

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

AARON KEITH AVERY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Border Patrol's unfettered and arbitrary questioning of those stopped at an immigration checkpoint to ferret out crime go beyond the limited programmatic purpose of such a checkpoint as set out by this Court in *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

United States v. Avery, 804 Fed. Appx. 279 (5th Cir. 2020) (unpublished).

United States v. Avery, Case No. 2:18-CR-1094-1 (S.D. Tex.).

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PRAYER

Petitioner Aaron Keith Avery respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on May 11, 2020.

OPINIONS BELOW

On May 11, 2020, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Mr. Avery's judgment of conviction and sentence. *See United States v. Avery*, 804 Fed. Appx. 279 (5th Cir. 2020) (unpublished). The Fifth Circuit's opinion is reproduced as Appendix A to this petition. The district court's order denying the motion to suppress in *United States v. Avery*, No. 2-18-CR-1094 (S.D. Tex. Mar. 15, 2020), is reproduced as Appendix B to this petition.

JURISDICTION

On May 11, 2020, the United States Court of Appeals for the Fifth Circuit entered its opinion and judgment in this case. This petition is filed within 150 days after that date and thus is timely. *See* Sup. Ct. R. 13.1; *see also* Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION 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.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

The petitioner, Aaron Keith Avery, was charged by a two-count indictment with transporting two undocumented aliens. ROA.27-28 Mr. Avery filed a motion to suppress evidence of the two aliens discovered in his vehicle when he was stopped at the Falfurrias, Texas, Border Patrol checkpoint. ROA.43-53. The motion argued that the stop went beyond the permissible scope and programmatic purpose of an immigration inspection. ROA.43-53. At the suppression hearing, the evidence showed the following.

On September 14, 2018, at approximately 4:05 p.m., Border Patrol Agent Vanessa Prado was working in the primary inspection lane at the Falfurrias, Texas, Border Patrol immigration checkpoint on Highway 281. ROA.163-64. Mr. Avery drove a 2018 Toyota Camry into her primary inspection lane and stopped. ROA.165, 181. A canine handler was in the area of Mr. Avery's car at the time, but the canine did not alert to the car even though the handler and the canine moved next to the vehicle's rear. ROA.184-86; *see also* Gov't Ex. No. 1 (DVD), at 17:01:05-17:01:20.¹ Agent Prado noticed that the vehicle was a rental car due to the bar code on the window and that the car was very clean, although she conceded that rental cars normally are pretty clean. ROA.165, 181. She also noticed that Mr. Avery was wearing nice clothing as if he had been to some kind of an event. ROA.165.

The questions Agent Prado asks a traveler depend on what she decides to start off

¹ At the suppression hearing, a DVD containing a video recording of the checkpoint stop was admitted as Government's Exhibit No. 1 [cited and referred to herein as "Gov't Ex. No. 1 (DVD)"]. *See* ROA.71, 169. The times on Gov't Ex. No. 1 (DVD) are cited by the digital time clock displayed in the upper left-hand corner of the screen.

the conversation with. ROA.174. Sometimes she greets the person to see what type of language the person responds in. ROA.174. Next, Agent Prado usually asks the person about his or her travel. ROA.175. Although Agent Prado conceded that such questions do not help her determine whether the person is a citizen, she asks about the person's travel just to see where he or she is traveling from and going to. ROA.175. These questions are not part of establishing citizenship, but Agent Prado asks them because "the secondary duty of a Border Patrol Agent is to see if they're involved in any other criminal activity, like narcotics and that type of stuff." ROA.175. Of all of the questions that Agent Prado asks, she normally asks about citizenship last. ROA.176. In fact, she does not always ask about citizenship. ROA.176. If the person is fluent in answering her questions, Agent Prado normally will do an immigration check and release the vehicle. ROA.174. Mr. Avery spoke fluent English and was fluent in answering Agent Prado's questions. ROA.174-75. However, according to Agent Prado, the fact that Mr. Avery, who is an African American, spoke fluent English did not indicate anything to her about his citizenship because she had not yet asked him about his citizenship. ROA.175, 194.

The first question Agent Prado asked Mr. Avery was whether the vehicle was his, and he answered that it was not and that it was a rental vehicle. ROA.165. Agent Prado next asked Mr. Avery where he had traveled to and where he was living. ROA.165-67. Mr. Avery said that he had traveled to the Rio Grande Valley for a funeral and was living in San Antonio. ROA.165. Mr. Avery's nice clothes were consistent with the kind of clothing a person would wear to a funeral. ROA.199. Agent Prado asked if Mr. Avery was traveling

back to San Antonio, and he said that he was. ROA.167. Agent Prado then asked if Mr. Avery had any luggage, and he said no. ROA.167, 177.

Agent Prado agreed, however, that it is possible for a person to travel roundtrip on the same day from San Antonio to the Rio Grande Valley and return from there to the Falfurrias checkpoint by around 4:00 p.m., although the person would have to leave at 4:00 a.m. or 5:00 a.m. to make the 5 and a half hour trip to the Valley, attend a 1 hour funeral, for example, and return to the checkpoint by around 4:00 p.m. ROA.196-98. Agent Prado also conceded that, depending on the person, someone making such a trip might not have any need for luggage. ROA.197-98. Nevertheless, the fact that Mr. Avery had no luggage raised Agent Prado's suspicions because people on vacation normally have luggage, but people who are engaged in alien or narcotics smuggling make a very quick trip down and back to the Valley. ROA.195-96.

Agent Prado next asked Mr. Avery for consent to search the trunk of the vehicle. ROA.167, 177. Agent Prado described her decision to ask travelers for consent in the following manner: "Whenever I would like consent and that's whenever I ask for consent." ROA.178. Whether she asks for consent just depends "on where the vehicle[']s coming from, where it's traveling to, [and] how long they were down in the Valley because that's where the majority of illegal aliens would come from because that's where they cross for narcotics." ROA.178. Agent Prado estimated that she asks for consent about 10 times per hour. ROA.178-79. She asks for consent before she ever asks if the person is a citizen because the question about citizenship is the last question that she asks. ROA.179.

Although rental cars entering the checkpoint are going to such places as Houston, Dallas, and San Antonio, Agent Prado recalled that there were several rental cars that had passed through the checkpoint in the past month that were headed to San Antonio. ROA.192. She decided to ask for consent to search the trunk because Mr. Avery was driving a rental car, was headed to San Antonio, and had only been in the Valley for a few hours, but she would have asked for consent even if Mr. Avery had been heading to Houston or a different place. ROA.192-93.

In response to Agent Prado's question, Mr. Avery consented to a search of his trunk. ROA.167. Although Agent Prado noticed that Mr. Avery's hands were shaking as he reached for the trunk release within the vehicle, that was after she had asked for consent and right before Mr. Avery opened the trunk, and she did not notice any nervousness prior to asking for consent. ROA.167-68, 182. Nor did she notice any failure by Mr. Avery to make eye contact or to answer questions. ROA.182-83. As Mr. Avery reached for the trunk release, the car rolled forward slightly, and the trunk then opened. ROA.172; Gov't Ex. No. 1(DVD), at 17:01:30-17:01:38. In fact, Mr. Avery can be seen on the videotape of the stop leaning forward, which is consistent with reaching for the trunk release, when the car moves forward slightly just before the trunk opens. *See* Gov't Ex. No. 1 (DVD), at 17:01:30-17:01:38.

When the trunk of the vehicle opened, Agent Prado moved to the vehicle's rear, looked into the trunk, and saw two aliens within it. ROA.172; Gov't Ex. No. 1 (DVD), at 17:01:38-17:01-41. As she walked back to Mr. Avery, who was still in the driver's seat,

she placed a spike strip in front of the rear tire to prevent Mr. Avery from leaving because she “kind of had a feeling maybe he might try to take off” since the car had “rolled forward a little bit” when Mr. Avery had reached for the trunk release. ROA.172-73. Agent Prado never asked Mr. Avery for any identification before she asked for consent to search the trunk. ROA.180. She assumed that she had done that after she looked in the trunk, but it is difficult to determine from the videotape of the stop whether she did that or not. ROA.179; Gov’t Ex. No. 1 (DVD), at 17:01:41-17:02:05.

At the end of the suppression hearing, the court took the matter under advisement, ROA.208, and on March 15, 2019, entered an order denying the motion to suppress and finding that there was “reasonable suspicion on the facts of the case,” that “the immigration stop was not unconstitutionally prolonged,” and that Mr. Avery freely and voluntarily consented to the search of his trunk. ROA.92, 95.

On March 28, 2019, the district court found Mr. Avery guilty of the counts alleged in the indictment after he waived of his right to a jury and proceeded to a bench trial on stipulated facts, while preserving his right to appeal the denial of his motion to suppress. *See* ROA.240-49; *see also* ROA.104-05, 107-11. On June 27, 2019, the district court sentenced Mr. Avery to serve 8 months in the custody of the Bureau of Prisons and a 3-year term of supervised release. ROA.260. The court also imposed a \$200 special assessment, but did not impose a fine. ROA.260.

On July 10, 2019, Mr. Avery timely filed notice of appeal. ROA.133; *see also* ROA.126 (judgment entered July 2, 2019). On appeal, Mr. Avery challenged the district

court's order denying his motion to suppress. He contended that Agent Prado disregarded and acted contrary to the limited programmatic purpose set out by *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976), as she was permitted to and did exercise standardless and unconstrained discretion in using the checkpoint for general crime control purposes. Mr. Avery argued that Agent Prado's questioning of travelers based on any number of arbitrary factors to ferret crimes in general, including such crimes as alien smuggling and drug trafficking, is contrary to the safeguards discussed in *Martinez-Fuerte*.

In its opinion, the Fifth Circuit rejected Mr. Avery's Fourth Amendment challenge. *United States v. Avery*, 804 Fed. Appx. 279 (2020) (unpublished). Although the Fifth Circuit acknowledged that Mr. Avery was challenging the use of the checkpoint for general crime control purposes, *id.* at 279, it avoided that issue and Agent Prado's arbitrary approach to questioning passengers to ferret out crime. The Fifth Circuit instead chose to address the different and narrower issue of the scope and purpose of the stop as well as the number of questions asked. *See id.* Looking at that issue, the Fifth Circuit affirmed. *Id.* at 280.

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

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

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Fifth Circuit has entered a decision in conflict with this Court's decision in *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976), by approving the Border Patrol's unfettered and arbitrary questioning of those stopped at an immigration checkpoint in disregard of the limited programmatic purpose of such a checkpoint as set out by this Court and because this case shows that *Martinez-Fuerte* no longer provides any restraint on the conduct of Border Patrol.

A. The Scope of the Fourth Amendment as Interpreted by *Martinez-Fuerte*.

The Fourth Amendment forbids law enforcement officers from indiscriminately seizing persons by stopping them without individualized suspicion at roadside checkpoints. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). This Court thus has made clear that the Fourth Amendment prohibits the use of a checkpoint for general crime control purposes. *Id.* at 47. However, the Court has carved out a Fourth Amendment exception for checkpoints that permits them if they are limited to a restricted programmatic purpose that is narrower than a "general interest in crime control." *Id.* at 41-44. But checkpoints remain unconstitutional when their primary purpose is to intercept illegal drugs or to detect evidence of ordinary criminal wrongdoing. *See id.* The Court has contrasted the permissible use of checkpoints with unconstitutional spot checks of driver's licenses and vehicle registrations that give officers "'standardless and unconstrained discretion.'" *Id.* at 39 (discussing and quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1990)).

In *Martinez-Fuerte*, the Court held that the Border Patrol is authorized to set up immigration checkpoints where agents may briefly detain motorists and question them about their citizenship status. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58

(1976). The Court justified the authorization of immigration checkpoints on two grounds. First, the Court determined that “the flow of illegal aliens cannot be controlled effectively at the border,” making interior checkpoints a reasonable method of controlling that flow. *Id.* at 556. Second, the checkpoint stops described to the Court were brief, minimal intrusions on the interests of motorists. *See id.* at 556-60.

The Court noted its belief that these checkpoint stops should require only “a response to a brief question or two and possibly the production of a document evidencing the right to be in the United States.” *Id.* at 558 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)). Those stops “should not be frightening or offensive,” causing nothing more than “some annoyance.” *Martinez-Fuerte*, 428 U.S. at 560. The Court explained that anything beyond the “brief question or two and possibly the production of a document evidencing a right to be in the United States” should be deemed unreasonable. *See id.* at 558, 566-67. And, as the Court recognized in *Martinez-Fuerte*, “a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.” *Martinez-Fuerte*, 428 U.S. at 559 (footnote omitted).

B. This Court Should Grant Certiorari Because, as Shown by this Case, *Martinez-Fuerte* Has Come to Be Disregarded by the Border Patrol, and Because the Fifth Circuit’s Approval of the Border Patrol’s Conduct Is in Conflict with *Martinez-Fuerte*.

This case demonstrates just how far the courts and the Border Patrol have strayed from this Court’s holding in *Martinez-Fuerte*, to the point where they find it perfectly acceptable for a Border Patrol agent to ask any person stopped at an immigration checkpoint any question for any reason even if the agent is doing so for the purpose of

general crime control. Here, the Border Patrol agent disregarded and acted contrary to the limited programmatic purpose set out by *Martinez-Fuerte* and made clear that it was her ordinary practice to do so. In other words, her exercise of discretion in operating the checkpoint was unreasonable because she was permitted to and did exercise ““standardless and unconstrained discretion,”” *Edmond*, 531 U.S. at 39 (quoting *Prouse*, 440 U.S. at 661), in using the checkpoint for general crime control purposes. *Edmond*, 531 U.S. at 47.

As the facts show and Agent Prado admitted, *see supra* text, at 3-8, she has no set questions that she asks of travelers, but instead chooses in each case how to start off and continue the conversation. In addition, Agent Prado asks travelers about their travel just to see where they are going to and traveling from even though she knows that such questions do not help her determine whether the person is a citizen. In fact, Agent Prado admitted that she asks questions of travelers because as a Border Patrol agent she is trying to determine whether travelers are “involved in any other criminal activity, like narcotics and that type of stuff.” ROA.175. Indeed, if Agent Prado asks about citizenship at all (because she does not always ask about it), that is the last question she asks even after she asks for consent to search a traveler’s vehicle.

And, Agent Prado’s exercise of her discretion to ask for consent to search a traveler’s vehicle is similarly as “standardless and unconstrained” as her exercise of her discretion to ask certain questions, as shown by her admission that she asks for consent whenever she wants to. ROA.178 (“Whenever I would like consent and that’s whenever I ask for consent.”). Moreover, her decision to ask for consent just depends “on where the

vehicle[']s coming from, where it's traveling to, [and] how long they were down in the Valley because that's where the majority of illegal aliens would come from because that's where they cross for narcotics." ROA.178. Based on the arbitrary exercise of her discretion, Agent Prado asks for consent to search about 10 times per hour even before she asks if the person is a citizen because the question about citizenship is the last question that she asks.

It was this standardless and unconstrained discretion that Agent Prado used for general crime control purposes in this case to unconstitutionally detain and question Mr. Avery and to search his vehicle. *See, e.g., Brown v. Texas*, 443 U.S. 47, 51 (1979) (holding that a central concern in balancing competing Fourth Amendment considerations "has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field"). Agent Prado did so, moreover, despite the fact that: (1) a drug canine did not alert to Mr. Avery's vehicle when he drove into Agent Prado's primary inspection lane; (2) Mr. Avery's answers concerning his vehicle were consistent with the rental car he was driving; (3) he spoke fluent English; (4) he was not nervous; (5) he answered all of Agent Prado's questions; (6) he did not fail to make eye contact; and (7) he was wearing clothing consistent with his statement that he had attended a funeral. *See supra* text, at 3-7. Despite these facts, and in search of a crime, at the tail end of her detention and questioning of Mr. Avery, Agent Prado asked for consent to search the trunk of Mr. Avery's car because he was driving a rental car, had no luggage, and had taken a day trip to the Rio Grande Valley.

In this case, the immigration checkpoint was operated in a manner that was contrary

to the safeguards discussed in *Martinez-Fuerte*, which presupposes that the encounter will only include “a response to a brief question or two and possibly the production of a document evidencing the right to be in the United States.” *Martinez-Fuerte*, 428 U.S. at 558; *see e.g. United States v. Huguenin*, 154 F.3d 547, 560 (6th Cir. 1998). In other words, the immigration checkpoint was operated for purposes of general crime control. The Fourth Amendment would do little to prevent constitutionally impermissible intrusions without drawing the line at roadblocks operated to serve the general interest in crime control. *See Edmond*, 531 U.S. at 42. And, a search for illegal drugs cannot be used to rationalize such an unconstitutional intrusion. *See id.* at 43.

In sum, the standardless and unconstrained detention and questioning of Mr. Avery at an immigration checkpoint that was operated for purposes of general crime control in contravention of *Martinez-Fuerte* violated the Fourth Amendment. And, Agent Prado’s description of and approach to her job as a Border Patrol agent at an interior immigration checkpoint and the Fifth Circuit’s decision approving her actions in conflict with *Martinez-Fuerte* show that the limits imposed by *Martinez-Fuerte* have long been forgotten by the Border Patrol and the lower courts. This Court, therefore, should grant certiorari because the Fifth Circuit’s decision is in conflict with *Martinez-Fuerte* and to breathe new life into the constitutional limits that *Martinez-Fuerte* imposes on the Border Patrol.²

² In the Fifth Circuit, Mr. Avery further contended that his consent to search was unconstitutionally obtained because there was no attenuation between the constitutional violation and his consent. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 601-02 (1975); *see also New York v. Harris*, 495 U.S. 14, 18-19 (1990). This Court need not decide the consent issue, but instead may remand after resolving the question presented, leaving the resolution of the consent issue to the


CONCLUSION

For the foregoing reasons, petitioner Aaron Keith Avery prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date: September 25, 2020

Respectfully submitted,

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Fifth Circuit. *See, e.g., Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017); *Skilling v. United States*, 561 U.S. 358, 414 (2010); *Rose v. Clark*, 478 U.S. 570, 582 n.12 (1986).

804 Fed.Appx. 279 (Mem)

This case was not selected for publication in West's Federal Reporter. 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.

Aaron Keith AVERY, Defendant-Appellant

No. 19-40625

Summary Calendar

FILED May 11, 2020

Appeal from the United States District Court for the Southern District of Texas, USDC No. 2:18-CR-1094-1

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Before [WIENER](#), [HAYNES](#), and [COSTA](#), Circuit Judges.

Opinion

PER CURIAM: *

Aaron Keith Avery was convicted of two counts of transporting an undocumented alien. He argues that the district court erroneously denied his motion to suppress evidence because the stop of his vehicle at the Falfurrias Border Patrol checkpoint violated the Fourth Amendment. He contends that the Fourth Amendment violation occurred because the primary purpose of the checkpoint was general crime control rather than the enforcement of immigration laws.

On appeal from the denial of a motion to suppress, we review the district court's findings of fact for clear error and its conclusions of law de novo. [United States v. Lopez-Moreno](#), 420 F.3d 420, 429 (5th Cir. 2005). Evidence is viewed in the light most favorable to the prevailing party, and "the clearly erroneous standard is particularly strong" where, as here, the district court's ruling is based on live oral testimony. [United States v. Gibbs](#), 421 F.3d 352, 357 (5th Cir. 2005) (internal quotation marks and citation omitted).

"At a fixed checkpoint having the primary purpose of identifying illegal immigrants, vehicles may be briefly detained in furtherance of that purpose and their occupants questioned, all without either a warrant or any individualized reasonable suspicion." [United States v. Jaime](#), 473 F.3d 178, 181 (5th Cir. 2006). The scope of immigration checkpoint stops "is limited to the justifying, programmatic purpose of the stop: determining the citizenship status of persons passing through the checkpoint." [United States v. Machuca-Barrera](#), 261 F.3d 425, 433, 435 (5th Cir. 2001).

The district court did not err in rejecting Avery's argument that the agent's questioning went beyond the reasonable scope and duration of an immigration-related stop. In the brief stop, lasting about 35 seconds, the agent asked Avery roughly four questions pertaining to his travels before requesting, and receiving, Avery's consent to search his trunk. See [Jaime](#), 473 F.3d at 181; cf. [City of Indianapolis v. Edmond](#), 531 U.S. 32, 47-48, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). These were permissible queries. See [United States v. Tello](#), 924 F.3d 782, 787 (5th Cir.); cert. denied [*280](#), — U.S. —, 140 S.Ct. 172, 205 L.Ed.2d 188 (2019). Avery thus fails to show that the district court erred in denying his motion to suppress evidence discovered after the stop. See [Lopez-Moreno](#), 420 F.3d at 429. Because Avery has not shown that the initial stop was unconstitutional, we do not address his argument that the unconstitutional stop tainted his consent to the search of his trunk.

The judgment is AFFIRMED.

All Citations

804 Fed.Appx. 279 (Mem)

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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ENTERED

March 15, 2019

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 2:18-CR-1094
	§	
AARON KEITH AVERY	§	

ORDER DENYING MOTION TO SUPPRESS

Before the Court is Defendant Aaron Keith Avery's (Avery) motion to suppress evidence (D.E. 15). Avery is charged by indictment (D.E. 9) with two counts of illegally transporting aliens within the United States. The Government filed a response (D.E. 17) and the Court held a hearing on the motion on January 24, 2019. For the following reasons, the motion to suppress (D.E. 15) is DENIED.

FACTS

On September 14, 2018, Border Patrol Agent Vanessa Prado (Agent Prado) was working in the primary inspection area of the border patrol checkpoint near Falfurrias, Texas. Around 4:00 p.m., Avery entered the checkpoint driving a 2018 Toyota Camry with no visible passengers. Agent Prado, who has approximately three and a half years of experience as a border patrol agent, immediately noted a bar code on the windshield indicating that Avery's car was a rental. She observed that the vehicle was clean, there was no luggage, and Avery wore nice clothing, suggesting that he came from an event.

Agent Prado asked Avery about his reason for travel and whether the vehicle belonged to him. Avery answered that he was returning to San Antonio from a funeral in the Rio Grande Valley and the vehicle was a rental. Agent Prado asked whether he had

any luggage in the trunk to which he responded that he did not. Agent Prado testified that Avery also said that he had spent only a couple of hours in the Rio Grande Valley. However, she did not include this statement in her report. As she questioned Avery, a canine handler walked by the vehicle with his dog, but there was no alert.

Agent Prado then asked if she could search the trunk of the car and Avery responded, “Yes.” As he reached for the trunk lever, she observed his hands shaking. Two individuals were discovered in the trunk, who were later determined to be illegally present in the United States. The encounter lasted approximately 35 seconds.

Agent Prado never asked Avery about his immigration status. She testified that several matters raised her suspicion—the car was a rental, Avery had only been in the Rio Grande Valley a couple of hours after traveling from San Antonio which is about a five hour trip, and there was no luggage in the vehicle. She stated that individuals involved in alien smuggling normally make quick trips.

Avery now moves to suppress the fruits of the search, arguing that the stop violated his Fourth Amendment rights.

DISCUSSION

A. The Immigration Checkpoint Stop Was Not Unconstitutionally Prolonged

Avery first argues that the stop in the primary area of the immigration checkpoint was unconstitutionally prolonged, thereby requiring suppression. The Court disagrees.

The Fourth Amendment generally prohibits law enforcement from stopping motorists absent “individualized suspicion of wrongdoing.” *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). However, the Supreme Court has exempted

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immigration checkpoints from this rule because of the public interest in stemming the flow of illegal immigration and the brief, nonintrusive nature of these checkpoints. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976).

Ordinarily, “[t]he permissible duration of an immigration checkpoint stop is . . . the time reasonably necessary to determine the citizenship status of the persons stopped.” *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001). “[T]he length of the detention, not the questions asked” determines the constitutionality of the stop. *Id.* at 432 (finding that a stop lasting “no more than a couple of minutes” was within the permissible duration). If the routine questioning generates reasonable suspicion of other criminal activity, the stop may be extended to accommodate the new justification. *Id.* at 433. This analysis “‘is necessarily fact-specific, and factors which by themselves may appear innocent, may in the aggregate rise to the level of reasonable suspicion.’” *United States v. Santiago*, 310 F.3d 336, 340 (5th Cir. 2002) (quoting *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759 (5th Cir. 1999)). In assessing reasonable suspicion, the Supreme Court has “said repeatedly that [courts] must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)).

Avery argues that there was no reasonable suspicion to extend the stop. And because Agent Prado failed to ask about his citizenship status, the unrelated questions impermissibly prolonged the stop.

The Fifth Circuit has repeatedly “declined to establish a set script of immigration questioning to which agents must adhere by rote, recognizing that, generally, it is the length of the detention, not the questions asked, that makes a specific stop unreasonable.” *United States v. Ventura*, 447 F.3d 375, 381 (5th Cir. 2006) (citations omitted); *see also United States v. Jaime*, 473 F.3d 178, 185 (5th Cir. 2006). (“[U]nder *Machuca-Barrera* it is necessarily irrelevant whether a non-immigration question comes before, rather than immediately following, the completion of the immigration questions and answers, for in either event the duration of the stop is equally extended, and, if the non-immigration question and answer are asking and giving consent to search, in either event the extension of the stop’s duration is permissible.”).

The Court finds reasonable suspicion on the facts of this case. Additionally, the immigration stop was not unconstitutionally prolonged.

B. Avery’s Consent to Search the Trunk Was Valid

Avery argues that his consent to search the trunk was not voluntarily and freely given. 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 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)). However, the “validity of the search turns entirely on the effectiveness of consent given for the search.” *United States v. Jaras*, 86 F.3d 383, 388 (5th Cir. 1996). The consent must have been “freely and voluntarily given.”

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United States v. Watson, 273 F.3d 599, 604 (5th Cir. 2001) (citing *United States v. Ponce*, 8 F.3d 989, 998 (5th Cir. 1993)).

“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) (citing *United States v. Gonzales*, 121 F.3d 928, 938 (5th Cir. 1997)). The Fifth Circuit has identified six factors, no one of which is dispositive, to weigh in determining whether consent is voluntarily given:

- (1) the voluntariness of the defendant’s custodial status; (2) the presence of coercive police procedure; (3) the extent and level of the defendant’s cooperation with the police; (4) the defendant’s awareness of his right to refuse consent; (5) the defendant’s education and intelligence; and (6) the defendant’s belief that no incriminating evidence will be found.

United States v. Tedford, 875 F.2d 446, 451–52 (5th Cir. 1989) (citing *United States v. Galberth*, 846 F.2d 983, 987 (5th Cir.1988)). The Court considers each in turn.

The voluntariness of the defendant’s custodial status. The parties do not dispute that Avery was not free to leave. Although this factor weighs in Avery’s favor, the Court notes that Avery had been detained for only about 30 seconds before he consented to the search.

The presence of coercive police procedure. Although Agent Prado carried a visible firearm, “the mere presence of armed officers does not render a situation coercive.” *United States v. Escamilla*, 852 F.3d 474, 483 (5th Cir. 2017) (quoting *United*

States v. Martinez, 410 Fed. App'x 759, 764 (5th Cir. 2011)). There is no evidence that Agent Prado threatened or yelled at Avery or treated him rudely. See *United States v. Mata*, 517 F.3d 279, 291 (5th Cir. 2008). The absence of any coercive police activity weighs in favor of the Government.

The extent and level of the defendant's cooperation with the police. The evidence indicates that Avery fully cooperated with Agent Prado's questions. Therefore, this factor also weighs in favor of the Government.

The defendant's awareness of his right to refuse consent. There is no evidence that Avery was informed of his right to refuse consent. However, "the lack of awareness of this right does not taint the voluntariness of consent." *United States v. Lopez*, 911 F.2d 1006, 1011 (5th Cir. 1990) (citations omitted); see also *United States v. Arias-Robles*, 477 F.3d 245, 250 (5th Cir. 2007) ("[T]here is no 'Miranda requirement' attending a simple request for permission to search."). The Government cites to Avery's criminal record, but fails to establish how prior, unrelated criminal history informed him of his right to refuse consent. This factor is neutral.

The defendant's education and intelligence. There was no evidence presented regarding Avery's education or intelligence. There is no reason to believe based on the facts that he was not of reasonable intelligence. Accordingly, this factor weighs slightly in favor of the Government.

The defendant's belief that no incriminating evidence will be found. Finally, it was certain that a search of the trunk would reveal the two aliens hiding inside. Avery could not have rationally believed otherwise. See *c.f. United States v. Olivier-Becerril*, 6 / 7

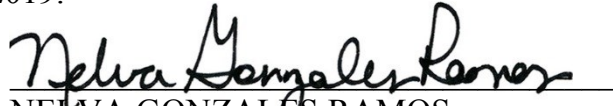
861 F.2d 424, 426 (5th Cir. 1988) (“[Defendant was] apparently secure in the knowledge that because the hidden compartment was below the trunk floor, and the carpet above was glued to the false top, the inspection of the trunk would disclose nothing.”); *United States v. Muniz-Melchor*, 894 F.2d 1430, 1440 (5th Cir. 1990) (evidence that defendant “believed it likely nothing would be discovered” weighed in favor of finding consent to search was voluntarily given). Thus, this factor weighs in Avery’s favor.

After a review of the evidence, the Court concludes that Avery freely and voluntarily consented to the search of his trunk.

CONCLUSION

For the reasons set forth above, Avery’s motion to suppress (D.E. 15) is DENIED.

ORDERED this 15th day of March, 2019.


NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE