NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

GUILLERMO MARTINEZ-TORRES,

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 WRIT OF CERTIORARI

Respectfully submitted,

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May 20, 2021

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QUESTION PRESENTED FOR REVIEW

Once a Fourth Amendment violation is established, does the defendant have the burden to prove the violation was the "but for" cause of the subsequent discovery of contraband or is it the prosecution's burden to prove the admissibility of evidence discovered after illegal police activity? There is a circuit split on this issue, which this Court should resolve to prevent unfair suppression outcomes that turn on the location where they arise.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Guillermo Martinez-Torres respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the district court's denial of his motion to suppress.

PARTIES TO THE PROCEEDINGS

Petitioner Guillermo Martinez-Torres and Jesus Gomez-Arzate were co-defendants in the district court. They separately appealed their convictions to the Tenth Circuit. The Tenth Circuit consolidated the appeals for oral argument and issued a single decision denying both appeals.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in *United States v. Gomez-Arzate*, 10th Cir. No. 19-2119, and *United States v. Martinez-*

Torres, 10th Cir. No. 19-2121, dated December 2, 2020, is attached hereto as Petitioner's Appendix ("Pet.App.") A. The January 4, 2019, order of the United States District Court for the District of New Mexico denying defendants' motion to suppress in *United States v. Martinez-Torres and Gomez-Arzate,* No. 18CR1960 WJ, is attached as Pet.App. B. The Tenth Circuit order denying rehearing and rehearing en banc in *United States v. Martinez-Torres*, No. 19-2121, dated December 29, 2020, is Pet.App. C.

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CITATIONS OF REPORTS OF OPINIONS AND ORDERS

The court of appeals' opinion, reported at 981 F.3d 832 (10th Cir. 2020), is attached hereto as Pet.App. A. The order of the United States District Court for the District of New Mexico denying defendants' motion to suppress, 2019 WL 113729, is Pet.App. B.

This Court denied certiorari in *Gomez-Arzate v. United States*, 2021 WL 1602674, on April 26, 2021.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The Tenth Circuit issued its decision December 2, 2020. The Tenth Circuit denied rehearing and rehearing en banc on December 29, 2020. This petition is timely under Supreme Court Rule 13.1 and 13.3 if filed on or before May 28, 2021.

FEDERAL LAWS AT ISSUE

The Fourth Amendment of 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 . . ."

INTRODUCTION

The imposition of a burden on defendants to prove that an illegal detention was the "but for" cause of the subsequent discovery of contraband will frequently result in denial of a motion to suppress, as it did in this case. It is often difficult to demonstrate the extent to which information acquired during an illegal detention heightened officers' suspicions and whether the officers would have requested and received consent to further interrogation and consent to search without that information. Here, defendants' suppression motion was denied because defendants were found to have failed to prove that without the illegally prolonged traffic stop, deputies would not have requested defendants' consent to further questioning and consent to search and defendants would not have given consent. The court of appeals speculated that even without the illegally prolonged stop, deputies would have requested those consents and defendants would have agreed.

The circuits are split as to the proper allocation of the burden of proof on suppression of evidence once a Fourth Amendment violation is established. Some circuits hold that it is the defendant's burden to prove "but for" causation. Others do not impose that burden on the defendant and merely place a burden on the government to show that there was only an attenuated connection between the illegal police activity and the discovery of contraband. It would seem that imposition of a burden on defendants to show the inadmissibility of evidence discovered after illegal police activity is contrary to *Brown v. Illinois*, 422 U.S. 590 (1975), where this Court declared that "the burden of showing admissibility rests, of course, on the prosecution."

Disparate burdens of proof from circuit to circuit result in the denial of motions to suppress in some circuits that are granted in others. This Court should grant certiorari, resolve the split between circuits, and rectify the injustice that will otherwise persist.

STATEMENT OF THE CASE

Defendant-Appellant Guillermo Martinez-Torres and his co-defendant, Jesus Gomez-Arzate, were charged with one count of conspiracy to distribute more than 500 grams of methamphetamine and one count of possession with intent to distribute more than 500 grams of methamphetamine. They filed a joint motion to suppress, which the district court denied after a suppression hearing. Martinez-Torres and Gomez-Arzate entered into a conditional plea agreement that reserved their right to appeal the suppression order and both received sentences of 63 months' imprisonment and a five-year term of unsupervised release.

The Suppression Hearing Evidence.

This case stemmed from a careless driving stop on Interstate 40 west of Albuquerque, New Mexico. Defendants were traveling in a Kia that Martinez-Torres was driving at the time of the stop. Martinez-Torres and Gomez-Arzate moved to suppress the drug evidence, arguing, *inter alia*, that the traffic stop was unlawfully prolonged and that they did not voluntarily consent to officers' search of their car.

The underlying facts were mostly undisputed. Because Martinez-Torres and Gomez-Arzate speak Spanish and the officer spoke little Spanish, a Spanish speaking deputy was called to the scene to explain to Martinez-Torres the reason for the stop.

Martinez-Torres provided his driver's license, the vehicle registration, and proof of insurance and responded to questions about his travels. His name was on the insurance certificate, but not the registration.

After completing the warning citation, but before giving the citation to Martinez-Torres, the deputies questioned Gomez-Arzate about travel plans and about the owner of the car as they looked at the Kia VIN numbers. The deputies uncovered inconsistencies between the defendants' accounts.

After questioning Gomez-Arzate for about five minutes, the deputies returned to Martinez-Torres, who was waiting at the patrol car, and gave him the citation. Martinez-Torres walked to his car. He returned to the patrol car when the deputies called him back. They asked him more questions.

Immediately before requesting consent to "check" the car, deputies asked Martinez-Torres thirteen accusatory questions about whether he was carrying large sums of money, weapons, and drugs. Despite his repeated denials that he possessed any drugs or weapons, deputies continued to press him with questions about whether he was carrying specific types of weapons and drugs. By the time deputes requested consent to "check" the car, at least three uniformed deputies and three marked patrol cars were on the scene, all with flashing emergency lights.

Martinez-Torres and Gomez-Arzate signed a consent-to-search form. Deputies searched the car for an hour and a half. After removing part of the front fender and front and back panels, they snapped off plastic rivets from the car's right rear interior

quarter panel and discovered two packages containing about seven pounds of methamphetamine.

The District Court's Denial of the Motion to Suppress.

The district court found no Fourth Amendment violations. It upheld the legality of the stop, the detention that followed, and the voluntariness of the consent to search of the car. Pet.App. B.

Martinez-Torres's Appeal and the Court of Appeal's Ruling.

The court of appeals had jurisdiction under 28 U.S.C. § 1291. Martinez-Torres argued on appeal, *inter alia*, that the deputies unlawfully prolonged the traffic stop after issuing him a warning and that he did not voluntarily consent to the search of his car. The court of appeals agreed that the traffic stop was illegally prolonged during the period 11 to 16 minutes after the stop was initiated. The deputies questioned Gomez-Arzate during that time about matters unrelated to the traffic violation that justified the stop, then talked further with Martinez-Torres. Pet. App. A at 11-12.

The court of appeals nonetheless affirmed the denial of suppression based on its determination that defendants failed to show that the Fourth Amendment violation was the "but for" cause of deputies' discovery of the drugs. *Id.* at 13-14. It explained that "[i]t seems likely that Deputy Mora would have asked for consent to ask additional questions based on his initial suspicions even without the information he gleaned during minutes 11 to 16." *Id.* at 13. The court of appeals also decided that defendants voluntarily consented to the search of their car, pointing to its conclusion that the stop

became a consensual encounter and the fact that defendants signed the consent-to-search form. *Id.* at 20.

Martinez-Torres's Petition for Rehearing.

Both defendants filed petitions requesting panel rehearing and rehearing en banc. They argued, *inter alia*, that the court wrongly decided that they freely and voluntarily consented to the search of their car after the illegally prolonged stop. The rehearing petitions were denied on December 29, 2020. Pet.App. C.

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari to Resolve the Circuit Conflict concerning the Proper Allocation of the Burden of Proof on whether Evidence Discovered after an Illegal Detention Must be Suppressed.

1. Once a Fourth Amendment violation is identified, courts must decide whether to suppress evidence discovered as a direct or indirect result of that violation. There is a split between the circuits as to whether a defendant must prove that an illegal detention was the "but for" cause of officers' subsequent discovery of contraband. While the Eighth and Tenth Circuits impose that requirement, most circuits do not. They hold instead that once a defendant establishes an illegal seizure, the government must prove the admissibility of any disputed evidence based on the three attenuation factors enumerated by this Court in *Brown v. Illinois*, 422 U.S. 590 (1975). They are: (1) the time elapsed between the illegal conduct and the discovery of evidence; (2) the existence of intervening circumstances; and (3) the nature and purposefulness of the police misconduct (hereafter "the *Brown* factors"). *Id.* at 603–04.

The Tenth Circuit upheld the district court's denial of defendants' motion to suppress in this case because it decided that defendants failed to prove the illegally prolonged traffic stop was the "but for" cause of deputies' discovery of methamphetamine. Pet.App. A at 13-14. Under longstanding Tenth Circuit jurisprudence, defendants who have proved a Fourth Amendment violation must then prove that the violation was at least the "but for" cause of officers' discovery of challenged evidence. *See, e.g., United States v. Shrum*, 908 F.3d 1219, 1233 (10th Cir. 2018) ("A defendant has the initial burden of establishing a causal connection between an illegal seizure and the evidence he seeks to suppress."); *United States v. Chavira*, 467 F.3d 1286, 1291 (10th Cir. 2006) (the defendant must show the challenged evidence would not have come to light "but for the government's unconstitutional conduct.").

Eighth Circuit case law on this issue is consistent with the Tenth Circuit's. *See, e.g., United States v. Riesselman,* 646 F.3d 1072, 1079 (8th Cir. 2011) ("the defendant bears the initial burden of establishing the factual nexus between the constitutional violation and the challenged evidence."); *United States v. Marasco*, 487 F.3d 543, 548 (8th Cir.2007)(reversing the grant of a motion to suppress because the defendant did not prove "the factual nexus between the constitutional violation ad the challenged evidence.").

Unlike the Eighth and Tenth Circuits, most circuits do not require defendants to prove "but for" causation once a Fourth Amendment violation is found. Instead, they place the burden on the government to establish the admissibility of the challenged evidence based on the *Brown* factors. *See, e.g., United States v. Delgado-Perez*, 867

F.3d 244, 257 (1st Cir 2017)(whether there was a sufficient nexus between the illegal act and the defendant's consent turns on the *Brown* factors); *United States v. Macias*, 658 F.3d 509, 522-23 (5th Cir. 2011)(the government must prove in light of the *Brown* factors that consent given after a constitutional violation was free and voluntary and an independent act of free will that broke any causal chain between the consent and the illegal detention); *United States v. Cole*, – F.3d –, 2021 WL 1437201 at*11 (7th Cir. 2021)(after finding stop was illegally prolonged, court orders remand to permit withdrawal of plea conditioned on admissibility of the evidence against him without requiring the defendant to prove "but for" causation); *United States v. Gorman*, 859 F.3d 706, 716 (9th Cir. 2017)(it is the prosecution's burden to prove the admissibility of evidence discovered after a Fourth Amendment violation, which must be suppressed if an illegal detention was the impetus for a chain of events leading to the discovery); *United States v. Santa*, 236 F.3d 662, 676 (11th Cir. 2000)("For consent given after an illegal seizure to be valid, the Government must prove two things: that the consent is voluntary and that the consent was not a product of the illegal seizure.").

2. The exclusionary rule "bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Davis v. United States*, 564 U.S. 229, 231-32 (2011). In addressing the admissibility of a statement that followed an illegal arrest in *Brown*, this Court declared that "the burden of showing admissibility rests, of course, on the prosecution." 422 U.S. at 603-04. *See also Nix v. Williams*, 467 U.S. 431, 444 (1984)(the prosecution has the burden to prove by a preponderance of the evidence the applicability of an exception to the exclusionary rule).

Although *Brown* dealt with the admissibility of statements, the *Brown* factors also govern the admissibility of seized physical evidence. *See Wong Sun v. United States*, 371 U.S. 471, 486 (1963)("Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence."). The purpose of the *Brown* test is to "deter lawless conduct by . . . officers and [to] clos[e] the doors of the courts to any use of evidence unconstitutionally obtained." *Brown* 422 U.S. at 599 (quotation marks omitted).

3. The uncertainty concerning the proper allocation of the burden to prove the admissibility of evidence discovered after illegal police activity also impacts state criminal jurisprudence. A number of states place the full burden on the prosecution to prove the admissibility of evidence discovered after illegal police activity. *See, e.g., Commonwealth v. Shaw*, 476 Pa. 543, 556 n.8, 383 A.2d 496 (1978) (the Commonwealth failed to meet its burden to show that statement would have been made even without the illegal police activity (citing *Wong Sun*, 371 U.S. at 488; *Brown v. Illinois*)); *Garrison v. State*, 642 S.W.2d 168, 169 (Tx. App. 1982)("The defendant does not have the burden of showing that the statement is inadmissible. Once the fact of an illegal arrest [here, the fact of an illegal detention] is shown, it is the State's burden to show that a statement taken as a result of that arrest is admissible." (citing *Brown v. Illinois*)).

4. This case raises a consequential and frequently recurring Fourth Amendment issue that often determines the outcome of a suppression motion. While the evidence showed that deputies in this case uncovered suspicious contradictions between the

defendants' accounts of their travel plans during the illegal detention, there was no definitive evidence proving or disproving whether the deputies would have requested consent and whether defendants would have given consent in the absence of the illegal detention. The court of appeals upheld the denial of suppression based on its conclusion that defendants failed to prove "but for" causation. It speculated that the illegal prolonging of the stop had little impact on deputies' discovery of the drugs, concluding that "[i]t seems likely that Deputy Mora would have asked for consent to ask additional questions based on his initial suspicions even without the information he gleaned during minutes 11 to 16."

5. As this Court indicated in *Brown*, once a defendant proves illegal police activity, the government should be required to prove that subsequently discovered evidence is nonetheless admissible. It is the government's burden to prove under the totality of the circumstances that consent was unequivocal and given freely, intelligently, and voluntarily. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)*; Florida v. Royer*, 460 U.S. 491, 497 (1983). "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights, and [] we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)(quotations omitted). Where there has been illegal police activity, the government should be required to prove that any consent that followed was voluntary in spite of the illegality.

6. The disparate burdens of proof from one circuit to the next produce disparate suppression outcomes. It is profoundly unfair that a defendant who is illegally detained

in the Eighth and Tenth Circuits is more likely to be convicted than similarly situated individuals in circuits where evidence is more likely to be suppressed.

7. This case presents an ideal vehicle for this Court to clarify the appropriate burden of proof on suppression of evidence once a Fourth Amendment violation is shown. There are no preservation issues and the pertinent facts are undisputed.

CONCLUSION

For the reasons stated above, Petitioner Guillermo Martinez-Torres respectfully requests that this Court grant his petition for writ of certiorari and resolve the split between circuits concerning the proper allocation of the burden of proof with respect to suppression of evidence discovered after an illegal detention.

Respectfully submitted,

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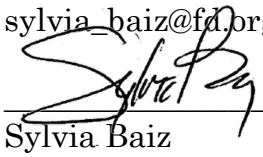

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CERTIFICATE OF SERVICE

I, Sylvia Baiz, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Guillermo Martinez-Torres, I caused to be mailed one copy of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid, to the Solicitor General, Department of Justice, 950 Pennsylvania Ave. NW, Room 5614, Washington, DC 20530, and to be sent electronic copies of the foregoing by e-mail at supremectbriefs@usdoj.gov, on this 20th day of May 2021.

_____

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