence.

On December 13, 2018, a hearing was held as to Defendant/Appellant Jesus Gomez-Arzate's Motion to Suppress Evidence in which Co-Defendant Guillermo Martinez-Torres joined, before the Honorable Chief District Judge William P. Johnson, presiding. After the hearing, the matter was taken under submission.

On January 4, 2019, a Memorandum Opinion and Order denying the Motion to Suppress Evidence was entered by the Court. (App.30 et.seq)

On April 11, 2019, Defendant/Appellant Jesus Gomez-Arzate entered a plea of guilty to the Indictment.

On July 24, 2019, Defendant/Appellant Jesus Gomez/Arzate was sentenced to the Bureau of Prisons for a term of 63 months, with five years of unsupervised release.

Judgment was entered on July 24, 2019. (App. 24)

Notice of Appeal was timely filed on August 2, 2019.

A decision on appeal was rendered on December 2, 2020. A copy of that Opinion is provided in Appendix "A", App.1-23; the Opinion was published, and is cited as United States v. Gomez-Arzate, 981 F.3d 832 (10th Cir. 2020).

A Petition for Rehearing was timely filed, but was denied. See, App.56.

STATEMENT OF FACTS

The issues in this case emanate from a traffic stop, followed by an extended detention and an eventual car search pursuant to a purported consent, that occurred on May 17, 2018, at about 7:30 a.m., on eastbound Interstate 40, at mile post 133. The area is west of Albuquerque, New Mexico. (19-2119 App. II: 138, the citation to the record is to the record on appeal in the Court of Appeals; App. II refers to the transcript of the motion to suppress held on December 13, 2018). On May 17 Deputy Mora of the Bernalillio County Sheriff's Department testified that he was on duty watching eastbound traffic, looking for traffic violations and enforcing highway interdiction. Deputy Mora had been trained in highway interdiction, had been involved in highway interdiction, and had special training in that area. (19-2119, App. II: 135-137)

A group of cars went by his position, and he followed. He noticed a white Kia Soul which veered onto the white line on the right shoulder of the highway, perhaps two times in the space of about a mile, and swerved within its lane. (19-2119, App. II: 165-167, 176, 273). Deputy Mora effected a traffic stop; he had received no information in relation to the Kia prior to his observations. (19-2119, App. II: 188, 278-279) Deputy Mora also testified that he noticed that the front left tire was out of alignment; photos of the vehicle did not show any obvious signs of such a problem, and Deputy Mora did nothing to further inspect the tire. (19-2119: App. II: 139, 204-205)

Deputy Mora made contact with the driver, Guillermo Martinez-Torres; Petitioner Jesus Gomez-Arzate was the passenger. Deputy Mora directed Martinez-Torres to get out of the vehicle, and to lift his shirt, but did not conduct a pat down search. (19:2119, App. II: 231-233) Deputy Mora smelled air freshener, but also stated that alone, this meant nothing. (19-2119, App. II: 230-232) Martinez-Torres was told to go to the front of the patrol vehicle, and he complied. (RTM: 26) Deputy Mora obtained a driver's license, registration, and proof of insurance from Martinez-Torres. Martinez-Torres was not the listed registered owner of the Kia, but was listed on the insurance. But Deputy Mora did not think the vehicle was stolen. (19-2119, App. II: 177, 230-231) During the first four minutes of the traffic stop, Deputy Mora tried to ask Martinez-Torres questions about his travel plans, but Martinez-Torres seemed to speak only Spanish. Mora called for a Spanish Speaking Deputy. (19- 2119, App. III: 332)

Petitioner Gomez-Arzate began to also get out of the Kia, but was ordered to stay in the vehicle, which he did. (RTM: 71; 19:2119, App. II, p. 197).

Within about three and a half minutes of the initiation of the traffic stop, Deputy Mora advised Martinez-Torres that he would receive a warning citation. (19-2119, App. II: 171-172) Deputy Mora was able to obtain sufficient information, and had written the warning citation within eight to ten minutes of the stop; but he decided that he needed the assistance of a Spanish speaking deputy to complete the process. The first observation of the Kia occurred at 7:39 a.m. (19-2119, App. II: 168) The warning ticket bears a time notation of 7:48 a.m. (19-2119, App. II:140-145, 174-176). Deputy Mauricio arrived at about nine- plus minutes into the traffic stop; the warning ticket had already been completed. By eleven minutes into the car stop, the warning ticket had been completed, and Deputy Mauricio had time to explain it in Spanish. (19-2119, App. III: 337-338, the reference is to the record on Appeal, in Appendix III, which includes a transcript of the audio recording of the car stop and inquiries). But the warning citation was not given to Martinez-Torres to sign until sixteen minutes had passed. (19:2119, App. II: 175) Instead, the Deputies approached the Kia, in order to check the VIN number, and to converse with Petitioner Gomez-Arzate, who was still seated in the Kia where he had been ordered to remain. Petitioner was told that the officers were going to check the VIN (he said "okay"), and wanted to talk to him "...about what you are doing and all of that." (19-2119, App. III: 340) The purpose of this was to question Petitioner about travel plans and other unrelated issues; the conversation with Petitioner lasted

about two minutes and fifteen seconds, and included questions as to travel plans, whose car was the Kia, and where the owner lived. (19-2119: App. II: 178-179, 19-2119 App. III: 340-34) Deputy Mora explained that he could have given Martinez-Torres the warning ticket as soon as Deputy Mauricio had explained it (at eleven minutes into the stop), but he had been suspicious from the beginning of the traffic stop, and intended to extend the stop so he could ask further questions, and would not end the contact until he was satisfied. (19-2119, App. II: 175, 176, 178, 185-191)

After speaking to Petitioner Gomez-Arzate, the deputies returned to Martinez-Torres at the front of the patrol vehicle, but then asked more questions of Petitioner, including how long he planned to be in Texas. (19-2119: App. III: 344) At about fifteen to sixteen minutes into the detention, the deputies again conversed with Martinez-Torres, explained the ticket further, and then gave him the warning citation, which he signed, and the deputies told Martinez he was free to go. (19-2119, App. III: 345-346) But as Martinez-Torres started to walk towards the Kia, Deputy Mora said the name "Guillermo" in a very loud voice. (19-2119, App. III: 346) Martinez-Torres responded back to where the deputies awaited him. The Deputies stated they had more questions for him, but he was free to go. There followed a period of several minutes during which Martinez was asked more questions about travel plans, why they were going, how long they were going to stay, who they were going to visit, where they lived, who owned the Kia, and where they were going to stay. (19-2119, App. III: 347-352). The questions were related to criminality, not to any traffic violation. (19-2119, App. II: 194-196) The conversation lasted until just

before 19:56 minutes into the detention, at which time the deputies approached Petitioner Gomez-Arzate, and told him that Martinez-Torres was receiving a warning citation and would be free to go. Petitioner was told he would be free to go also, but they wanted to ask more questions. For the next three minutes, Petitioner was asked more questions, similar to those asked of Martinez-Torres, as to travel plans, and questions as to where they were going to stay, why they were going, and who they were going to see. This lasted until shortly after twenty-two minutes into the stop. (19-2119, App. III: 352-358) Those questions also related to possible criminality, and had nothing to do with the traffic investigation. (19-2119, App. II: 199) And in reality, neither of the occupants of the Kia were free to go at that point; and Martinez-Torres was still at the front of the patrol car, where he had been told to wait. (19-2119, App. II: 199) At twenty-two plus minutes into the detention, Petitioner Gomez-Arzate was asked the name of the registered owner of the Kia, but could not supply the name. (19-2119, App. III: 358-359)

Beginning at 23:31 minutes into the detention, questions were asked first of Martinez-Torres, and then of Petitioner Gomez-Arzate, about what items for which they were responsible in the Kia, and whether or not there were any money, guns, or drugs in the Kia. Martinez-Torres responded that he had a bag and some clothes, and there were no drugs or money or weapons in the car. Martinez-Torres also asked permission to make a phone call to his daughter, but was initially told they would let him go soon. The inquiries as to Martinez-Torres lasted until 26:22 into the detention. (19-2119, App. III: 359-363) Questions then turned to Petitioner Gomez-Arzate;

he was asked for which property in the Kia he was responsible, and he identified a bag and a cooler. He was then asked, as had Martinez-Torres, if there were drugs, firearms or money in the Kia. He denied that any money or contraband was in the Kia. He was then asked for consent to search the Kia, and stated that they could "check." He signed a consent to search form. This occurred from about 26:22 to 30:11 into the detention. Martinez-Torres was then also asked for consent to search, and signed a form shortly after 31:44 into the detention. (19-2119, App. III: 368-370.)

It should be noted that throughout the events recounted above, the two occupants of the Kia were kept apart, with Martinez-Torres at the front of the patrol vehicle, and Petitioner seated as passenger in the Kia, until the consents were signed. (19-2119, App. II: 160-161) Both occupants were told to go 25 to 50 yards from the Kia while it was searched. (19-2119, App. II: 209) They were about seven miles from the nearest gas station, in an area of scrub brush. (19-2119, App. II: 19-2119, App. II: 269)

INTRODUCTION

Appellant/Petitioner Jesus Gomez-Arzate hereby Petitions this Honorable Court for Review of the decision of the Court of Appeals for the Tenth Circuit. The Court issued a published Opinion on December 2, 2020, affirming Appellant/ Petitioner's conviction as well as the denial of his motion to suppress. United States v. Gomez-Arzate, 981 F.3d 832 (10th Cir. 2020). The Court therein did correctly find, relying in part upon this Court's holding in Rodriguez v. United States, *supra*, 575 U.S. 348, 354, that the traffic detention of the occupants of a Kia

Soul had become unlawfully extended after eleven minutes, and that the period of detention from eleven to sixteen minutes was unlawful.

But the Tenth Circuit found that once the vehicle's driver had been handed back his documents, and was given a warning ticket, and was told that he was free to leave, a consensual encounter had developed. The Court so held, even though as the driver began to walk away from the officers, he was called by his name in a loud voice, at which point he returned to where the officers were waiting. The Court held that the unlawfully extended detention did not require suppression of the evidence obtained in an ensuing search pursuant to a consent by both occupants, because it could not be shown that "but for" the unlawfully extended detention, consent to search would not have been sought and obtained for the extended period of contact, or the eventual consent to search the vehicle. Accordingly, it was held that after the driver's documents were returned to him, and he was given a warning ticket, and told he was free to leave (*Id.*, at 840-841), the contact had turned into a consensual encounter, and the continued interrogation of the occupants, and their eventual consents to search the Kia, were valid.

It was, and is, and will be asserted that a "consensual encounter" cannot follow on the heels of an unlawful detention, at least in the absence of a showing of attenuation within the meaning of this Court's holdings in the cases of Brown v. Illinois, 422 U.S. 590, 599-601 (1975), Dunaway v. New York, 442 U.S. 200, 217 (1979), and as enunciated more recently in this Court's holding in the case of Utah v. Strieff, 579 U.S. __ [136 S.Ct. 2056; 195 L.Ed.2d 400] (2016).

It is respectfully submitted that the Court of Appeals erred as a matter of law on this point. At the time that the consensual encounter purportedly began, both occupants of the Kia had been unlawfully detained. But for the fact that they had been unlawfully detained, they should have been allowed to go on their way, and would not have been subject to further interrogation, and no consent to search the Kia would have been sought or obtained. (See Vasquez v. Lewis, 834 F.3d 1132, 1136-1138 (10th Cir. 2018); Rodriguez v. United States, *supra*, 575 U.S. at 357.)

Most importantly, the Opinion of the Tenth Circuit does not analyze the taint of the unlawfully extended detention, or its impact on the validity of a consent to further contact (or for the search of the Kia) which consent is essential to the concept of a consensual encounter. Florida v. Bostick, 501 U.S. 429 [115 L.Ed.2d 389, 111 S.Ct. 2382] (1991); Ohio v. Robinette, 519 U.S. 33 (1996), see also the case of United States v. Bowman, 884 F.3d 200 (4th Cir.2018) in which the Court rejected a Government argument that a detention had morphed into a consensual encounter, under circumstances similar to those in the present case.

As will be seen, *infra*, the purported "consent" to further the contact between the officers came immediately as the unlawfully extended detention assertedly ended. But there were no intervening events to break the chain of causation, and the officers' conduct was purposeful, flagrant, and blatant.

The present case requires an explanation and a resolution of the relationship between the "consensual encounter" rationale common to Ohio v. Robinette, *supra*, and Florida v. Bostick, *supra*, and that applied requiring a

showing of attenuation, where there has been an antecedent illegality. The majority of this Court did not resolve the issue in Ohio v. Robinette, *supra*, and only Justice Stevens in his lone dissent addressed the issue of the need for a showing of attenuation. But Justice Stevens was not called to address the issue in the context of a detention that had already become unreasonably prolonged minutes prior to the question of a consent to further inquiry ("consensual encounter") had arisen. Ohio v. Robinette, *supra*, 519 U.S. at 51. It thus appears that this Court does not appear to have squarely ruled on the issue. As expressly noted in the case of United States v. Lopez-Arias, 344 F.3d 623, 628-630, and fn. 1 (6th Cir. 2003):

> The Guimond panel relied upon the Supreme Court's 1996 decision in Robinette, but Robinette did not overrule Royer, Dunaway, Brown, Caicedo, Richardson, and Buchanan. The Robinette Court did not address the issue of an illegal seizure. Robinette, 519 U.S. at 35.

Accordingly, it is hereby requested that this Court issue a Writ of Certiorari, and resolve the issues herein presented, and reverse the decision of the Tenth Circuit in this matter, and order that the motion to suppress be granted.

REASONS FOR GRANTING THE WRIT

I. This Court Should Decide Whether, and Under What Circumstances, a Valid "Consensual Encounter" Can Follow Immediately Upon the Purported Conclusion of a Period of Unlawfully Extended Detention.

A. This case presents an important question as to the interrelationship between this Court's holding in the case of Rodriguez v. United States, *supra*, and the concept of a "consensual encounter," since the Court of Appeals for the Tenth Circuit found the detention unlawfully extended but denied suppression on the grounds of a lack of "but for" causation, and found the onset of a period of consensual encounter" which led to a consent to search.

Petitioner Gomez-Arzate does not concede the question of the validity of the initial car stop, but on this Petition for Certiorari addresses the Fourth Amendment consequences relating to the unlawful extension of the detention that followed, and its implications for the application of the exclusionary rule.

In its Opinion (App. 9-12, 981 F.3d at 840-841) the Court of Appeals concluded that the traffic detention became unlawfully extended from minutes 11 to 16. The Court properly concluded that the "mission" of the traffic stop had concluded, and the period of time from minutes 11 to 16 constituted an unlawful extension of the detention. Reliance was placed on the holding in Rodriguez v. United States, *supra*, 575 U.S. 348, 354.

But the Opinion by the Tenth Circuit in this matter, also concluded that suppression of evidence need not follow, because the "detention" thereafter morphed into a consensual encounter, and that it was not shown that "but for" the illegality, the evidence would not have come to light. The Court held (App. 13-14; 981 F.3d at 841) that the consent of the two occupants of the Kia rendered permissible the further

inquiry after minute sixteen, which was followed ultimately by voluntary and effective consent to search the vehicle. (App. 12-18, 20-21; 981 F.3d 841, 843,844) To reach that conclusion, the Court of Appeals engaged in what is respectfully described as a speculative supposition that regardless of the antecedent illegality, the "consensual" responses by the occupants of the Kia would have occurred in any event. Accordingly, it was concluded in the Opinion that it could not be shown that the challenged evidence would not have come to light "but for" the antecedent unlawful conduct. (Opinion, at pp. 12-14, 981 F.3d 841)

As will be seen, *infra*, the application of a "but for" analysis in the present context is at least unnecessary, and also misleading. Assumed in the application of a finding that a detention has been unlawfully extended, is the notion that the detained person should have been allowed to go on his way, and that no further contact would be constitutionally permissible.

It has been, and continues to be, the position of Petitioner Gomez-Arzate that "but for" the unlawfully extended detention, Petitioner Gomez-Arzate and his driver, Martinez-Torres, would have been allowed to go on their way at minute eleven. To the extent that a "but for" analysis can even be potentially applied, it should be satisfied by the notion, stated above, that by the time the detention had become unlawfully extended within the meaning of this Court's holding in Rodriguez v. United States, *supra*, they should have been allowed to go on their way. The supposed consents to further questioning, as well as the ultimate consents to search, would never have occurred. Vasquez v. Lewis, 834 F.3d 1132, 1136 (10th Cir. 2016);

United States v. Guerrero-Espinoza, 462 F.3d 1302, 1308 (10th Cir. 2006), Rodriguez v. United States, *supra*.

In its Opinion, the Court of Appeals concluded that a "consensual encounter" could follow upon an unlawful detention, citing in part the case of United States v. Bradford, 423 F.3d 1149, 1158 (10th Cir. 2005). But it is respectfully submitted that such reliance was misplaced. The detention in Bradford had been deemed lawful, and there was thus no reason to address the issue of a purported "consensual encounter" emanating from an unlawfully extended detention. Reliance by the Court of Appeals in the present case was also placed on the holding in United States v. Chavira, 467 F.3d 1286, 1291-1292 (10th Cir. 2006), in which it was held that checking the door jam VIN number was unlawful, but added nothing to the detention or the subject's consent to search, since the VIN number had already been checked through the windshield. But the subject therein had been lawfully detained, and was not confronted with anything learned unlawfully.

It is herein respectfully asserted that the analysis of the Court of Appeals in its Opinion is erroneous. It is at the outset difficult to harmonize the notion of a "consensual encounter" and an unlawfully extended detention. As will be addressed more fully below, the very notion of a consensual encounter is founded upon the concept of a free and voluntary consent, and subject to the limitations inherent in any traditional issue of consent. Florida v. Bostick, *supra*; Ohio v. Robinette, *supra*. It will almost uniformly be the case, that a purported consensual encounter in a traffic stop case, will begin within seconds of the lawful and proper termination

of the "mission" that justified the detention at its inception. But where the traffic detention has been unlawfully extended within the meaning of Rodriguez v. United States, *supra*, any assent by the person detained unlawfully will necessarily morph into a purported but tainted and invalid consensual encounter because the person detained is subject to an unconstitutional violation of his or her Fourth Amendment rights. Such a result presents an anomaly in view of this Court's precedent.

It would seem nearly impossible to reconcile the notion of an unlawfully extended detention and a "consensual encounter." Obviously, "but for" the unlawfully extended detention, there would be no lawful opportunity to seek further questioning. See, Florida v. Royer, 460 U.S. 491, 508-509 (1983) (plurality opinion, with Justice Brennan concurring, and five justices agreeing that a consent obtained during an unlawful period of detention is invalid.) (questioned on a different point in United States v. Dixon, 51 F.3d 1376, fn.3, (8th Cir. 1995) but cited with apparent approval in Rodriguez v, United States, *supra*, 575 U.S. at 354.)

B. As a related issue, this case also presents the question of whether or not, after a period of unlawful detention, "but for" causation must be proven by the defense and the nature of that proof, to secure suppression of evidence.

In addition to the initial question of whether or not a valid period of consensual encounter can be viewed as potentially extending an already unlawfully extended detention, it is necessary to examine the nature and implications of the application of the "but for" analysis by the Court of Appeals. Of particular concern is the fact, addressed below, that the approach by the Court of Appeals in this case obviated the

need to engage in an analysis of the taint versus the attenuation emanating from the unlawfully extended detention. The Court of Appeals appears to have concluded (1) that the officers would have ultimately sought consent to search, that Gomez-Arzate and Martinez-Torres would have granted their voluntary consent, and (2) that they voluntarily consented to the further contact, thus rendering applicable the "consensual encounter" doctrine, which then led to further inquiry, assertedly suspicious answers, and ultimately a valid consent to search the Kia.

Certainly, decisions of this Court, as well as Circuit Courts, have addressed the requirement of demonstrating that, "but for" the unlawful conduct of law enforcement, the challenged evidence would not have come to light. See, *e.g.*, United States v. Chavira, *supra*, 467 F.3d 286, 1291-1292. It is no Constitutional error for a Court to observe that a detention was unlawfully extended, but that some evidence was found independently of that detention. An example of this is the Tenth Circuit decision in the case of United States v. Goebel, 959 F.3d 1259, 1268 (10th Cir. 2020), in which the Court found a detention lawful, but opined that even if it had been unlawfully extended, the gun in the case was found in an alley, and the detention of the defendant did not lead to its discovery.

The issue of "but for" causation has been addressed by this Court in cases such as Hudson v. Michigan, 547 U.S. 586, 593-594 (2006). In Hudson, this Court noted that while "but for" causation may be necessary to support suppression of evidence for a violation of Constitutional right, it is not by itself sufficient. Examples of "but for" causation that would not support suppression of evidence were given in Hudson,

such as where the evidence was obtained by a means sufficiently distinguishable to be purged of the primary taint instead of by exploitation of the antecedent illegality. (*Id.*, 547 U.S. at 592-593) In essence, this Court noted that "but for" causation can be attenuated when the causal connection is remote. What this Court did not indicate in Hudson, was that one could speculate as to the causation, and avoid entirely an analysis of attenuation. In fact, in Hudson, the cause for the search was a judicially authorized search warrant the existence of which preceded and was independent of the Constitutional or statutory violation that occurred at the time of entry. Hudson was distinguished on essentially these grounds in the case of United States v. Hardin, 539 F.3d 404, fn.13 (6th Cir. 2008), in which it was held (1) that Hudson was controlled by its specific application to knock and announce rules, and is not necessarily applicable to Fourth Amendment applications and (2) that but for the illegal entry into the residence, the defendant in Hardin would have been taken into custody outside, and the evidence would not have come to light. (See also, United States v. Cos, 498 F.3d 1115, 1131 (10th Cir. 2007), as in accord.)

This Court also addressed the issue of "but for" causation in the case of United States v. Crews, 445 U.S. 463, 471-473 (1980), in which the occurrence of a prior illegal arrest, followed by suppressible photographic and lineup identifications, was held not to cause suppression of an in-court identification by the robbery victim. This followed because the source for the in-court identification was the victim's pre-existing memory of the robbery itself. This Court observed that in the usual scenario, the challenged evidence is acquired after a constitutional violation,

and the issue becomes one of assessing attenuation. This Court therein stated, *Id.*, 445 U.S. at 471:

> In the typical "fruit of the poisonous tree" case, however, the challenged evidence was acquired by the police after some initial Fourth Amendment violation, and the question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality. Thus most cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity.

As acknowledged in Dunaway v. New York, *supra*, this Court in Brown v. Illinois, *supra*, held that the issue to be resolved when there is established a primary violation of Fourth Amendment rights, is that of whether or not the challenged evidence was come at by means of exploitation of the primary illegality; there must be shown a break in the chain of causation. Stated otherwise, the Government bears the burden of establishing attenuation.

An amount of unnecessary and unfortunate speculation is found in the decision of the Court of Appeals' Opinion in the present case, as to what would have happened had the unlawful extension of the detention not occurred. (Opinion, at p.13, 891 F.3d at 840-841) But such speculation is inconsistent with the resolution of the issue in Brown v. Illinois, *supra*, and in Dunaway v. New York, *supra*. For the more apt question is that of whether or not there has been a purging of the prior illegality, such that the "taint" is attenuated. Several Circuit Court cases have properly analyzed similar situations. Notably, in the case of United States v. Shrum, 908 F.3d 1219 (10th Cir. 2018), the Court was called upon to assess the validity of a search pursuant to consent after the police had unlawfully secured the

defendant's residence from outside. The Court therein noted that the defense has an initial burden of showing "causation," which means it must be shown that "but for" the unlawful police conduct, the challenged evidence would not have come to light. The Court did apply the "but for" analysis, but did so by noting that had the police allowed the defendant to enter his own home and retrieve his medication, the officer would not have gotten consent to enter, and would not have seen ammunition. (Id., at 1233- 1234) The Court then analyzed the controlling factors that relate to the presence of a break in the chain of events, and the question of attenuation, as that term is defined and applied in Brown v. Illinois, *supra*, and Utah v. Strieff, 579 U.S. __ [136 S.Ct. 2056; 195 L.Ed.2d 400) (2016).

In the present case, had the Deputies not extended the time of the detention from minutes 11 to 16, the occupants of the Kia in this case would have been allowed to go free. (See Vasquez v. Lewis, *supra*, 834 F.3d at 1136-1138; Rodriguez v. United States, *supra*.) But for that unlawful conduct, the interrogations that followed, the purported discrepancies that were developed after the sixteen minute and nineteen minute marks, and the consents to search, would never have occurred.

Properly applied, if at all in this context, "but for" causation is proven once it is shown that, but for the unlawful conduct by law enforcement, there would have been no opportunity to seek a "consensual encounter," or an eventual consent to search a vehicle.

This case is in that sense, the "typical case" in which the challenged evidence is, and was, the product of a violation of the principles laid down by this Court in

the case of Rodriguez v. United States, *supra*. Because the Court of Appeals in the present case relied on a "but for causation" analysis that was improperly applied, it did not squarely reach the issue of taint and attenuation. It is respectfully submitted that this was error.

II. This Court Should Decide Whether, and to What Extent, the Government Bears the Burden of Proving Attenuation from the Unlawful Period of Detention, Before a Valid Period of Consensual Encounter, or a Valid Consent to Search a Vehicle Can Be Found.

A. This case presents a clear question as to the necessity of a showing of attenuation from a period of unlawfully extended detention, before a period of "consensual encounter" can properly begin.

In many cases, including the present case, a purported "consensual encounter" ensuing immediately after a period of unlawful detention, must be considered to be the tainted fruit of that unlawfully extended detention. This follows because at its root, the basis for a "consensual encounter" is a true, voluntary, uncoerced and free consent, the validity of which is determined by traditional standards. Florida v. Bostick, *supra*, 501 U.S. at 438; Ohio v. Robinette, *supra*, 519 F.3d at 40.

It is almost uniformly held that a consent given during or after a period of unlawful detention is deemed a fruit of the unlawful police conduct, unless "attenuation"can be shown in a manner consistent with the holdings in Brown v. Illinois, *supra,* and Utah v. Strieff, *supra*. (See, United States v. Caro, 248 F.3d 1240, 1247 (10th Cir. 2001); United States v. Hill, 649 F.3d 258, 268 (4th Cir. 2011), in which consent after illegal entry was found subject to thethree part determination of attenuation, and the case was remanded for the district court to determine;

United States v. McSwain, 29 F.3d 558, 563-564 (10th Cir. 1994), unlawfully extended detention, followed by a consent that was held not purged of the taint, especially in view of officer's inquiries which demonstrated a purposefulness; United States v. Chavez-Villarreal, 3 F.3d 124, 127-28 (5th Cir. 1993) (same); United States v. Washington, 490 F.3d 765, 776-777 (9th Cir. 2007), even if voluntary, a consent not purged of the taint of the prior illegality, held, ineffective; United States v. Jerez, 108 F.3d 684, 695 (7th Cir. 1997). All of the forgoing decisions require a showing of consent that is "voluntary in fact," *and* a showing of a breaking in the causal chain to purge the taint of the prior illegality. That analysis requires at least the three factors enunciated in Brown, Dunaway and Utah v. Streiff to show attenuation. To the same effect is the case of United States v. Macias, 658 F.3d 509, 522-523 (5th Cir. 2011), holding that voluntariness in fact *plus* attenuation is required to validate a consent search after an unlawful detention. See also, United States v. Ramirez, 976 F.3d 946, 961-962 (9th Cir. 2019) holding voluntary consent insufficient to purge taint from prior illegality-the Government must go beyond merely showing the consent was voluntary in fact; United States v. Bocharnikov, 966 F.3d 1000, 1005 (9th Cir. 2020) (same, even when eight months intervened.) In the case of United States v. Jaquez, 421 F.3d 338, 341-342 (5th Cir. 2005), a consent to search a car given after an illegal traffic stop was held not sufficiently an act of free will to break causal chain of events flowing from the constitutional violation. Even in the Tenth Circuit, there is authority to the same

effect. United States v. Fox, 600 F.3d 1253, 1259-1260 (10th Cir. 2010). As noted by this Court in the case of Florida v. Royer, *supra,* 460 U.S. at 508-509:

> Because we affirm the Florida District Court of Appeal's conclusion that Royer was being illegallydetained when he consented to the search of his luggage, we agree that the consent was tainted bythe illegality and was ineffective to justify the search.

It is held that the facts must demonstrate a purgingof the taint, in addition to the mere fact of a voluntary consent. But the test has been applied with different nuances in different courts. The nuances must be resolved by this Court. See, United States v. Cordero-Rosario, 786 F.3d64, 75-76, and fn.7 (1st Cir. 2015). Some courts have emphasized an examination of whether or not the prior illegality "significantly influenced" or "played a significant role" in the subsequent consent. But that determination rests, not as squarely, upon the application of the factors determining attenuation, noted above. United Sates v. Cordero-Rosario, *supra*, 786 F.3d at 76; as stated in United States v. Smith, 919 F.3d 1, 11 (1st Cir. 2019):

> A defendant's consent to a search may be invalidated if it "bear[s] a sufficiently close relationship to the underlying illegality." United States v. Delgado-Pérez, 867 F.3d 244, 256 (1st Cir. 2017) (quotation marks and citation omitted). To determine whether there was a sufficient nexus between the illegal act and the defendant's consent, this court considers the factors enumerated by the Supreme Court in Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Delgado-Pérez, 867 F.3d at 257.

And see, United States v. Cooke, 674 F.3d 491, 495-496 (5th Cir. 2012) (using same analysis, but with emphasis on flagrancy in determining attenuation).

It is respectfully submitted that much, if not all, of the rationale behind the Court of Appeals' conclusion inthe present case, that the a "but for" causation was not shown in the present case is because the consents were viewed as voluntary in

fact (App. 13-14, 16, 20;981 F.3d at 840-841, 843, 844). It is respectfully submittedthat such a conclusion is both circular and fails to assess the presence or absence of attenuation. (App. 16-19; 981 F.3d at 841-843) Not addressed by the Court of Appeals in the present case is the effect of "taint" from the unlawful period of detention of the occupants of the Kia on the validity of any consent or acquiescence to a "consensual encounter." The failure to address that issue presents a significant constitutional issue that needs to be addressed by this Court.

The Opinion of the Court of Appeals in the present case assumes (and it is respectfully submitted that the assumption is incorrect) that a consent (to further inquiry and/or to a car search) that is shown to be voluntary in fact in this context renders unnecessary an examination of attenuation. Missed in that analysis is the necessary conclusion that a "consent" to further contact, in support of a "consensual encounter," during or immediately after a period of unlawful detention, requires a showing of attenuation. Such a showing was not, and could not be, made on the facts of the present case.

An attenuation examination requires an analysis of three major factors, all of which support suppression in this case. First, the temporal proximity between the unlawful conduct of the deputies in extending the detention and the purported consents was quite close, comprising a matter of seconds. In Shrum, the period between the illegality and the signing of a written consent was about two and a half hours, and was held to support suppression. In the case of United States v. Borochnikov, *supra*, a period of eight months was held insufficient to

show a break in that causal chain. Similar to, and relying on Shrum, is the case of United States v. Walker, 965 F.3d 180, 190 (2nd Cir. 2020), in which a lack of attenuation, combined with a need for deterrence where the police conduct was more than just negligent (and thus considered "flagrant") compelled the application of the exclusionary rule.

In the present case, there were no intervening circumstances to serve as a break in the chain, or to demonstrate a purging of the tainting effect. This was all one continuous process with no breaks. And while the Court of Appeals in its Opinion seems to support the notion of consensual encounter and/or consent based on the fact that Martinez-Torres was allowed to make a phone call to his daughter, it is more revealing to note that when he first asked to do so, he was basically told "no" but you will be free soon (as opposed to you are free now). (19-2119, App. III: 363)

Further, as noted, throughout the period of purported "consensual encounter," Petitioner Gomez-Arzate was seated in the Kia where he was ordered to remain; and until 19:56 into the detention he would not even have known that his driver had been ostensibly told he was free to go. Petitioner was not a party to that conversation between Martinez-Torres and the deputies. Petitioner Gomez-Arzate could go nowhere, since his driver was still at the front of the police car. And Petitioner remained seated in the Kia, separated from his driver, all the way until the consents to search were signed. The case thus does in fact resemble United

States v. Guerrero-Espinoza, 462 F.3d 1302, 1309-1310 (10th Cir. 2006) and United States v. Richardson, 385 F.3d 625, 630 (6th Cir. 2004), in essential respects.

Finally, on the issue of flagrancy, the deputies detained the occupants of the Kia without cause well after the traffic matter had been or should have been concluded. According to the direct testimony of Deputy Mora this was because they were in fact were never free to leave. The events followed what was initially Mora's unsupported hunch that something was amiss, and he would not let them go until he had been satisfied. His attempt at a "consensual encounter" was a deliberate charade. (19-2119 II: at. pp. 56, 57-58, 61-62, 66)

It also bears emphasis that the fruits of the unlawful detention were overtly exploited to advance the criminal investigation. It was the development of potentially inconsistent and or implausible travel plans, and comparing the answers obtained prior to the sixteen minute mark with those obtained afterwards, that created whatever limited suspicion there was. And increasing questions relating to potential criminal conduct led to the consent to search. Petitioner's inability to name the registered owner of the Kia surfaced at about twenty-two minutes into the detention. (19-2119, App.III: 358).

In the Opinion in this case, the Court of Appeals held that after each occupant of the Kia was told he was free to leave, the contact had become a "consensual encounter." Also found was that the circumstances at that point, including discrepancies in the statements of the Appellants, and some implausibilities, would support the period from sixteen minutes to the point when a consent to search was

sought and obtained. (App. 19-20; 981 F.3d at 843-844.) It is respectfully submitted that in so concluding, the Court of Appeals erred, both factually and as a matter of law.

As noted, the concept of a consensual encounter expressed in Ohio v. Robinette, *supra*, does not address the implications that arise if a period of unlawful detention precedes the purported "consensual encounter."

A "consensual encounter" is based on the notion of a free and voluntary consent on the part of the subject. It is thus subject to the same conditions and limitations as any issue of consent. Florida v. Bostick *supra*, see also the case of United States v. Bowman, 884 F.3d 200 (4th Cir. 2018) in which the Court rejected a Governmentargument that a detention had morphed into a consensual encounter, under circumstances similar to those in the present case.

Of course, the general rule is that a consent obtained during or as the result of an unlawful detention is tainted and ineffective. Florida v. Royer, *supra*; United States v. McSwain, *supra*, 29 F.3d at 562 (10th Cir. 1994); see United States v. Gregory, 79 F.3d 973, 979 (10th Cir. 1996). Consistent on this point is the case of United States v. Guerrero-Espinoza, *supra*, 462 F.3d at 1308, defining a "consensual encounter." There is no viable reason to deviate from this general rule as to consent, on the grounds that the post-unlawful detention "consent" that is sought is a "consent" to a further interrogation, i.e. a "consensual encounter," as opposed to a general consent to search.

It has been noted that Robinette did not address the situation in which there has been an antecedent illegality, and does not purport to undermine Brown v. Illinois, *supra,* or Dunaway v. New York, *supra*, see, United States v. Lopez-Arias, *supra*, 344 F.3d at 628-630, and fn. 1. The present case presents that issue, and it should be held that a purported "consensual encounter" that follows an unlawful detention, can be deemed valid only if the "consent" to the continued encounter is both voluntary in fact, and can be determined to be purged of the taint of the prior illegality.

In the present case, the purported "consensual encounters," as to either of the occupants of the Kia, cannot properly be held to have been purged of the taint from the prior illegality. As to each, the temporal proximity to the antecedent illegality was immediate. There was no intervening event causing a break in the chain of events. And the Deputies' conduct was flagrant and deliberate, and involved a false assertion that the Appellants were free to leave, when in fact they were not. (19-2119 II: 56-58, 66, 70-71)

After returning his documents and speaking to Martinez-Torres for several minutes, the Deputy told him to wait by the car while Petitioner Gomez-Arzate was contacted. In that sense, this case resembles United States v. Bowman, *supra*, where the suspect was told to "hang tight," while the officer in that case went to contact the other occupant of the stopped vehicle.

And it must be observed that the period of unlawful detention after minute 16 as to Martinez-Torres, resulted in the unlawful further detention of Gomez-Arzate.

As noted previously, he was still seated in the Kia, his driver was still at the patrol car, and Petitioner Gomez-Arzate knew nothing of the statement that Martinez-Torres had been told that he was free to leave. It was not until until Gomez-Arzate was contacted at 19:56 into the detention that he was so informed. The case does in fact resemble both United States v. Guerrero-Espinoza, *supra*, and United States v. Richardson, *supra*, in that his driver was being held unavailable.

Petitioner Gomez-Arzate remained in the passenger seat of the vehicle, as ordered, throughout the encounter, even until his signature on the consent form was sought, almost thirty minutes into the stop (19-2119 II: pp. 70-71). As a factual matter, he was detained throughout the whole process. Once he was told of the supposed status of Martinez-Torres, Petitioner Gomez-Arzate's response in acquiescing to further questioning was both a mere acquiescence, and was a product of the antecedent unlawful detention. (See United States v. Guerrero-Espinoza, *supra*, 462 F.3d at 1310.

As in Guerrero-Espinoza, *supra*, without a driver, Appellant Gomez-Arzate could not have felt, as a reasonable person, that he was free to leave. His response to the Deputy's request to answer further questions did not validly signal a consensual encounter. See also United States v. Richardson, *supra*, 385 F.3d at 630 (passenger is effectively detained while driver is separately detained.)

B. This case presents the related issue of the validity of a consent to search a vehicle obtained after an unlawfully extended detention, followed by an invalid period of "consensual encounter"; to be resolved are questions of consent that is "voluntary in fact" versus consents "tainted" by prior law enforcement conduct. This Court Should Hold That, Absent a Showing of Attenuation, Any Consent Would Be Tainted, and the Ensuing Search Unlawful.

The purported "consents" in this case, either to further inquiry, or to search the Kia, were nether voluntary in fact, nor purged of the primary taint from the extended detention.

The consent to search the Kia, and the search of the Kia, were the direct products of the unlawfully extended detention in this case, and the period of purported but invalid "consensual encounter." United States v. Guerrero-Espinoza, *supra*, 462 F.3d at 1310, and United States v. Melendez-Garcia, 28 F.3d 1046, 1054-1055 (10th Cir. 1994). Petitioner has addressed the controlling factors in determining the issue of taint versus attenuation, and all favor suppression in this case. Utah v. Strieff, *supra*.

Nor were the consents to search the Kia "voluntary" in fact. The occupants of the Kia in this case were continuously detained for about thirty minutes before the consents were signed (about eighteen minutes from the time that Maurico had explained the warning citation). There were no intervening events; Appellants were separated for questioning in order to uncover a further basis to investigate and ultimately to search. (19-2119 App. III 346-360)

CONCLUSION

Wherefore Petitioner Gomez-Arzate respectfully requests that the Court grant Certiorari in this matter, to address the issues herein presented; and reverse the decision of the Court of Appeals, and direct that an order granting Petitioner's motion to suppress be entered.

Dated: March 26, 2021

Respectfully submitted,

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