
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RAUL ADRIAN TORRES, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

August 3, 2021

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RAUL ADRIAN TORRES, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CARLTON F. GUNN
Attorney at Law
65 North Raymond Ave., Suite 320
Pasadena, California 91103

Attorney for the Petitioner

QUESTION PRESENTED

Whether a search of a backpack or other bag that was being carried by an arrestee is permissible as a search incident to arrest even after officers have secured the arrestee in handcuffs.

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

Raul Adrian Torres petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

I.
OPINIONS BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit is included in the appendix as Appendix 1. An order denying a petition for rehearing en banc is included in the appendix as Appendix 2. A transcript of the district court hearing with the district court's oral rulings is included in the appendix as Appendix 3.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 27, 2021, *see* App. A001-14, and a timely petition for rehearing en banc was denied on June 3, 2021, *see* App. A015. The

jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED.

1. Arrest and Search.

On March 15, 2018, a Fresno, California, Police Department detective

who was monitoring social media for gang members observed a video showing Petitioner and another man pointing a gun and making gang signs. *See* App. A066-67. The detective mistakenly identified Petitioner as another man who had a prior felon in possession of ammunition conviction and outstanding warrant. App. A115; *see* App. A067, A086-87, A089, A091-92. Two officers who were surveilling the house where the video was recorded subsequently observed Petitioner and another man leave. *See* App. A074-75. Petitioner had a small black backpack. App. A074.

After observing the other man and Petitioner leave the house, one of the surveilling officers got out of the car the officers were in, drew his gun, and yelled, "Fresno Police, let me see your hands." App. A075. The other man stopped, but Petitioner began to walk faster. App. A075. When the officer again stated, "Police, Stop!," Petitioner began to run. App. A075. The officer chased him and continued yelling, "Police, Stop!" App. A075.

Petitioner turned into an alley and ran through the alley. App. A075. The officer who had remained in the car was able to drive up next to Petitioner and attempted to stop Petitioner by drifting into Petitioner's path. App. A075. Petitioner slipped and fell when he tried to stop, and the officer who was running after Petitioner caught up to Petitioner. App. A075. Petitioner stood up facing the officer with clenched fists, and the officer knocked Petitioner to the ground by kicking him in the chest. App. A075.

The officer in the car got out and came to help the officer who had knocked Petitioner to the ground. *See* App. A076. Petitioner rolled onto his stomach, placed his hands under his stomach and tried to get up. App. A075-76. The officer who had knocked him down was on top of him and struck him

several times to keep him down. App. A076. While the officer who had come from the car helped, the officer who knocked Petitioner down was able to pull Petitioner's arms to his back and handcuff him. App. A076. The other officer then retrieved a pair of leg shackles from the car and placed them on Petitioner's ankles. App. A076.

While waiting for additional units, one of the officers asked Petitioner why he had run, and Petitioner replied, "Cause I have a gun." App. A076. The other officer then opened the backpack and found a gun. App. A076. Another officer who had come to the scene placed Petitioner in a patrol car, asked him for biographical information, and discovered he was not the man with the prior felon in possession of ammunition conviction, though he was on felony probation. *See* App. A080. The original detective came to the scene, read Miranda warnings to Petitioner, and questioned him. App. A069. Petitioner made additional statements about the gun, including that he did possess it, that he knew it had obliterated serial numbers, and that he needed it for protection. *See* App. A069-70.

2. Indictment, Motions, and District Court Ruling on Motions.

Petitioner was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). App. A083, A090-91, A116. He filed several motions, including a motion to suppress which made multiple Fourth and Fifth Amendment arguments, *see* App. A053-80. One of the arguments was that the search of the backpack was not a lawful search incident to arrest because it took place after Petitioner was handcuffed. *See* App. A060.

Another argument was that the "Cause I have a gun" statement in response to the question about why Petitioner had run should be suppressed because it was in response to custodial interrogation without Miranda warnings. *See* App. A060-61. Defense counsel also argued there needed to be an evidentiary hearing. *See* App. A019.

The district court denied the motion without an evidentiary hearing. It focused largely on whether there was probable cause to arrest Petitioner despite the mistaken identification. *See* App. A037-39, A042-48. It seemed to recognize the question about why Petitioner had run was custodial interrogation in violation of the Miranda rule, *see* App. A040-41, but suggested the statement did not matter because the officers would have found the gun anyway, *see* App. A043, A047. The court did not comment on the other issues. *See* App. A051 (simply "incorporat[ing] its argument in the questions just asked and answers" and denying motion).

3. Appeal.

Petitioner subsequently entered a conditional guilty plea and appealed after being sentenced. *See* App. A094, A117. One of the arguments he made on appeal was that the search of the backpack was not a lawful search incident to arrest. *See* App. A098-105.[1] Petitioner acknowledged that the Ninth Circuit

[1] Petitioner also responded to a government argument that the gun would have been inevitably discovered during an inventory search by pointing to Ninth Circuit case law requiring the government to provide evidence of a valid inventory search policy and the government's failure to provide any such evidence in the case at bar. *See* App. A105-08.

had held in a prior published opinion – *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015) – that a search incident to arrest was permissible even when the defendant was handcuffed face down on the ground, *see* App. A099-100, but argued *Cook* did not control for two reasons. First, Petitioner argued there were "intervening acts" that prevented the search from satisfying a "contemporaneity requirement" established by other Ninth Circuit cases. *See* App. A100-03. Alternatively, he argued there needed to be an evidentiary hearing to determine relevant facts, including the location of the backpack, which was potentially relevant under *Cook*.

> Was the backpack right next to Petitioner after he was handcuffed and shackled, like the backpack in *Cook* after the defendant there was handcuffed (but not placed in leg shackles)? Or was it some feet away, and were the officers between Mr. Torres and the backpack? *Compare United States v. Knapp*, 917 F.3d 1161, 1169 (10th Cir. 2019) (search of purse not justified as search incident to arrest when "the purse was closed and three to four feet behind [the defendant], and officers had maintained exclusive possession of it since placing her in handcuffs"), *with United States v. Shakir*, 616 F.3d 315, 318-19 (3d Cir. 2010) (search of bag justified as search incident to arrest even when defendant handcuffed because defendant was standing and "his bag was right next to him"; distinguishing *United States v. Myers*, 308 F.3d 251 (3d Cir. 2002), where defendant was lying on floor and bag was three feet away and zipped shut).

App. A104. Petitioner also suggested the court should reconsider *Cook* en banc if the panel did view it as controlling. *See* App. A104 n.7.

The panel rejected Petitioner's argument in a single paragraph, based on *Cook*. It wrote:

> The search did not violate the Fourth Amendment, however, because it falls within the search incident to a lawful arrest exception. *See Arizona v. Gant*, 556 U.S. 332, 351 (2009). This case is controlled by *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015), which held that the

> search incident to a lawful arrest exception applied even though the individual searched was on the ground in handcuffs when his backpack was searched nearby. *See id.* at 1199-1200.

App. A004.[2]

Petitioner then filed a petition for rehearing en banc. *See* App. A110-23. He argued first that the court should overrule *Cook* because *Cook* is inconsistent with clarification of the search incident to arrest exception in *Gant*. *See* App. A118-21. He argued alternatively that the court should strictly limit *Cook* to cases where the backpack is right next to the arrestee and that that requires either reversal or remand for an evidentiary hearing because there is no evidence of where the backpack was in the present record. *See* App. A121-22.[3] The court of appeals denied the petition without comment. *See* App. A015.

* * *

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[2] The panel also rejected several other arguments not being pursued in this petition for writ of certiorari. *See* App. A003-08. One judge of the panel dissented on one of those questions, but she did not dissent from the holding on the search. *See* App. A009-14.

[3] Petitioner also challenged the Ninth Circuit's application of the harmless error rule to the claim that the question about why Petitioner had run was custodial interrogation in violation of the Miranda rule, *see* App. A111-12, A114, A122, but that issue is not being pursued in this petition for writ of certiorari.

IV.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT TO RESOLVE A SPLIT IN THE LOWER COURTS ON THE QUESTION OF WHETHER A SEARCH INCIDENT TO ARREST OF A BACKPACK OR OTHER BAG THAT WAS BEING CARRIED BY AN ARRESTEE IS PERMISSIBLE AS A SEARCH INCIDENT TO ARREST EVEN AFTER OFFICERS HAVE SECURED THE ARRESTEE IN HANDCUFFS.

The Court should grant the writ because there is a split in the circuits about whether a search of a backpack or other bag that was being carried by an arrestee is permissible as a search incident to arrest even after officers have secured the arrestee in handcuffs. Some courts have held searches in these circumstances lawful, apparently imagining Houdini-like or Herculean capabilities. Other courts have held such searches unlawful, recognizing there was no realistic possibility of the defendant accessing the backpack or bag and refusing to imagine "acrobatic maneuvers" or rely on "far-fetched possibilities."

This case is an excellent vehicle for resolving the split for two reasons. First, the restraint here was not somewhere in the middle of a continuum where Petitioner had some freedom of movement; rather, he was as completely restrained as possible, being not only handcuffed, but face down on the ground, held there by an officer, with his legs shackled in addition to his hands. Second, were the Court to conclude that a search after the arrestee is

handcuffed might be permissible as a search incident to arrest in certain unusual or extraordinary circumstances – e.g., a defendant who does have Houdini-like or Herculean capabilities, or, perhaps, a defendant who is not restrained or under control in any way other than being handcuffed – the Court can use this case to make clear that there must be factual findings of such unusual or extraordinary circumstances.

Finally, the question is an important one and it was decided incorrectly by the lower court. The question is important because it is standard police practice to handcuff an arrestee before searching, that means the question presented here will arise frequently, and police should know what they can and cannot do in such a common scenario. The question was decided incorrectly by the lower court because it will be in only the most unusual or extraordinary circumstances in which there is a realistic concern that an arrestee might access a backpack or bag even after he was handcuffed, and such unusual or extraordinary circumstances must be found as facts after an evidentiary hearing, not simply assumed.

A. THERE IS A SPLIT IN THE LOWER COURTS ON THE QUESTION.

The Court revisited its search incident to arrest case law a little more than a decade ago in *Arizona v. Gant*, 556 U.S. 332 (2009). What triggered the Court's review was a "chorus that has called for us to revisit [*New York v.*] *Belton*[, 453 U.S. 454 (1981)]." *Gant*, 556 U.S. at 338. The Court recognized that *Belton* had been "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could

gain access to the vehicle at the time of the search." *Gant*, 556 U.S. at 341. The Court then clarified that this was not the proper reading of *Belton* and held it "authorizes the police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343.

In reaching this conclusion, the Court reached back to the origins of the search incident to arrest exception and its general rationale – as clarified in the non-vehicle search case of *Chimel v. California*, 395 U.S. 752 (1969). It explained:

> In *Chimel*, we held that a search incident to arrest may only include "the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Ibid.* That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. *See ibid.* (noting that searches incident to arrest are reasonable "*in order to* remove any weapons [the arrestee] might seek to use" and *"in order to prevent* [the] concealment or destruction" of evidence (emphasis added)). If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. (Citation omitted.)

Gant, 556 U.S. at 339.

The Court then applied this rationale to the search of the vehicle in *Gant*, which had taken place after the arrestee had been removed from the vehicle, handcuffed, and placed in a police car.

> Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized a search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers

> in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search.

Gant, 556 U.S. at 344.

While *Gant* involved the search of a vehicle, its reasoning, which was based on the non-vehicle search case of *Chimel*, extends to non-vehicle search incident to arrest cases. The lower courts have generally recognized this. *See United States v. Davis*, 997 F.3d 191, 197 (4th Cir. 2021) (collecting cases). But they are divided – both specifically and more generally – on the proper application of *Gant* in such circumstances.

To begin, there is a split on just the specific facts of the present case. The Ninth Circuit upheld the search in the present case despite the fact that Petitioner was face down on the ground, at least one officer was holding him down, and he had his hands cuffed behind his back and his ankles in leg irons. *See also Cook*, 808 F.3d at 1200 (noting defendant was face down on ground). But the Fourth Circuit in *Davis* considered facts almost identical to these and held the search of the backpack was not a permissible search incident to arrest.

> Under these conditions, [the officer's] warrantless search of Davis's backpack was unlawful. To be sure, there is a level of precarity when police officers arrest a suspect who has fled arrest. But there is no doubt that Davis was secured and not within reaching distance of his backpack when [the officer] unzipped and searched it. Davis was face down on the ground and handcuffed with his hands behind his back. He had just been ordered out of the swamp at gunpoint. The only other individuals within eyesight were officers, who outnumbered him three to one. And while this all took place in a residential area, it appears there was no one else around to distract the officers.

Id., 997 F.3d at 198.

In addition to the split on the specific facts of the present case, there are splits at a more general level. At a rhetorical level, *Davis* declined to rely on "the various acrobatic maneuvers Davis would have needed to perform to place the backpack within his reaching distance at the time of the search." *Id.* at 198. *See also United States v. Ferebee*, 957 F.3d 406, 425 (4th Cir. 2020) (Floyd, J., dissenting) (complaining that "the best the government can do is speculate that Ferebee's handcuffs *could* have spontaneously failed; or that Ferebee, still handcuffed, *could* have rushed back into the house, dodged past the couch and the various officers crowding the room, and, in a remarkable feat of dexterity, reached into his backpack to destroy evidence or retrieve his firearm"); *United States v. Perdoma*, 621 F.3d 745, 757 (8th Cir. 2010) (Bye, J., dissenting) (acknowledging "remote possibility that [the defendant] could have broken free, single-handedly overpowered three police officers, and, while handcuffed behind his back, unzipped his luggage, and gained access to a weapon or evidence," but objecting that "*Gant* teaches us that such far-fetched possibilities do not justify a warrantless search incident to arrest"). One state court has read the case law differently than *Davis*, however, opining that "the courts, unwilling to risk a dead officer, will look on the arrestee as if he were Harry Houdini." *Feaster v. State*, 47 A.3d 1051, 1071 (Md. App. 2012). *See, e.g., United States v. Shakir*, 616 F.3d 315, 321 (3d Cir. 2010) ("Although he was handcuffed and guarded by two policemen, [the defendant's] bag was literally at his feet, so it was accessible if he had dropped to the floor."); *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part) (complaining that defendant could have reached briefcase only if he had been "possessed of the

skill of Houdini and the strength of Hercules"), *quoted in Thornton v. United States*, 541 U.S. 615, 626 (2004) (Scalia, J., concurring in judgment).

These differing views are reflected in the courts' application of *Gant* to searches of backpacks or other bags after defendants are handcuffed. The Ninth Circuit – in the unpublished opinion in this case, another unpublished opinion in *United States v. Gordon*, 694 Fed. Appx. 556 (9th Cir. 2017) (unpublished), and the published opinion in *Cook*, which both the panel in this case and the panel in *Gordon* treated as controlling, *see* App. A004; *Gordon*, 694 Fed. Appx. at 557 – was willing to speculate that the defendants could either access the backpack or bag even with handcuffs on or break free from the handcuffs to access the backpack or bag. The Third Circuit – in *Shakir* – was willing to engage in similar speculation. *See id.*, 616 F.3d at 321. The Eighth Circuit – in *Perdoma* – was also apparently willing to engage in such speculation, though it focused more on the question of the officers' control of the bag than the handcuffs on the defendant, and relied on pre-*Gant* case law, *see id.*, 621 F.3d at 757 (Bye, J., dissenting).

Other circuits have not been willing to engage in such speculation, however. First, there is the *Davis* case discussed above, which refused to imagine "acrobatic maneuvers." Second, there is the Tenth Circuit's opinion in *United States v. Knapp*, 917 F.3d 1161 (10th Cir. 2019). The court there held handcuffing of the defendant made a search of her purse improper even though the purse was just three or four feet away. *See id.* at 1168-69.[4]

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[4] The record in the *Davis* case did not reflect exactly how close the backpack was to the defendant, but he had "dropped the bag next to him before lying down." *Id.*, 997 F.3d at 190. And the record in the present case is

In sum, there is a split in the circuits on the propriety of a search incident to arrest on the exact facts of the present case; there is a split in the circuits' rhetoric about relying upon "Harry Houdini" and "Hercules" capabilities, "acrobatic maneuvers," and "far-fetched possibilities"; and there is a split in the circuits' application of *Gant* in the cases in which defendants were handcuffed. The writ should be granted in order to resolve these splits in the lower courts.

B. THE PRESENT CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE SPLIT IN THE CIRCUITS.

The present case is an excellent vehicle for resolving the split in the circuits – in two respects. First, the restraint here was not somewhere in the middle of the continuum. There was nothing qualified about it. Petitioner was not only handcuffed, but was handcuffed behind his back, was face down on the ground, had at least one officer holding him down, and was restrained with leg irons to boot. *Compare Ferebee*, 947 F.3d at 419 (noting defendant "still could walk around somewhat freely and could easily have made a break for the backpack inside the house" and defendant "managed to wad up and throw away his marijuana joint without attracting the attention of the police officers around him"); *Shakir*, 616 F.3d at 321 (defendant standing with bag at his feet). *See also United States v. Jones*, 475 F.2d 723, 728 (5th Cir. 1973) (discussing difference between defendant's hands cuffed in front of him and

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similarly unclear about exactly where the backpack was.

hands cuffed behind him). Such complete restraint gives the court an opportunity to clarify whether it agrees with, on the one hand, the courts that have recognized Harry Houdini capabilities or, on the other hand, the courts that have declined to speculate about "far-fetched possibilities" and "acrobatic maneuvers." *Supra* pp. 12-13.

Second, this case is an excellent vehicle if the Court were to conclude the question is a more fact-specific question. Some courts have attempted to reconcile the cases based on factual differences, which may or may not be significant enough to justify the different results. *See, e.g., Davis*, 997 F.3d at 198-200 (attempting to distinguish *Ferebee* and *Shakir*). Other cases have emphasized the importance of the trial court's factual findings about whether the defendant in fact could have broken free and reached the backpack or other bag and the need to give deference to those factual findings. *See, e.g., United States v. Ciotti*, 469 F.2d 1204, 1207 (3d Cir. 1972) (relying on district court finding that handcuffs would not prevent defendants from opening briefcases or using guns if guns were present); *State v. LaMay*, 103 P.3d 440, 452 (Idaho 2004) (relying on district court determination that defendant's backpack was not within his immediate control); *Feaster v. State*, 47 A.3d at 1072 (emphasizing "the wisdom of appellate deference to the factfinding of the trial judge"); *State v. Galpin*, 80 P.3d 1207, 1217 (Mont. 2003) (relying on district court finding that coat and duffel bag were within defendants "grab area" and district court finding that defendant, although handcuffed, could potentially reach coat and remove weapon or eliminate evidence).

This Court can clarify whether such factual findings can justify a search incident to arrest after handcuffing – as well as just what findings are

necessary. The Court could emphasize the importance of such factual findings by reversing based on the failure to hold an evidentiary hearing in the present case and the resulting failure to make factual findings about how Petitioner could have somehow thrown the officer off of him, gotten off the ground, and either freed himself from the handcuffs and leg irons or somehow reached into the backpack even with the handcuffs and leg irons still on.

C. THE QUESTION IS AN IMPORTANT ONE BECAUSE IT WILL ARISE FREQUENTLY.

The question is also an important one, because it will arise frequently. What evidence there is of standard practice – as well as consideration of what the only rational practice is – suggests the standard practice is to handcuff a defendant before conducting a search. *See* Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 Wis. L. Rev. 657, 663-66 (summarizing efforts to obtain law enforcement training materials and consultations with law enforcement representatives and "conclud[ing] that, in general, police officers are taught to handcuff an arrestee (preferably behind his back) before searching the area around him"). *See also Thornton v. United States*, 541 U.S. 615, 628 (Scalia, concurring in judgment) (citing Moskovitz article and asking, "what rational officer would not take such measures?"); *id.* (noting admission in government's brief that "[t]he practice of restraining an arrestee on the scene before searching a car that he just occupied is so prevalent that holding that *Belton* does not apply in that setting would largely render *Belton* a dead letter" (internal quotation marks

and ellipses omitted)).

Given this standard practice, it is important that officers know what the Fourth Amendment does and does not permit. It is in the interest of arrestees because it will prevent officers from mistakenly violating Fourth Amendment rights. It is in the interest of law enforcement because it will prevent the suppression of evidence officers might have obtained in some other, lawful way, such as by getting a search warrant.

D. THE DECISION BELOW IS AN ERRONEOUS APPLICATION OF THE SEARCH INCIDENT TO ARREST EXCEPTION.

While perhaps not the most important consideration guiding this Court's decision to grant review, the decision below – and the published opinion in *Cook* that it treated as controlling – is also wrong. *Gant* reaffirmed what this Court took great pains to establish in *Chimel*. That is that a search incident to arrest must be tied to one of two particular underlying purposes – first, the protection of officers from weapons an arrestee might access, and, second, the preservation of evidence by preventing an arrestee from destroying or concealing evidence he might access. In the case of the search of a backpack or other bag, that makes the key question, "Could the arrestee have accessed the backpack or bag?"

Under either a fact-based approach or a more general rule, that question must be answered in the negative here. As a general matter, it should be in only the most extraordinary circumstances that there can be a search incident to arrest when a defendant's hands are cuffed behind his back. Such a search

is especially inappropriate when, as here, there are the additional facts that the defendant was face down on the ground, held down by at least one officer, and had his ankles shackled in addition to his hands. Only in the most extraordinary circumstances – to quote Justice Scalia's quote of Judge Goldberg *supra* pp. 12-13, a defendant "possessed of the skill of Houdini and the strength of Hercules" – could there be a concern that a defendant in this position might gain access to weapons or evidence in a backpack or other bag. Such extraordinary circumstances should not be assumed as a general matter, but must be found to factually exist in a specific case.

And here there were no such factual findings. There was not even an evidentiary hearing with evidence on which such findings could be based. The decision below was certainly unjustified without an evidentiary hearing and factual findings of extraordinary circumstances. If Petitioner was a Houdini or a Hercules – or there were "acrobatic maneuvers" in which he could engage, *supra* p. 12, 15 – there had to be factual findings that he was a Harry Houdini or Hercules or "acrobatic maneuvers" in which he could engage. And there had to be an evidentiary hearing on which to base such factual findings.

* * *

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: August 3, 2021

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

A P P E N D I X 1

FILED

APR 27 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAUL ADRIAN TORRES, Defendant-Appellant.	No. 20-10112 D.C. Nos. 1:18-cr-00147-DAD-SKO-1 1:18-cr-00147-DAD-SKO MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Argued and Submitted March 9, 2021
San Francisco, California

Before: McKEOWN, IKUTA, and BRESS, Circuit Judges.
Dissent by Judge McKEOWN

Raul Adrian Torres appeals the district court's denial of his motions to suppress and to dismiss. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

A detective with the Fresno Police Department was browsing social media when he observed a recently uploaded video of Torres posing with a gun at the house of a local gang member. The detective quickly linked the video to another social media profile that used the name Adrian Torres. After further investigation, the detective concluded (mistakenly, as it would turn out) that Torres had an outstanding warrant for being a felon in possession of ammunition. Officers on surveillance observed Torres leaving the house with a backpack. Officers exited the car, identified themselves, and ordered Torres to stop, but he took off running.

Officers gave chase and eventually caught up to Torres, who resisted arrest. Torres yelled profanities at officers while continuing to resist and fight. Eventually, officers were able to get Torres under control, handcuffed, and shackled. One officer asked Torres why he ran. He responded, "[c]ause I have a gun." Officers then searched Torres's backpack and found a firearm with its serial number scratched off, along with a loaded magazine and additional ammunition. Torres then stated to officers, "I'm gonna smoke you."

Officers asked Torres several routine booking questions, during which time Torres made multiple unsolicited statements about how he wished he would have used the gun to "shoot it out" with police. Eventually, officers discovered that Torres was not Adrian Torres, but Raul Adrian Torres, and that he had two

previous felony convictions for domestic violence, was on felony probation, and was wanted for another recent domestic violence offense. Officers advised Torres of his *Miranda* rights, *see Miranda v. Arizona*, 384 U.S. 436 (1966), and he agreed to speak with them. He admitted that the gun was his, that he knew the serial numbers were scratched off, and that he was on the run "because he didn't check into his probation."

1. Torres argues that the police lacked sufficient cause to arrest him and that the district court erred by misapplying Section 148 of the California Penal Code and by declining to hold an evidentiary hearing. But the record establishes that the police had sufficient cause for the stop and the arrest. Given the information they were provided, the officers had "a good faith, reasonable belief that the arrestee was the subject of the warrant." *Rivera v. Cnty. of Los Angeles*, 745 F.3d 384, 389 (9th Cir. 2014). Alternatively, police had reasonable suspicion to stop Torres based on the social media post and their belief that he was the subject of an outstanding warrant, *see Terry v. Ohio*, 392 U.S. 1, 30 (1968); *United States v. Garcia-Acuna*, 175 F.3d 1143, 1147 (9th Cir. 1999). Once Torres fled the attempted *Terry* stop and then assumed a fighting stance to resist the *Terry* stop, Detective Wilkin and Agent Carlos had probable cause to arrest Torres under Section 148(a)(1) of the California Penal Code. *See Velazquez v. City of Long*

Beach, 793 F.3d 1010, 1018–19 (9th Cir. 2015). No evidentiary hearing was required because, although Torres argues about the legal significance of uncontested facts, he fails to identify any disputed, material issues of historical fact. *See United States v. DiCesare*, 765 F.2d 890, 895 (9th Cir. 1985).

2. Torres next claims that the search of his backpack violated the Fourth Amendment, and that therefore the district court erred in declining to suppress the gun found within it. The search did not violate the Fourth Amendment, however, because it falls within the search incident to a lawful arrest exception. *See Arizona v. Gant*, 556 U.S. 332, 351 (2009). This case is controlled by *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015), which held that the search incident to a lawful arrest exception applied even though the individual searched was on the ground in handcuffs when his backpack was searched nearby. *See id.* at 1199-1200.

3. Torres also argues that the district court erred in declining to suppress his statement "[c]ause I have a gun" in response to the officer's question regarding "why he ran." But assuming without deciding that this question is not covered by the public safety exception to *Miranda*, *see, e.g.*, *Allen v. Roe*, 305 F.3d 1046, 1050 (9th Cir. 2002), any error in admitting this statement is harmless, because there is no reasonable possibility that the erroneously admitted statement contributed to

Torres's decision to plead guilty to a violation of 18 U.S.C. § 922(g)(1). *United States v. Lustig*, 830 F.3d 1075, 1088–89 & n.14 (9th Cir. 2016).

To convict Torres under 18 U.S.C. § 922(g)(1), the government had to prove that Torres (1) knew that he possessed a firearm and (2) knew he was a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1); *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). In his reply brief, Torres argues for the first time that his "[c]ause I have a gun" response is prejudicial because it is evidence of the second element.[1] But even if we accept Torres's characterization of his own ambiguous statement, Torres's response does not tend to prove that Torres knew he was a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). At most, Torres's response could be evidence that Torres knew that possession of the firearm was generally unlawful (because having the firearm motivated him to run from the police).[2] The dissent argues that because Torres's statement raises the

[1]As to the first element, that the defendant knew that he possessed a firearm, Torres's statement is duplicative of other evidence in the record. For instance, in his interview with Detective Martinez after receiving *Miranda* warnings, Torres admitted to knowing he was in possession of the firearm.

[2] Of course, a defendant's knowledge that possession of a firearm is unlawful is not itself an element of a § 922(g)(1) offense.

inference that Torres "knew it was wrong to have a gun," this inference then supports the further inference that the statement "suggests Torres knew" he was a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" under 18 U.S.C. § 922(g)(1). We disagree. The dissent's labored and tangled disquisition, relies on a chain of inferences too attenuated and speculative to raise a "reasonable possibility" that Torres's statement contributed to Torres's plea decision. *Lustig*, 830 F.3d at 1088 & n.14. To hold otherwise would effectively create the automatic reversal rule rejected by *Lustig* and *Neder v. United States*, 527 U.S. 1, 7 (1999). *See Lustig*, 830 F.3d at 1089–90.

Torres's statement also adds little, if anything, to the already substantial circumstantial evidence that Torres knew his possession of a gun was illegal.[3] "[K]nowledge can be inferred from circumstantial evidence." *Rehaif*, 139 S. Ct. at 2198 (quoting *Staples v. United States*, 511 U.S. 600, 615 n.11 (1994)). Torres took off running when police attempted to stop him, and he admitted in multiple

[3]Because Torres's knowledge that it was illegal for him to possess a gun is not an element of a § 922(g)(1) charge, our observation that Torres's "[c]ause I have a gun" statement adds "little, if anything," to the evidence regarding this knowledge does not support the dissent's argument that Torres would have thought the admission of this statement would hurt him at trial by showing that he knew he was a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(g)(1).

post-*Miranda* police interviews that he knew he had a gun, the gun was his, and he knew he had failed to comply with the terms of his probation and was wanted or had a warrant out for his arrest. Torres also later admitted that he knew the gun he had was illegal because its serial numbers were obliterated, and he also said he knew he was "going to get charged with it." He has also been convicted of two prior felonies and has never claimed he was unaware of his felon status. Given all this evidence, any improper admission of the "[c]ause I have a gun" statement was harmless.

4. Torres argues that his statements to Detectives Flowers and Martinez should have been suppressed or, in the alternative, that an evidentiary hearing was needed. The statements made to Detective Flowers were admissible under the routine booking questions exception because Detective Flowers only asked Torres questions needed to run his information in the police booking system, and these questions were not reasonably likely to elicit incriminating responses. *See United States v. Williams*, 842 F.3d 1143, 1147 (9th Cir. 2016). Any spontaneous statements made by Torres during these booking questions need not be suppressed. *See Cox v. Del Papa*, 542 F.3d 669, 675–76 & n.10 (9th Cir. 2008).

There is also no issue with the post-arrest statements made to Detective Martinez. Although Torres attempts to analogize this case to *Missouri v. Seibert*,

542 U.S. 600 (2004), there is no evidence that a deliberate two-step interrogation occurred here. Nothing regarding any of the statements made by Torres in this case mandates an evidentiary hearing. *See DiCesare*, 765 F.2d at 895.

5. Finally, Torres claims that in denying his motion to dismiss, the district court failed to consider a fundamental fairness exception, which provides that charges may be dismissed if a "breach of [an] agreement rendered a prosecution fundamentally unfair." *See United States v. Williams*, 780 F.2d 802, 803–04 (9th Cir. 1986) (per curiam). Nothing in the record supports the existence of any agreement made by state prosecutors or the state court, and the state-court transcript clearly informed Torres that the state firearm case was going to be dismissed "in light of a federal prosecution." Because there was no breach of any agreement, that exception does not apply.

AFFIRMED.

FILED

APR 27 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

United States v. Raul Torres, No. 20-10112

McKEOWN, Circuit Judge, dissenting:

When Agent Carlos kneed, punched, restrained, and handcuffed Torres, there was no doubt he was in custody. To its credit, the government doesn't disagree. But instead of giving Torres his *Miranda* warnings, Agent Carlos launched into questioning. Torres responded with an inculpatory statement that was instrumental in establishing an element of the charged crime. I respectfully dissent because Torres was subjected to custodial interrogation without the required *Miranda* advisements. The district court erred in failing to suppress the statement, and this error was not harmless.

The officer's question—why did you run?—easily falls into the category of "express questioning" or, at the very least, amounted to "words . . . that the police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980). This was a pointed question aimed at eliciting an inculpatory response, not a friendly inquiry to see how Torres was doing nor a casual query about where he was going.

The only issue, then, is whether the public safety exception applies. It does not. The exception excuses the need for *Miranda* warnings when "police officers ask questions reasonably prompted by a concern for the public safety." *Allen v. Roe*, 305 F.3d 1046, 1050 (9th Cir. 2002) (quoting *New York v. Quarles*, 467 U.S.

649, 656 (1984)). The standard is high: "the police must reasonably believe that there is a serious likelihood of harm to the public or fellow officers." *Id.* In applying this exception, we have often emphasized the non-investigatory nature of the questioning. *See, e.g.*, *United States v. Carrillo*, 16 F.3d 1046, 1049–50 (9th Cir. 1994), *as amended* (May 17, 1994) ("Our conclusion is buttressed by the non-investigatory nature of the officer's question. The question called for a 'yes' or 'no,' not a testimonial response."); *United States v. Brady*, 819 F.2d 884, 888 (9th Cir. 1987) (applying the exception because, among other reasons, the question was "not investigatory").

Though the majority does not reach this issue, I would conclude, without doubt, that the exception does not apply here both because there was no danger to the public or to the police that necessitated the question and because the question was investigatory. Torres was arrested in an alleyway, and there is no evidence that there were other people in the alleyway at the time of the arrest. The most telling fact is that the officers do not even assert a subjective perception of immediate danger when Torres was shackled and handcuffed. Because the standard requires that the officers "reasonably believe" there is a danger, the public safety exception simply cannot apply where the officers do not even believe there was a danger when the question was asked. *Allen*, 305 F.3d at 1050.

The absence of any perception of danger is underscored by the nature of the

question asked, which did not seek information to address a public safety threat, but rather was aimed at eliciting testimonial, inculpatory information. If the officers were concerned about the gun, they could have asked, "are you armed?"; "is there a gun?"; "where is the gun?"; or another similar question. But instead they asked only why Torres ran. That question is framed to elicit an incriminating response rather than information "necessary to secure [the officers'] own safety or the safety of the public" especially when, as here, no threat has even been identified. *Quarles*, 467 U.S. at 659.

With no public safety justification to fall back on, the custodial interrogation without *Miranda* warnings was a violation of Torres' Fifth Amendment right. Contrary to the majority's conclusion, the error in denying the motion to suppress was not harmless. Our precedent sets a high bar for the government to establish harmlessness where, as here, the defendant took a conditional guilty plea. The government must show that there is no "reasonable possibility" that the erroneously admitted evidence "contributed to [the] decision to plead guilty." *United States v. Lustig*, 830 F.3d 1075, 1088 (9th Cir. 2016) (citation omitted). This standard is "necessarily hard for the government to meet"—so much so that "an appellate court will *rarely*, *if ever*, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision [to plead guilty]." *Id*. (emphasis added) (citation omitted).

The government does not clear this high bar. Because the statement went directly to an element of the charged crime, there is more than a "reasonable possibility" that its erroneous admission contributed to the decision to plead guilty. *Id.* The statement that Torres ran because he had a gun establishes that he knew he was not allowed to have a gun. That is critical evidence because the charged crime—Felon in Possession of a Firearm, 18 U.S.C. § 922(g)(1)—requires proof that the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). By establishing that he knew it was wrong to have a gun, the statement in turn suggests that Torres knew he belonged to the category of persons barred from possessing a gun—in this case people with felony convictions. That the statement is legally damaging and would have been harmful to Torres at trial is more than enough to show that it "could have affected [Torres'] decision to plead guilty." *Lustig*, 830 F.3d at 1086.

The majority argues that Torres' statement does not tend to prove knowledge of felon status *at all*. That is a dramatic position to take, especially given the other evidence that the majority credits as tending to prove knowledge and the long-standing principle that knowledge "can be inferred from circumstantial evidence." *Rehaif*, 139 S. Ct. at 2198 (quoting *Staples v. United States*, 511 U.S. 600, 615 n.11 (1994)). Admittedly, different inferences might be drawn from the statement,

but the inference that Torres knew it was illegal for *him* to carry the gun because he has a felony conviction is a fair one, and indeed would be enough for a jury to convict. The evidence easily falls into the category of evidence the prosecutor could use to establish knowledge. And that's enough under *Lustig*, because if the prosecutor could leverage the evidence against Torres at trial, Torres could reasonably take a plea in fear of it.

The majority tries to sidestep the import of the statement by arguing that any value in the statement is merely duplicative of other evidence. But what other evidence? The only evidence that the majority cites as tending to prove *knowledge of felon status* is that Torres knew he was on probation and that he was convicted of a crime punishable by more than a year of prison.[1] Probation does not establish knowledge of felon status because it is used in California for both felonies and misdemeanors. *See* Cal. Penal Code § 1203. And the fact of a conviction *punishable* by over a year does not establish knowledge of that type of conviction because here, Torres was never actually punished by over a year of prison. More importantly, the Supreme Court has already told us that probation and the fact of a felony conviction are not enough to establish knowledge. *Rehaif* explicitly noted that the crime of Felon in Possession of a Weapon would not apply to "a person

[1] The majority also cites to evidence that clearly establishes that Torres possessed the gun, but that evidence goes to the first element—possession—not to the second element of knowledge of felon status.

who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is *punishable* by imprisonment for a term exceeding one year." *Rehaif*, 139 S. Ct. at 2198 (internal quotation marks omitted). Because the two pieces of evidence relied on by the majority do not establish the necessary knowledge element, they do not render Torres' statement duplicative.[2]

Even if the statement were duplicative, the *Lustig* standard would still be met. If there are multiple pieces of evidence probative of an element, it is the defendant's prerogative, not ours, to evaluate at what point the evidence becomes too strong to risk trial: "only the defendant is in a position to evaluate the impact of a particular erroneous refusal to suppress evidence." *Lustig*, 830 F.3d at 1088 (quoting *United States v. Benard*, 680 F.3d 1206, 1213 (10th Cir. 2012)) (internal quotation marks and citation omitted).

Because the statement contained evidence of guilt, the prospect of its admission "could have affected [Torres'] decision to plead guilty." *Id.* at 1086. The district court's error therefore was not harmless, and for that reason I respectfully dissent and would reverse.

[2] In passing, the majority also holds Torres' silence against him as evidence of knowledge, noting that Torres "has never claimed he was unaware of his felon status." But of course that reasoning misplaces the burden; Torres need not prove his innocence, and his silence on an issue should not be held out as evidence against him.

A P P E N D I X 2

FILED

JUN 3 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAUL ADRIAN TORRES, Defendant-Appellant.	No. 20-10112 D.C. Nos. 1:18-cr-00147-DAD-SKO-1 1:18-cr-00147-DAD-SKO Eastern District of California, Fresno ORDER

Before: McKEOWN, IKUTA, and BRESS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

A P P E N D I X 3

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HON. LAWRENCE J. O'NEILL

UNITED STATES OF AMERICA, Plaintiff, vs. RAUL ADRIAN TORRES, Defendant.	1:18-cr-00147 LJO-SKO Motion for Discovery Motion to Suppress Motion to Dismiss

Fresno, California Monday, January 13, 2020

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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REPORTED BY: RACHAEL LUNDY, CSR, RPR, Official Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

Monday, January 13, 2020 Fresno, California
12:49 p.m.

THE COURT: All right. United States versus Raul Torres.

MR. SHERRIFF: Is Mr. Torres being brought out, or is he not here?

MR. JONES: He's here.

MR. SHERRIFF: I would note --

THE COURT: No, he's here.

MR. SHERRIFF: There's been a superseding indictment, and we do need to arraign Mr. Torres on his superseding indictment at some point.

THE COURT: What does the superseding indictment do?

MR. SHERRIFF: It simply corrects the one count indictment, it's the 18 U.S.C. 922(g)(1) count --

THE COURT: Right.

MR. SHERRIFF: -- to reflect the *Rehaif* language, the Supreme Court's language of the *Rehaif* as to knowledge.

THE COURT: All right. Let the record reflect that Mr. Torres is here as well.

Did you give me your appearances?

MR. JONES: No. Peter Jones for Raul Adrian Torres, who is present in court.

MR. SHERRIFF: Kirk Sherriff and Jessica Massey for the United States, Your Honor. Good after --

MR. JONES: Good afternoon?

THE COURT: I would say, it can't be morning still.

All right. Let's proceed with the arraignment on the superseding indictment.

All right, Mr. Jones.

MR. JONES: Yes, one moment.

Okay. We're prepared to proceed.

THE COURT: Okay.

MR. JONES: We've received a copy of the superseding indictment in this case. We waive a formal reading of it at this time and further advisement of statutory or constitutional rights, enter a plea of not guilty, denying the allegations set forth therein. And we already have a trial date.

THE COURT: All right. Now, let's proceed to the motions. The Court has received and reviewed the motions filed by the defense, the government's response with the attachments, including declarations, photographs, reports, and probation conditions.

The defendant's motions are three. And number 1 is the motion for discovery, the standard Rule 16 Brady material request. Number 2 is to suppress based on the Fourth Amendment violation regarding search and seizure. And Fifth Amendment Miranda violations, that the defendant was arrested by the officers who thought that he was a different person

with a warrant. And also post arrest statements given in response to the pre-Miranda advisement in violation according to the motion.

Third motion is motion to dismiss the indictment based on a prosecutorial agreement in the superior court that the current charges would be dismissed for an admission to a probation violation, that resulted in four additional years in prison.

The government's responded to each one of those and concedes nothing.

You, I believe, Mr. Jones, had indicated you wanted some additional oral argument. I believe the U.S. Attorney's Office had indicated they didn't need further oral argument.

So what, in addition to that which you've provided, do you want to tell me?

MR. JONES: Well, I would like to, in this oral argument, reply to the government's response, because I think there are some cases they've cited that are very distinguishable, are important to a full understanding of our motions.

I believe that an evidentiary hearing should be ordered. I would like to start with the motion to suppress. I'll be as brief as possible, but there are certain points I feel I need to cover and put on the record.

THE COURT: And remember, I have read what you've

submitted so far.

MR. JONES: Yes, and I understand that. I'm -- and I may repeat what is said there foundationally to support the argument I want to make regarding distinguishing certain things.

THE COURT: I'll let you know, if do you.

MR. JONES: Well, thank you.

I'm going to start out with a repetition, and that is that Officer Wilkin clearly either erroneously or intentionally misrepresented in his police report that he was advised that the defendant, Raul Adrian Torres, was the individual that had been identified on Snapchat and that he had a warrant out for his arrest and that he was on felony probation.

And I think the Court even mentioned this in its introductory statement that it was a case of mistaken identity, and the U.S. Attorney indicated it was a case of mistaken identity.

However, I would like to submit -- I would have done this in reply, however, in moving this to Monday -- I handed Mr. Sherriff a copy of this exhibit this morning, but the *Hill* case that the prosecution cited regarding mistaken identity, *Hill* vs. *California*, a rather old case --

THE COURT: Counsel, could I ask you, I need a five-minute recess because another judge is needing something

now. And I will be -- it will be no more than five minutes, I promise. Five minutes.

MR. JONES: Thank you.

(Recess held.)

THE COURT: All right. Back on the record. I'm sorry.

Go ahead, Mr. Jones.

MR. JONES: Thank you.

As I was saying, when Officer Wilkin and Officer Carlos took over for Officer Martinez, and he sent them a picture, he believed the individual in the house was Adrian Torres, who was eight years older than my client, had a warrant out for his arrest, who was on felony probation.

Then Officer Wilkin wrote in his report that he was informed it was Raul Adrian Torres, which could not have possibly occurred, because as Officer Martinez himself later said, he didn't know it at that time -- at that time he was notified.

So they had a mistaken belief that the defendant was Adrian Torres, eight years older, had a warrant out for his arrest, and was on felony probation.

Based on that, when he exited the house, yes, he did appear to be the individual in the Snapchat photo. He did -- he had the beanie on, and -- but they were basing their approach to him on there's an arrest warrant out. He can be

arrested immediately. There's a warrant out for his arrest.

Now, they were undercover in an unmarked car, and the first approach was not anywhere near what you consider a Terry stop. It was pointing a gun at him and the yelling, "Police," and "stop."

Now, the U.S. Attorney made emphasis that the back of the vest that Officer Wilkin was wearing said "MAGEC" on it. But obviously, if my client is walking down the street, and someone yells for him to stop, and turns around and sees a gun and a plainclothes individual, in another unmarked car, plainclothes individual, and he turns to run, he's not going to see something emblazoned on the back of a vest.

And this clearly exceeded a Terry stop. It was an attempt to execute an arrest warrant that they believe they had.

Now, Mr. Sheriff has cited to the Court *Hill vs. California*. I would note in *Hill vs. California*, a subsequent case *Delgadillo -- U.S. vs. Delgadillo-Velasquez*, a Ninth Circuit Court of Appeal case, 856 F.2d 1292, emphasized that in *Hill*, the information the officers had was that Hill was inside of the house. It was Hill's house. And when they went there, the individual that answered the door looked exactly like Hill. Exactly. And it has to be a reasonable mistake.

Here, Officer Martinez -- Detective Martinez said that he looked at the Snapchat video, of course, but he also

researched the defendant's Facebook, and there were pictures of the defendant there. And in fact, we were provided other pictures of the defendant, and our Exhibit A1 has those pictures.

And clearly, if even a cursory attempt to determine if this, in fact, was the individual in the Snapchat photo, and Adrian was viewed, Adrian Torres, on the right side of his neck front, has red lips tattooed. He has a prominent tattoo closely over his right forehead. And that was from a prior booking photo.

Mr. Torres' Facebook and Snapchat was from very recently. He does not have those tattoos. He could have been ruled out.

Adrian Torres was, with the warrant, with the felony probation status, could have been ruled out immediately. We don't believe *Hill vs. California* rescues that argument by the prosecution.

And we believe that we have submitted enough confusion over what information was provided, and -- for example, my client, when Detective Flowers says he was making spontaneous statements, said he didn't know they were officers. He made that spontaneously. "Had I known they were officers, I might have shot it out with them or shot myself." I don't know. But he didn't know they were officers. It wasn't as obvious as they maintain it must have been under the

circumstances presented.

As far as the Miranda -- cutting to the chase -- he was handcuffed and placed under arrest. And then he was asked -- and to me, this is an interrogation -- "Why did you run?" That invites a potentially incriminating response, and he did give an incriminating response according to Officer Carlos. And that response allegedly was, "Because I have a gun."

All other statements were within a very short period of time within that. I don't know how many other -- there are other questions about. There's a big question about any further questioning or interrogation by Detective Carlos or Officer Wilkin.

But we know this, apparently Officer Flowers then questioned him, does not advise him of his Miranda rights, is questioning him about who he is, and then he supposedly makes these spontaneous statements.

And then, Detective Martinez questions him and finally advises him of his Miranda rights. But by then, we've already had a number of statements starting with the non-Mirandized statement from Agent Carlos regarding whether or not he had a gun. So our argument is that all of his statements are -- should be excluded because of the Miranda violation.

And I also would submit that there is enough

information provided to the Court to order an evidentiary hearing here to clear the air on all these issues; who said what when, who asked what when, what information went over to the detectives. And that's our position on the motion to suppress.

And I'm trying to expedite for the Court's benefit.

The -- oh, I should have mentioned, too, though, I stand by our argument under the *Robey* case, that once he was placed in handcuffs and leg restraints he could not access the handbag. It's the equivalent of the luggage and cell phone or other items that a search warrant after arrest could easily be obtained, should have been obtained, and could have been obtained.

And that the gun should be suppressed not only because it was an illegal detention, it wasn't a Terry stop, an unlawful arrest, they didn't know he was on felony probation at the time of his arrest; he did not have a warrant out for his arrest.

But a further ground to exclude the gun would be illegal search of the backpack without a warrant. The discovery issue, we believe, that the -- that based on the information we've provided to the Court, the information that is in the police reports were Detective Wilkin claims that Officer Martinez told him one thing. And we know he absolutely couldn't, didn't, and even himself wrote in his

report that he hadn't. It opens up the door to memos and notes and internal communications regarding what was provided by who, when. And so I think we do have a prima facie case.

Mr. Sherriff said there was no prima facie basis to go beyond Rule 16 or Brady, and we believe we've submitted sufficient evidence to the Court.

On the motion to dismiss, finally, I wanted to have oral argument, because I believe *Gamble* is very distinguishable from our case.

In the *Gamble* -- of course very recent -- 72 U.S. Supreme Court decision on double jeopardy, Mr. Gamble was prosecuted initially in Alabama State court. He pled guilty and received 12 -- he had a prior robbery conviction. He pled guilty to felon in possession of a gun. He got -- he received 12 months sentence.

After that, he was indicted by the U.S. Attorney's Office, and that never came into play at all during his state prosecution. He received 46 months. So Mr. Gamble received a total of 58 months on that felon in possession charge between his state sentence of 12 months and his federal sentence of 46 months.

In our case, the federal charge had been filed. The complaint had been filed. At the time this case was resolved, the state case was still pending. The federal charge had been filed. And Mr. Torres came to court, and it was on the record

from the D.A., but only briefly and vaguely. And it's never really ever articulated that where the D.A. says, "We're dismissing the 2018 DV case based on his admission to the VOP; and we're dismissing the firearm case, based on the federal prosecution." That's after the Court advised Mr. Torres that they were dismissing both cases because of his admission to the violation and his agreeing to accept four additional years on that case he was on probation for.

So the prosecutor makes that one brief comment, after -- his attorney never says anything.

After that, the Court says two more times on the record, "So you understand, both of your cases are being dismissed because you're admitting violating probation and taking the four years?" That's the gist of what the Court says after the fact of this one brief comment by the D.A. The D.A. never brings it up again, never comments on it. His attorney never comments on it.

The minute order reflects in the minute order that the firearm case is being dismissed in light of his admission to the violation of probation. That's what -- he was 20 years old, has no legal training, and he's being informed by the Court, his attorney's silent, and -- that these cases are both being dismissed.

And we cited for the Court the case of *Cooper*. I think it's a Fourth Circuit case. But in *Cooper*, regarding

plea bargaining, *Cooper v. United States* 594 F.2d 12, regarding plea bargaining, the Court held that, we begin by noting that two distinct sources of constitutional rights are involved here.

Most obviously and directly, the right to fundamental fairness embraced within substantial due process guarantees.

Less directly, perhaps, but nonetheless importantly the Sixth Amendment right, the affective assistance of counsel.

And those are the rights we are asserting here, not just double jeopardy. Although I think Justice Gorsuch and Hinsburg were very persuasive.

But our point is the due process, the right to fairness and plea agreements and plea bargaining, and what you're led to believe.

I know Mr. Sherriff says, Well, how could you possibly think that four years is going to be enough time or dismissal of two cases would be the result of your admitting probation and taking four years?

Interestingly, Mr. Torres actually has done 58 months, exactly what Mr. Gamble got his gun charge on that one DV case.

This was -- this was not something that was rare or unusual. There had been some discussions about running these concurrent, and substantially less time he would have been

facing.

So to be told accepting four years after having already waived almost ten months was his understanding that, This is resolving my cases. He had never been to prison. And 20 years old, and being advised that this is the end of the case. Instead, turns around, brought over to federal court and told, You can get ten years consecutive in addition to the four years you just agreed to take, thinking it was going to resolve everything.

So I think this in a sense of, as *Cooper* talked about, the due process clause, and the Sixth Amendment that, in my opinion, were not effectively dealt with, that the federal charge should be dismissed on constitutional grounds. And we believe there could be an evidentiary hearing on that.

I did correspond with his prior counsel, which was very ineffectual in terms of what was remembered or not remembered or done asking for 90-day diagnostic and transcripts and never getting them. But I believe based on the record we have, and Mr. Torres' understanding that that was his reasonable understanding of how the cases were being handled; it could have gone concurrent. They got dismissed instead. He still took the four years, and he's still doing the four years. So --

THE COURT: What about the issue of the discovery? Did the government's response take care of that for you?

MR. JONES: The government has been providing additional discovery in anticipation of trial. Their response was, "We didn't make a prima facie case to justify producing everything we wanted in terms notes and communications, interagency communications regarding this case to get to the bottom of why there are dramatically different statements in the police reports regarding what they did have or didn't have or didn't know."

We never got that Snapchat, that picture. We had the video. We never -- that's not even Bates-stamped. It's an exhibit that we finally got when we filed this motion.

THE COURT: So --

MR. JONES: My answer would be we would still like to have an evidentiary hearing and have these notes provided.

THE COURT: All right. Mr. Sherriff?

MR. SHERRIFF: Your Honor, I'm going to address the motion to dismiss and the discovery aspect. And Ms. Massey is going to address the suppression motion. I don't know how the Court wants to proceed.

THE COURT: I don't care. It's whatever.

MR. SHERRIFF: So I'll address the motion to dismiss.

The federal government was not party to the plea agreement in state court.

THE COURT: True.

MR. SHERRIFF: And *Gamble* is dispositive of that.

The fact that the defendant -- I mean, in *Gamble*, as the defendant -- as Mr. Jones just pointed out, *Gamble* was successfully prosecuted in state court on a gun charge, convicted and sentenced, and then the federal government prosecuted him for the same conduct.

And the Supreme Court said that's exactly what's allowed under the Double Jeopardy Clause. There's dual sovereigns. That is permissible.

He's complaining here because in state court, his gun case was dismissed. And the Deputy D.A. put on the record in the transcript of his state court proceeding that it was being dismissed in light of a federal prosecution.

THE COURT: If you're arguing double jeopardy, double jeopardy does not apply.

MR. SHERRIFF: Right. And I believe that's the only basis that would really have any legs here, and it's been specifically rejected by the Supreme Court.

We were not party to the state court plea. The Deputy D.A. put on the record that that state court dismissal as to the gun charges and the gun case were that case was being dismissed in light of federal prosecution. And put on the record that the other case, the domestic violence -- the new domestic violence charge in state court, was being dismissed in light of the defendant's plea to a probation violation on a prior domestic violence conviction, and noted

those by case numbers separately so it was clear on the record.

Now, the Court in state court appropriately dismissed the two new filed cases and sentenced him on the probation violation.

But that's exactly what is reflected on the record as the understanding of what would be done, that one was being dismissed in light of the federal prosecution, the other was being -- the new domestic violence case was being dismissed in light of the probation plea.

To the extent he's alleging that there was some sort of fundamental unfairness or ineffective assistance of counsel in his state court plea, we don't believe that's reflected in the transcript or in the minutes, which the defendant has put in. But if it was the case, that's a matter for him to address in state court with respect to pleadings in state court, with respect to his state court plea on the probation violation. It's not a matter that has any bearing on this proceeding in federal court.

And I have noted to Mr. Jones that to the extent there's any relevance to the sentence that he received on probation violation, that's something he's certainly entitled to bring up in sentencing before this Court. Again, I don't think it has relevance as to his sentence were he to be convicted in this case. But because, essentially, what the

defendant is saying is that he thought that his sentence of four years on a probation violation, for which he was given a pass on his new domestic violence charge, also gives him perpetual immunity from every sovereign for his criminal conduct that is the subject of this federal case. That's never been prosecuted ultimately anywhere and won't be other than here as far as we understand.

THE COURT: What is your position with regard to the discovery?

MR. SHERRIFF: So we have provided -- first of all, I note that the reports -- the police reports do reflect some confusion as to Officer Martinez indicating that he initially believed the defendant was Adrian Torres for the reasons laid out in his report, and conveyed that to the officer on the scene along with the photo of the defendant from the Snapchat video.

We -- and then Officer Wilkin's report indicates that he believes he heard "Raul Adrian Torres." There's obviously some confusion there, but the core of it, as addressed in the suppression motion, is that they -- the core understanding of this defendant was the individual exiting the residence. It was the in -- the same individual who's depicted in the video with the gun, and that he was -- the belief he was subject to arrest or search based on probation status, and/or a warrant, that's the same. And the difference is that there's an

initial name.

What I would say is, we have asked officers for the screenshot that was taken from the Snapchat video. They do not appear to have the specific screenshot that was sent. We're trying to inquire with Fresno Police Department if there's a mechanism for preserving any communication like that in the form of a text or however that was sent. And if we can obtain that, we will; or if Mr. Jones wants to be party to that conversation, we were -- we'll talk to him about that. But we're going to try and obtain anything the Fresno Police Department has independent of the officers.

But in any event, we've produced the entire video and the officer -- Officer Martinez has clarified that while he can't say exactly which screenshot from the video he sent at that time to Officer Wilkin, it was one of the screenshots that the defense has, because they have the entire brief Snapchat video -- which is not very long. It's a matter of seconds -- and one of those screenshots depicting the defendant with the his face visible and a gun in his hand was sent.

And second, we have had asked whether there were -- officers had any other communications, and we have not been provided any. We're not aware of any.

We've produced to Mr. Jones what we have, and we'll continue to produce any other Jencks-type statements or

certainly give Brady if we come into -- if we acquire.

THE COURT: One thing I'm concerned about with regard to the motion to discover, while you may have provided everything that you have and provided everything that is required of you by rule and statute and case law to date, I'm concerned if we get to the date of trial, and that's when you have the rest of it, or that's when you produce the rest of it, that there's going to be an immediate motion to continue the trial based on the fact that they haven't had a chance to review it and do further discovery on it.

What's your response to that?

MR. SHERRIFF: So our response is we've asked officers if there's any other communications, and they don't have any, has been the response.

And what we have reached out to -- independently, we've reached out to County Counsel for Fresno Police Department to determine whether any communication would have been saved.

THE COURT: All right.

MR. SHERRIFF: So we're trying to determine through that route also.

It may, essentially, be just this one photo, which is reflected in the reports as having being sent. And it's clarified in Officer Martinez's declaration, it was a screenshot of the Snapchat video.

So to be clear, we've produced the entire Snapchat video, which is somewhere in the order of 15 seconds long, approximately 15-20 seconds long.

One of the screens on that brief video was what was sent. We just don't have that exact screenshot, but I think we've complied with the discovery obligations by producing the entire video and having the officer clarify the nature of what was sent.

THE COURT: All right. Ms. Massey?

MS. MASSEY: Thank you, Your Honor.

Your Honor, to begin, I just want to clarify. As I indicated in my response to the defense's motion that the defendant was not seized or arrested until officers finally caught up with him and had their hands on him, the case law is very clear that until that point, whether they place hands on an individual, or the individual succumbs to their indications of authority, that he is not seized. So I think we need to start at that point.

Working backwards from there, as Your Honor is well aware, the Court needs to look at the totality of the circumstances to determine whether or not officers were reasonable in their suspicion of the defendant.

And in this particular case, the facts, although there's some confusion about the defendant's identity, I think looking at the totality of what officers reasonably believed

at the time, it's very clear they were warranted in at least stopping him to have a conversation with him.

And additionally, based on what sort of transpires during this period of time, that's compounded and results in there being a probable cause to arrest him.

So at the time, Your Honor, officers reasonably believed that the defendant was a felon in possession of a firearm. The video that they were witnessing that Detective Martinez witnessed clearly shows the defendant holding a firearm. He did some research on his own, went onto Sharenet, believed the defendant was another individual by a very similar name, similar height, weight, et cetera, believed that individual to be a convicted felon who was on probation and had a warrant out for his arrest.

So at that point in time, that information, coupled with the fact that they see the defendant in the video with a firearm, gives them much more than reasonable suspicion to stop him, have a conversation.

THE COURT: So if you're arguing reasonableness, obviously, you're asking the Court to make a determination that the officers, based on what they saw, based on what they thought was reasonable; correct or not correct?

MS. MASSEY: Correct.

THE COURT: How can that not be the basis for an evidentiary hearing?

MS. MASSEY: Well, Your Honor, I think that the reports are ironically clear in their confusion, if that makes any sense.

So Detective Martinez says, "This is the information that I had, and this is what I relayed to Sergeant Wilkin."

Sergeant Wilkin says, "This is what I believe I heard from Detective Martinez."

I don't think an evidentiary hearing is going to provide the Court with any additional articulation beyond that, because it seems clear that the officers -- that there was some confusion in the communication between the two. And I don't believe that an evidentiary hearing is going to clarify that.

THE COURT: Well, how do I know whether that's true or not? I understand how you feel, but how do I know whether that's true or not, whether --

MS. MASSEY: Well, Your Honor, the government submitted declarations with its response, and each of the officers involved provided a declaration under penalty of perjury.

THE COURT: Yes, but there was no opportunity for defense counsel to ask probing questions with regard to their assertions and stated reasonable feelings; right or wrong?

MS. MASSEY: Correct.

THE COURT: Okay.

MS. MASSEY: To continue, Your Honor, officers at the time had reason to believe felon in possession of a firearm. He walked out of the same address, wearing the same clothing --

THE COURT: You don't have to go there. I agree, at least initially. What happened after, there was actual contact with him, then that may or may -- should have changed as to whether or not they had the right one or not.

But certainly, going after him with what they had was absolutely reasonable. They made a mistake, but it was a reasonable mistake to make. I don't need argument on that.

MS. MASSEY: So at the time that officers did finally catch up with the defendant, rather than submit to their orders for him to stop, he decided to physically assault the two officers who were attempting to stop him.

At that point, Your Honor, it's clear that in addition to the reasonable suspicion, they now had probable cause to arrest him on charges involving obstructing and assaulting those police officers.

THE COURT: True.

MS. MASSEY: So at that point in time, the defendant is placed under arrest. They finally confirm what his identity is, which although he's not the individual they thought him to be, he has nearly identical characteristics. He's a felon, he's on probation, and there was a warrant in

the system for him for another felony domestic violence incident that had taken place weeks prior.

At that point, the officers had the P.C. to arrest him. The search of his bag was incident to that arrest. And even if it weren't, inevitably that -- the contents of that bag would have been discovered when the defendant was booked into the Fresno County Jail.

With regard to the statements that the defendant made to Special Agent Carlos, those were voluntary, spontaneous statements. The question that Agent Carlos asked the defendant about why he ran was not designed to elicit an incriminating response, but rather, was to figure out what was going on.

The officers didn't know at that time why the defendant was running. Perhaps something had happened at the house, perhaps there was an injured party there. We don't know that. So to ask that question is completely reasonable.

THE COURT: It's certainly reasonable for the officer to ask the question, because it's -- the answer is important to know.

But are you saying that the officer shouldn't have known that that might elicit an incriminating statement?

MS. MASSEY: I believe --

THE COURT: "I just pulled a robbery, that's why I'm running," I mean, that's certainly one of the answers that

could have occurred.

And another one is the one he gave, "Well, I didn't want you to catch me with the gun that I have in my pocket."

Absolutely, it was important for the officer to know the answer to the question. But how could that not have been a Fifth Amendment issue?

MS. MASSEY: I think the Court needs to look to the intent behind the officer's question.

THE COURT: And how do I do that without an evidentiary hearing?

MS. MASSEY: Perhaps the Court can't do that without a hearing.

THE COURT: That's the problem.

Anything else?

MS. MASSEY: With regard to additional statements the defendant made, statements to Officer Flowers were similarly, voluntarily and spontaneous. Case law is clear that officers do not need to Mirandize an individual in order to ask questions regarding that individual's identification and background.

THE COURT: Agreed.

MS. MASSEY: All Officer Flowers did was that.

And with regard to statements made post-Miranda to Detective Martinez, the Court needs to, again, look at the totality of the circumstances to determine voluntarily,

knowingly, or intelligently made statements.

The defendant here was an adult male, English speaking, had numerous prior contacts with law enforcement, and prior convictions on his record. This was not his first rodeo. He was listening to the officer as he was read his Miranda rights from the officer's Miranda card. He agreed to speak with the officer and said he understood those rights. And very tellingly, he knew when he didn't want to answer questions from Detective Martinez. He freely spoke about his gang affiliation, where he got the gun, et cetera; but when it came to the point where Detective Martinez asked him who he purchased that firearm from, the defendant exercised his right to be silent.

So all that going together, Your Honor, leads to a very clear totality that the defendant voluntarily, knowingly, and intelligently made those statements to Detective Martinez.

Unless the Court has questions.

THE COURT: I have a question for defense counsel.

Under these circumstances of having officers make an error as to what person that they were chasing, and assuming that the Court does find reasonableness in the mistaken identity, once he started running and they got to him and they were yelling "police, stop," and he did not stop, he -- he says he didn't apparently -- he hasn't testified of course, but he's -- your client is assuming -- assuming he is saying

that he didn't believe it was the police, or he didn't know for sure it was the police. Now the officers had, certainly, probable cause at that point to arrest for obstruction at least to 148 of the Penal Code, and under those circumstances, they were going to pat him down for sure and take him in. That gun was going to be found; wasn't it?

MR. JONES: Well --

THE COURT: So while the issue of whether or not the answer comes in that he was -- that he should have been Mirandized when asked, "Why did you run?" "I have a gun." Now they know he has a gun, but they're going to know that anyway. So where's the harm?

MR. JONES: Well, foundationally, assuming what the Court is saying, that they had a reasonable belief --

THE COURT: I said "if." I said "if" --

MR. JONES: "If," if they had a reasonable belief, under the *Hill* case, then they are making arguably -- I think this is still subject -- I would go into it in an evidentiary hearing. But arguably, if they know that he has a -- that this individual, they think he -- reasonably think he has a warrant out for his arrest, then they have a right to follow him and arrest him for the warrant, and for -- if he resisted -- for resisting.

Of course I think, as the prosecution indicated, they at least had reason to stop him for and -- conversation

purposes, to find out if he had a gun based on the Snapchat video and the circumstances. But that's not what they did. They --

THE COURT: They weren't pulling him -- they weren't trying to question him to see if he had a gun. They were -- they thought they knew who that was.

They were wanting him to stop so they can confirm who he was and to see if he was the guy who had the arrest warrant out.

MR. JONES: Right. But they did it by pointing a gun at him. They're in plainclothes, point a gun at him. He's walking down the street. He looks back, and he sees the gun, someone in plainclothes. He told Officer Flowers later, "I didn't know they were officers."

So that's not the best approach when you're basing a detention or stop-and-frisk on a reasonable suspicion, as they did in *Terry vs. Ohio*.

THE COURT: They believed he was the person that they were after and felt that he was probably armed if it was the right person. And so from the officers' standpoint, why is that unreasonable approach?

MR. JONES: Well, I'd say they had a right to believe he might possibly be armed based on a totality of the circumstances.

Both individuals in this Snapchat video traded off

inside the house holding this gun. He exited I don't know how much longer later. One, two hours later is when he exited the house. So they certainly could have the suspicion that he might be armed and might want to stop and frisk him. But that's not what they did.

THE COURT: No. They didn't do that, because he didn't stop.

MR. JONES: Well, no. They pointed a gun at him and said, "Stop. Stop" --

THE COURT: Yes, they --

MR. JONES: They didn't say, "Hey, we'd like to ask you a few questions. We're police. We have our badges."

And they yelled, "Stop," pointed a gun at him. They were executing a warrant, I think, on the wrong guy.

THE COURT: Well, they were certainly detaining him with some force to find out.

MR. JONES: Right.

THE COURT: When they tried to do that, he took off.

MR. JONES: Right.

THE COURT: So the officers had a right to certainly say what they said, do what they did. And if it happened to be the wrong guy, and he had nothing else going, they would have let him go. They wouldn't have arrested him for being someone that he wasn't or for possessing a gun that he didn't have.

So we have a situation where the officer did what he believed was reasonable. There's no legal reason why I could find that it's not reasonable to do that.

MR. JONES: If he had a warrant out for his arrest, or if he was known --

THE COURT: Well, if he was the person that they were seeking who had the warrant out for his arrest.

MR. JONES: Right.

THE COURT: But they certainly had a right to stop him and detain him to find out if he was the person under these circumstances.

MR. JONES: And that's my point, I guess, to stop him and frisk. I could understand that based on the totality of circumstances. And *Terry* doesn't contemplate a situation where you point a gun at someone's head and say, "I want to stop and frisk you." It's reasonable suspicion versus probable cause.

And that's my point, that they, believing they had a warrant out for his arrest, he was somebody else. They could use the level of force that they used, which triggered his running and led to his ultimate seizure.

THE COURT: That's more of a 1983 argument in a civil matter; isn't it?

MR. JONES: Uh --

THE COURT: The amount of force, whether or not it

was -- but the amount of force the officers used does not negate their right to stop him and inquire and make sure that he is -- is or is not the person that they're seeking. It's just as a result of what they did do, he, your client, reacted in a way of escape, and it turned out to be probable cause. He created probable cause for a 148 arrest.

And once that occurred, they were going to find the gun whether he admitted it or not, whether they asked the question that could have been in violation of Miranda or not. They're going to find the gun. They're not going to suppress it.

MR. JONES: Well, if it's an illegal arrest --

THE COURT: Where's the illegal arrest?

MR. JONES: The illegal -- at the time they arrested him, they thought he was Adrian Torres on felony probation with a warrant out for his arrest.

THE COURT: But they certainly knew that whoever this guy was, we're arresting him for 148 and we told him we were police, and we told him to stop, and he did not. He ran.

MR. JONES: Well, I think that's a circumstantial question, because he told Officer Flowers, "I didn't know they were officers." Somebody is pointing a gun at you and yells at you. And you're walking down the street, and you turn around and the first thing you see is a gun and some guy in plainclothes and another guy, you know, who is in an unmarked

car. And he did explain to the officers on several occasions that he dropped out of a gang. He had been shot at. He was fearful for his life.

THE COURT: Those may be all great arguments in a jury trial after a 148 charge has been made, but we're talking about the arrest stage. And we're talking about if 148 was a valid arrest under those circumstances because of the probable cause based on what your client did, when he was told to stop, and the officers identified themselves as officers, then all of the things you're wanting to suppress would have been found anyway. It's inevitable discovery, is it not?

MR. JONES: If it was -- if it was a legal arrest, I think inevitable discovery and the search was somehow inappropriate, inevitable discovery might apply. I don't believe inevitable discovery should apply in this situation.

THE COURT: Okay.

MR. JONES: I do believe that the initial contact was excessive and that they may have had grounds for a Terry stop, but they initially exceeded that.

THE COURT: Okay. All right. Anything further?

MR. JONES: No, Your Honor. Thank you for your indulgence.

THE COURT: Okay.

MS. MASSEY: Your Honor, just briefly. I think it's important to reiterate that they're -- up until the time where

the defendant had fought with the police and at that point officers had probable cause to arrest him for that incident, there's no Fourth Amendment issue up until that point.

The defendant is not seized up until the point where the officers lay hands on him. Despite the fact that officers wear a tactical vest with patches on it that indicate they're police, that are yelling to him, "Stop. Police," despite all that, he takes off running. He's not submitting to their authority at that point in time.

He doesn't submit to their authority until the two of them, meaning Officers Sergeant Wilkin and Special Agent Carlos, have to physically fight with the defendant in order to subdue him. So it does not become an issue with the Fourth Amendment until that point in time, because he never succumbs to their authority in the first place.

With regard to counsel's statement about the excess force in attempting to stop the defendant, I don't believe that should be an issue here at all, certainly based on the information the officers had at the time and believing him to still potentially be armed, coming out of that same location, wearing the same clothes. At that point in time, officers were certainly reasonable to draw their firearms, coupling that with the fact defendant had this outstanding warrant.

THE COURT: Anything else?

All right. With regard to the motion for discovery,

that appears as though, based on representation of counsel, based on that which has been provided to the Court, that all has been provided that the prosecution has.

Now, if, for some reason, at a later time the police find something and give it to the government, and the government turns over in an untimely fashion, not because the government is untimely, but -- well, it would be the government because the government would include police. If the police give it to the -- to the government late, and there's an effect, then that's an issue that would be brought up at that time.

But right now, based on everything that has been provided, based on the law under Rule 16, Jencks that which is required to have been turned over to date has been. And therefore, that motion is denied, certainly without prejudice in the event that circumstances change, but based on what I've got before me now.

On the motion to dismiss, there is no double jeopardy issue. The *Gamble* case does adequately provide the law and certainly accurately. And in this particular case, even at the state -- no matter what the state case did, the bottom line was the state court had no authority to indicate to the federal government, specifically the Department of Justice, what they could or couldn't do with any federal court prosecution. The Department of Justice did whatever they did,

and I think what this is really, should there be either a plea or there should be a conviction, this is a 3553(a) factor at the time of sentencing on what that sentence should be. Therefore, the motion to dismiss is denied.

On the motion to suppress, that which occurred, even in light of what the defense's view of what occurred, has no effect to suppress anything. And as a result of -- and the Court incorporates its argument in the questions just asked and answers. Therefore, the motion to suppress is denied.

Trial date is January 28th. Does it appear as though this is a sure go?

MR. JONES: I can't predict with 100 percent certainty, but as of right now, I would say it's a go.

THE COURT: And is the government done with its plea bargaining and negotiations?

MR. SHERRIFF: Yes, Your Honor.

I would note that if Mr. Jones were to talk with us today and request a plea, given other matters and the Court's schedule, we would entertain a plea offer this week. But beyond that, no. In other circumstances, we would not be entertaining a plea at this point.

THE COURT: So in other words today is it?

MR. SHERRIFF: I would say we need to hear today that this is something interesting and that we they want to pursue, and we can hold it open for a few days this week.

THE COURT: So the government's position is that unless something new occurs at the end of today, you're done?

MR. SHERRIFF: That is correct, Your Honor.

THE COURT: That's just for information purposes only.

MR. JONES: Mr. Torres could always plead.

THE COURT: Straight up, sure.

MR. JONES: Straight up.

THE COURT: All right. Anything else?

MR. JONES: No.

THE COURT: Fine. We'll be in recess.

(The Proceedings were concluded at 1:49 p.m.)

I, RACHAEL LUNDY, Official Reporter, do hereby certify the foregoing transcript as true and correct.

Dated: April 2, 2020

/s/ Rachael Lundy_____
RACHAEL LUNDY, CSR-RPR
CSR No. 13815

A P P E N D I X 4

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RAUL ADRIAN TORRES, Defendant.	Case No. 1:18 CR 00147 LJO **NOTICE OF MOTION AND MOTION TO SUPPRESS EVIDENCE; MEMORANDUM OF POINTS AND AUTHORITIES** **Date: January 15, 2020** **Time: 1:30 p.m.** **Judge: Hon. Lawrence J. O'Neill**

TO THE UNITED STATES ATTORNEY, MCGREGOR W. SCOTT, AND HIS ASSISTANT UNITED STATES ATTORNEY, COUNSEL FOR PLAINTIFF:

PLEASE TAKE NOTICE that on January 15, 2020, at 1:30 p.m., in the courtroom of the Honorable Lawrence J. O'Neill, United States District Court Judge, Defendant Raul Adrian Torres (hereinafter, "Mr. Torres"), by and through counsel, Peter M. Jones, will move this court for an order suppressing all evidence obtained in this matter as the fruit of violations of Mr. Torres' Fourth Amendment right to be free of unreasonable searches and seizures. Mr. Torres further requests an evidentiary hearing.

This Motion is based upon the attached memorandum of points and authorities, declaration, and all files and records pertaining to this case.

Respectfully submitted,

Dated: December 20, 2019

WANGER JONES HELSLEY PC

By: _____
Peter M. Jones
Attorneys for Defendant RAUL ADRIAN TORRES

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

Nearly all of the factual material presented below has been taken from Officers Christopher Martinez, David Wilken's and Ron Flowers police reports (Exhibits A, B and C, respectively).

On March 15, 2018, Fresno Police Officer Christopher Martinez, was monitoring social media for gang activity. He located a video that was posted to snap chat under the name "nicolasrayg". Based on his prior contacts he believed that account to belong to Nicholas Ray Gonzales (DOB 10/16/96). Officer Martinez was aware, based on his prior contacts with Gonzales, that he was a member of the "College Street Bulldogs" criminal street gang. At approximately 1130 hours Martinez observed a video on Gonzales' snap chat account that had been posted at "approximately 11:29 hours—or one minute earlier—that day. The video showed Gonzales and another unknown Hispanic male inside of a residence. The unknown male was wearing a black beanie and a white shirt. The unknown male was "**later** positively identified as Raul Adrian Torres DOB 8/3/97". **"This information was not learned until we made contact with him later in the investigation".**

In the video, Martinez observed the unknown male—later determined to be defendant Torres—to be holding a black colored semi-automatic handgun while Gonzales was standing in the back-ground making a gang sign. Officer Martinez observed the defendant pointing the gun at the camera and at his own head and, based on his training and experience he recognized the gun as a real firearm. Upon further research Martinez discovered another video that had been posted earlier that morning, showing Gonzales wearing a ski mask and waving and pointing the same firearm at the camera.

Based on Martinez' prior contacts with Gonzales he was aware that he lived at 705 N. Ferger in Fresno. Based on these videos and prior postings by Gonzales, Martinez believed the background in the videos as being inside Gonzales' residence.

At approximately 1230 hours Martinez went to the Ferger address to conduct surveillance, and see if either of the suspects might exit the residence. Officer Martinez noted in his report that at this time he was not aware of the defendant's true identity.

Officer Martinez searched (impliedly while conducting surveillance) Gonzales' Facebook Friends and located the photo of a male who identified as "Reckit DaP". Martinez positively identified this individual as the one holding the gun in the video with Gonzales. He then searched through "Reckit DaPs" Facebook profile and noted that he identified himself as "Ay-dree-en TORRES". Martinez then ran the name Adrian Torres through Sharenet and found **"Adrian Torres DOB 06/07/1990".** He then looked up this individual's 'mug photo' and determined he appeared to be similar to the individual in the snap chat video. He also determined that **this** Adrian Torres was on felony probation for possession of ammunition, and that he had a warrant out for his arrest for violating his probation.

Officer Martinez then enlisted assistance on the surveillance so that he could go prepare a search warrant for the Ferger address. This transition apparently occurred at approximately 1350 hours when, per his report, Fresno Police Detective David Wilkin accompanied by Dept. Of Homeland Security Agent, J. Carlos, arrived to relieve Martinez. Martinez returned to the area at approximately 1500 hours, when he learned an arrest had been made. It was at this time, **after** the defendant's arrest, that Martinez learned he was mistaken as to the identity of the individual in the snap chat video holding the gun. He was advised by the other officers that the person they arrested was Raul Adrian Torres DOB 8/3/97 ("I met with Detective Wilkin and Detective Carlos to find out what they discovered. I was advised that the unknown male who was seen in the Snap Chat video was identified as Raul Adrian Torres DOB 08/03/1997 and not Adrian Torres DOB 06/07/1990 as I originally thought. I learned that Torres was on Felony probation for PC 243(f)(1) and open to search and seizure. I also learned that Torres was a wanted person on the DCB for the following open charges: PC 273.5(a)….The DCB was confirmed as still being active for Fresno PD case number 18013987.")

After he was already questioned by the other officers with no admonishment of his 5th Amendment rights, the Defendant was interviewed by Officer Martinez, who advised him of his rights. Mr. Torres reportedly waived his rights and agreed to talk. During this interview Martinez writes that Torres admitted possessing the handgun, purchasing it for $500, and was aware the serial # had been removed. He also reported that he had dropped out of a gang he had been in, and as a result of that, he had a lot of enemies and needed to carry a gun for protection.

Officer David Wilkin wrote a report regarding his involvement in the defendant's arrest. He indicated that on 3/15/18 at approximately 1350 hours he assisted Officer Martinez with the surveillance of 705 N. Ferger. Wilkin wrote: "Detective Martinez had advised us he was monitoring a Snapchat account when he saw a post of a male holding a gun. Detective Martinez advised the male was Raul Torres who was on felony probation for domestic violence. He also provided us with a picture of Torres holding what appeared to be a large caliber handgun. Detective Martinez stated the suspect was wanted for PC 273.5 and was a Bulldog Criminal Street Gang Member."

Det. Wilkin then wrote: "At approximately 1451 hours myself and Special Agent J. Carlos with the Department of Homeland Security Investigations were watching the house from N Ferger south of Thomas. We were in plain clothes in an unmarked Ford Expedition…At this time I watched two males exit the fence line from the backyard of 705 N Ferger on E Thomas Av from between the residence and the detached garage. The males walked east on the north side of east Thomas. One male was wearing a black beanie, jacket, jeans, with a small black backpack…we advised Detective Martinez of this and he stated the male with the black beanie had a felony warrant. I was able to clearly see the face of the male with the beanie and immediately recognized him as suspect Torres who was armed with a gun in the photograph provided by Detective Martinez. The two males then began walking north…**Detective Martinez had identified this person as Raul Torres 08-03-1997. I had been provided with information that he was a Bulldog Gang Member, armed with a handgun, on felony probation, and was wanted for a felony domestic violence warrant.** Myself and SA Carlos were the only investigators watching the house as Detective Martinez had left to author a search warrant for the house."

At this point Wilkin indicates in his report that he notified MAGEC units, and put on his department issued load bearing tactical vest which has a 5" grey cloth badge with the words "Fresno Police" on it, and the words "POLICE MAGEC" emblazoned on the back. He had a holster resting on his thigh. He and Carlos watched the two individuals cross Ferger and continue north. At this time SA Carlos drove north on Ferger and stopped south of the suspects. Wilkin exited the vehicle, **drew his firearm** and yelled, "Fresno Police let me see your hands." The defendant looked at him and began walking fast. Wilkin repeated "Police, stop!" and defendant began running at a full sprint north on

Ferger. Carlos gave chase in the unmarked vehicle while Wilkin pursued the defendant on foot, continuing to yell "Police, stop". The pursuit continued and Carlos was able to drive up alongside Mr. Torres and commanded him to stop. At some point the defendant fell backwards into loose dirt (in his report Wilkin wrote that the vehicle did not hit Mr. Torres. Mr. Torres advised them later, however, that it had). After struggling to place Mr. Torres under arrest, officer Wilkin used several physical blows to subdue him, place him in handcuffs and leg shackles. Wilkin repeats in his report that at the time of the pursuit he knew Suspect Torres was armed earlier in the day with a handgun, knew he was wanted, knew he was on felony probation and knew he was a Bulldog gang member. While waiting for additional units to arrive, Wilkin's noted that SA Carlos asked the defendant, after his arrest and before an advisement of his Miranda rights, why he ran and he said, "Cause I have a gun." Wilkin then opened up the defendant's backpack and found a "Beretta handgun with a loaded magazine seated in the magazine well". This occurred at a time they believed the suspect was the Adrian Torres (D.O.B. 06/07/1990) Officer Martinez had described to them, and **before** he was identified as Raul Torres, the defendant, (contrary to what Wilkin wrote in his report).

II. ARGUMENT

A. The Detention Conducted By Officer Wilkin and Agent Carlos Constituted an Illegal Seizure of Mr. Torres' Person Under the Fourth Amendment; and an Unlawful Search of His Backpack

The Fourth Amendment to the United States Constitution protects people against unreasonable searches and seizures by the Government. It reads: 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, protects against unreasonable searches and seizures. The Fifth Amendment to the Constitution protects people against self-incrimination.

Under the Fourth Amendment a search or seizure cannot take place without a warrant unless one of the narrow exceptions to the warrant requirement applies. The reason for this is that a warrantless search or seizure is presumed to be unlawful. *Katz v. United States* (1967) 389 U.S. 347,

357. In *Katz* the United States Supreme Court held that "searches conducted outside the judicial process without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Katz*, supra, at 357.

This long-standing rule places the burden upon the government to prove the lawfulness of warrantless police conduct. *Coolidge v. New Hampshire* (1971) 403 U.S. 433, 455.

Here, Mr. Torres, the Defendant, asserts there was no warrant of any kind in this case. Mr. Torres maintains that his detention, and arrest and search and seizure of his property, was unconstitutional and there was no lawful basis for such actions. Mr. Torres specifically asserts that the search and seizure of his backpack was conducted without a warrant, was illegal and was, in any event, the fruit of the illegal seizure of his person.

"In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person [citations omitted], this Court held nearly a half century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. [Citations omitted] The exclusionary prohibition extends as well to the indirect as well as the direct products of such invasions. *Wong Sun v. United States* (1963) 371 U.S. 471, 484-85.

Officer Martinez could not have provided Officer Wilken the information Wilken asserts he had, prior to the detention of the defendant. Officer Martinez clearly wrote in his report that he did not find out who the suspect actually was until **after he was arrested**. He believed the suspect was an older individual who bore a similar name, Adrian Torres. The older Torres was determined to be on felony probation and to have a warrant out for his arrest. This would have been the information provided to Wilken and Carlos. Wilken and Carlos only believed the suspect they were looking for was on probation because of Martinez' error. While it is true, the defendant was also on felony probation—they were not aware of this at the time of his detention and arrest (interestingly, Wilken claims the opposite in his report, and says he was provided the name Raul Torres, by Officer Martinez, when he (Wilken) first arrived at the scene; but Officer Martinez blatantly contradicts that claim; and he is the one who obtained and provided the information to Wilken, by Wilken's own admission). In the case of *United States v. Job* (1917) 871 F. 3d 852, the fact it is learned after the search occurs that the defendant was on probation and subject to search and seizure conditions does not cure an otherwise illegal detention,

search and seizure. In Mr. Torres' case, no one knew he (Raul Torres) was on probation until after his arrest.

Additionally, the defendant did not have a warrant out for his arrest at the time. The warrant that was outstanding was for the other Adrian Torres. The defendant was apparently on a DCB (Daily Crime Bulletin), but there was no outstanding warrant for his arrest at the time of the search and seizure.

The fact the officers did not know Raul Torres was on probation at the time of the offense; and the fact he did not have a warrant out for his arrest as believed; substantially limits the basis for and the manner of effectuating a warrantless detention of his person and search and seizure of his back-pack. It is clear from the police reports that Wilken and Carlos believed they were entitled to arrest the defendant and proceeded on that assumption. The drawing of the firearm supports the subjective belief that this was the Adrian Torres who was on felony probation, had a warrant outstanding and was subject to immediate arrest.

The detention and seizure of the defendant was based on false premises. The backpack was searched before the defendant was identified as Raul Torres rather than Adrian Torres; so no 4th amendment waiver would apply. *Robey v. Superior Court* (2013) 56 Cal 4th 1218, 460 U.S. 491, 500 (1983). The backpack was akin to personal luggage and not a search incident to even a lawful arrest; and would therefore require a warrant to open and search, barring exigent circumstances or consent. Additionally, it was conducted after the defendant was placed in restraints. *United States v. Chadwick*, 433 U.S. 1 (1977).

B. The statements made by Mr. Torres to Officers Wilken and Carlos, Officer Martinez, and Officer Flowers were obtained in violation of the 5th Amendment to the United States Constitution and must be suppressed.

According to Officer Wilken's report, after the Defendant was placed in handcuffs and leg shackles he was asked by Agent Carlos why he had run from them. In answer to this potentially incriminating question Mr. Torres allegedly responded, "Because I have a gun." Shortly thereafter the

Defendant was placed into a patrol vehicle by Officer Flowers who obtained Mr. Torres' information (this may be the first time the Defendant's identity was discerned). Officer Flowers did not advise Mr. Torres of his Miranda Rights prior to questioning him and did not record the interview. *Miranda v. Arizona*, 384 U.S. 436 (1966). Officer Flowers indicated in his report that Mr. Torres made several voluntary and spontaneous statements to the effect of, **had he known Det. Wilkin and Special Agent Carlos were cops** he would have shot it out with them or placed the weapon to his head and shot himself. He made reference to being a Bulldog drop-out and associating now with the "Fly-boys". He said he had been shot at several times by the Pleasant Street Bulldogs, and said he knew he was going to die soon. He said he had been trying to die by taking 'very large dosages of Xanax in an attempt to end his life, and did not want to go on living'. It is unknown if any tests were administered to determine if Torres was under the influence of drugs at the time of his arrest; or if he was even questioned about taking any controlled substances that day that might have affected his ability to understand his rights and competently be interviewed.

Officer Martinez contacted the Defendant while he was still in the patrol car and advised Mr. Torres of his Miranda rights and he agreed to talk to Officer Martinez. In response to Officer Martinez' questions, Mr. Torres admitted he knew he had a gun, the gun was his, he had paid $500.00 for it and was aware the serial number was removed. The initial contact with the defendant, after he was in custody, produced incriminating responses to questions **before** being advised he had a right to remain silent. A subsequent advisement shortly thereafter does not cure the initial failure and all statements made, must now be suppressed. *Missouri v. Seibert.* U.S, 600 (2004).

Once Mr. Torres incriminated himself during the initial interrogation, his subsequent incriminating comments made during the same time-frame, whether responsive or spontaneous, would not have been purged of the taint of the Fifth Amendment violation if they were close in time and proximity to his initial statements.

III. CONCLUSION

The seizure of Mr. Torres' person based on the belief that he was someone else who had a warrant out for their arrest and was on felony probation with search and seizure provisions;

and the warrantless search by the officers of the backpack he was in possession of, based on the same erroneous belief, violated the Fourth Amendment. All evidence recovered during the search should therefore be suppressed. Furthermore, his statements in response to a questions asked after his arrest and before an advisement of Miranda warnings should be suppressed as well as his subsequent statements to Officers Flowers and Martinez that were not attenuated from his initial non-mirandized responses, and should be viewed as violations of his Fifth Amendment right not to incriminate himself, and as fruits of the poisonous tree, and should, therefore, likewise be suppressed.

Respectfully submitted,

Dated: December 20, 2019

WANGER JONES HELSLEY PC

By: _____
Peter M. Jones
Attorneys for Defendant RAUL ADRIAN TORRES

EXHIBIT A

LAW ENFORCEMENT REPORT FORM
FRESNO POLICE DEPARTMENT
2323 MARIPOSA MALL, FRESNO CA 93721
Phone: (559)621-7000
CA0100500

Event: 18AL2664 **Case:** 18-018041

INCIDENT INFORMATION

Report #: 1 of 6 **Report Type:** OTHER CRIME **District:** CE **Beat:** F **Zone:** 2454
Definition and Class: PC29800(A)(1) - FELON/ETC POSS/ETC F/ARM - Lvl F
Occurred From: 03/15/18 15:13 Thu **Occurred To:** 03/15/18 16:57 Thu **Received Date:** 03/15/18 15:13 Thu
Location: 705 N FERGER AV FRESNO
Cross Street: E THOMAS AV
How Rcv:: O

CASE FACTORS

EVIDENCE
EVIDENCE.COM AUDIO/VIDEO UPLOADED
FOLLOWUP
SUSP ARRESTED
INVESTIGATION
SCENE PROCESSED CSI SECTION, SCENE PROCESSED BY OFFICER, SUSP INJURIES PHOTOGRAPHED
SOLVABILITY FACTORS
ADULT BOOKED, WEAPON INVOLVED
SPECIAL FACTORS
ADDITIONAL INFO, ELECTRONIC REPORT, FORCE USED, GANG RELATED

APPROVALS AND ROUTING

Close Class: 4X3 - WEAPONS OFFENSE **Open Class::** 2R
Premise: O **# of Premises:** 1 **CAS Code:** WEAP
Printed: 3/21/2018 9:22:35 AM **Printed By:** ESCALANTE (V3911), RICH(S166) **Printed From:** R10392
Press Log
Rpt #: 1 **Type:** FIRST **Officer:** MARTINEZ (V3927), CHRISTOPHER #P1615 **Clerk:** # **Created:** 03/15/18 16:24
Filed Date: 03/15/18 16:24 **Assigned Date:** 03/15/18 16:24
Approved By: ESCALANTE (V3911), RICH #S166 **Date Approved:** 3/20/2018 8:27:13 AM
Reviewed By: VASQUEZ (V2005), EVA #T93 **Date Reviewed:** 3/21/2018 6:10:28 AM
Routing: None

NAMES

Inv: ARRESTED # 1 **Adult/Juvenile:** A **Type:** PERSON
Name: TORRES,RAUL ADRIAN
Race: H **Sex:** M **DOB:** 08/03/1997 **Age:** 20 **Height:** 508 **Weight:** 145 **Hair:** BLK **Eyes:** BRO
Occupation: UNKNOWN
Language: ENGLISH **Birth City:** FRESNO **Birth State:** CA **Clothing:** BLUE JACKET, JEANS
Crime Type: PC 29800(A)(1) **Suspect Status:** ARR
Physical Desc:

Category	Type
POSS GANG VALIDATION	ADMITS GANG MEMBERSHIP
POSS GANG VALIDATION	HAS GANG TATTOOS
POSS GANG VALIDATION	ARRESTED WITH GANG MEMBERS/ASSOCIATES
EMOTIONAL STATE	UPSET
INJURY	ABRASION(S)
INJURY	MINOR CUT(S)
BODY BUILD	MEDIUM
HAIR LENGTH	SHORT
HAIR TYPE	FINE
HAIR STYLE	STRAIGHT
COMPLEXION	LIGHT/FAIR
FACIAL HAIR	MUSTACHE
WEAPON	HANDGUN
GUN FEATURE	SEMI AUTOMATIC

FRESNO POLICE DEPARTMENT

Event: 18AL2664 CA0100500 Case: 18-018041

Scars, Marks and Tattoos:	Location	Feature	Description
	CHEST	TAT	ESTHER
	CHEST	TAT	ESTELLA
	L ARM	TAT	SAMARAI
	L ARM	TAT	NSF

Identification: DL - F7553067 - CA
Home: 4049 N WEST AV, FRESNO, CA 93705
Phone: (559)496-9689
***** **Charge Information** *****

Section	Code	Lvl	Description	Counts	Bail	Warrant
626.9(B)	PC	F	FIREARM AT SCHOOL	1		
29800(A)(1)	PC	F	FELON/ETC POSS/ETC F/ARM	1		
23900	PC	F	ALTER/ETC F/ARM ID MARK	1		
30305(A)(1)	PC	F	PROHIB OWN/ETC AMMO/ETC	1		
25400(A)(2)	PC	F	CCW ON PERSON	1		
25800(A)	PC	F	CARRY LOAD F/ARM:COMT FEL	1		
186.22(A)	PC	F	PARTICIPATE:CRIM ST GANG	1		
69	PC	F	OBSTRUCT/RESIST EXEC OFCR	1		
1203.2(A)	PC	X	PROB VIOL:REAREST/REVOKE	1		

Section: 626.9(B) **Judicial District:** FRESNO MUNI **Dispo:** 4
Section: 29800(A)(1) **Judicial District:** FRESNO MUNI **Dispo:** 4
Section: 23900 **Judicial District:** FRESNO MUNI **Dispo:** 4
Section: 30305(A)(1) **Judicial District:** FRESNO MUNI **Dispo:** 4
Section: 25400(A)(2) **Judicial District:** FRESNO MUNI **Dispo:** 4
Section: 25800(A) **Judicial District:** FRESNO MUNI **Dispo:** 4
Section: 186.22(A) **Judicial District:** FRESNO MUNI **Dispo:** 4
Section: 69 **Judicial District:** FRESNO MUNI **Dispo:** 4
Section: 1203.2(A) **Judicial District:** FRESNO MUNI **Dispo:** 2

Inv: Other # 1 **Adult/Juvenile:** J **Type:** PERSON
Name: GONZALEZ,GAGE
Race: H **Sex:** M **DOB:** 11/16/2001 **Age:** 16 **Height:** 502 **Weight:** 80 **Hair:** BLK **Eyes:** BRO
Occupation: STUDENT
School: FRESNO HIGH **Grade in School:** 9
Language: ENGLISH
Identification: SCH - 563027 -
Home: 705 N FERGER AV, FRESNO, CA 93728
Phone: (559)415-4778
PARENT: GONZALEZ,MICHELLE CATHERINE

Inv: Other # 2 **Adult/Juvenile:** A **Type:** PERSON
Name: DELACRUZ,JUAN DANIEL
Race: H **Sex:** M **DOB:** 06/22/1995 **Age:** 22 **Height:** 505 **Weight:** 140 **Hair:** BLK **Eyes:** BRO
Occupation: LANDSCAPING
Language: ENGLISH **Birth City:** SANGER **Birth State:** CA **Clothing:** BLACK BULLDOGS SHIRT "FRESNO 559"

Scars, Marks and Tattoos:	Location	Feature	Description
	L ELB	SC	2" X 1/2" SCAR ON LEFT ELBOW
	RF ARM	TAT	ESF
	L ELB	TAT	E
	R ELB	TAT	S
	LF ARM	TAT	BULLDOG
	ARM	TAT	DOG PAWS ON RIGHT FOREARM

Officer: MARTINEZ (V3927), CHRISTOPHER #P1615
Supervisor: ESCALANTE (V3911), RICH #S166

FRESNO POLICE DEPARTMENT

Event: 18AL2664 CA0100500 Case: 18-018041

Home: 622 N PALM AV, FRESNO, CA 93728
Phone: (559)443-7106

Inv: PARENT # 1 **Adult/Juvenile:** A **Type:** PERSON
Name: GONZALEZ,MICHELLE CATHERINE
Race: H **Sex:** F **DOB:** 08/31/1973 **Age:** 44 **Height:** 502 **Weight:** 160 **Hair:** BRO **Eyes:** BRO
Occupation: UNEMPLOYED
Language: ENGLISH
Home: 705 N FERGER AV, FRESNO, CA 93728
Phone: (559)394-7792
CHILD: GONZALEZ,GAGE

Inv: VICTIM # 1 **Type:** STATE OF CALIFORNIA
Name: STATE OF CALIFORNIA

PROPERTY

Inv: Evidence # 1 **Date:** 3/15/2018 3:13:00 PM
Category: FIREARMS (NO BB-GUNS OR PELLET GUNS) **Article:** HANDGUN **Brand:** BERETTA **Model:** .92FS
Color: BLK **Disposition:** HQ **Officer ID:** P1615 **Quantity:** 1 **Value:** 5
Dispo: HQ **County Code:** 10 **Condition:** POO **Zone:** 2454
Obliterated
Firearm Type: PISTOL **Firearm Category:** SEMI-AUTOMATIC **Barrel:** 6 **Caliber:** 9
Crime Gun, Illegally Possessed Weapon
POSSESSED: TORRES,RAUL ADRIAN

MO

None

OTHER FACTORS

None

NARRATIVE

MEMBERS WHO CAN TESTIFY:
Detective C. Martinez, P1615
Detective D. Wilkin, P1297
Detective J. Carlos (HSI)
Detective R. Flowers, P1022
Detective J. Guzman, P1747
Sgt. R. Esclante, S166

SOURCE:

On March 15th, 2018 I was monitoring social media to help identify any gang members and to monitor gang activity. I located a video that was posted to Snap Chat under the name "nicolasrayg." Based on my prior contacts, I was familiar with this account belonging to Nicholas Ray Gonzales DOB 10/16/1996. I know from prior contacts with Gonzales that he associates with College Street Bulldog, criminal street gang members.

INVESTIGATION:

At approximately 1130 hours I saw a video posted by Gonzales on his Snap Chat account. This video was posted at approximately 1129 hours on 03/15/2018, approximately one minute prior to me viewing the video. This video shows Gonzales and another unknown Hispanic male inside of a residence. In the video Gonzales is wearing a black shirt and a black hat. The unknown male is wearing a black beanie and white shirt. Throughout the investigation the unknown male was later positively identified as Raul Adrian Torres DOB 08/03/1997. This information was not learned until we made contact with him later in the investigation.

In the video I saw Torres holding a black colored semi-automatic handgun while Gonzales was in standing the background. Torres was pointing the firearm at the lens of the camera, then he lifts the firearm to the side of his head. The firearm was a black colored semi-automatic handgun with a chrome lining inside of the tip of the barrel of the gun. When Torres lifts the gun to the side of his head, you can see a gun magazine is inserted into the gun magazine well. Based on my training and experience with firearms I recognized this firearm as being a real firearm.

In the background I could see Torres displaying a gang hand sign, by making the letter C with his left hand. Based on my training and experience with gang investigations I recognized the letter C as being a gang hand sign that is associated with the College Street Bulldogs.

I also saw a second video which shows Gonzales wearing a black ski mask while holding the same firearm Torres was holding. I was able to identify both firearms as being the same firearm based on the physical description, features on the gun and the chrome lining inside of the tip of the gun barrel. In this video Gonzales waves the firearm from side to side and also in a circular motion while pointing the firearm at the camera. This second video was posted on 03/15/2018 at approximately 0230 hours, approximately 9 hours prior to me viewing the videos. The second video was also posted on Gonzales' snap chat account.

Based on my prior contacts with Gonzales and his RMS history I was aware that he resided at 705 N Ferger Ave. I was also familiar with the background of both videos as being Gonzales' residence based on his prior social media postings.

At approximately 1230 hours I responded to this address in an attempt to conduct surveillance and identify either Gonzales or Torres leaving the residence. At this time in the investigation I did not know the true identity of the second male in the video. I searched through Gonzales' Facebook friends list and I found a male by the name of "Reckit DaP." I was able to positively identify the male in the profile picture "Reckit DaP" as being the same male I saw holding the gun in the Snapchat video.

While searching through "Reckit DaP" Facebook profile I saw that he identified himself as "Ay-dree-en TOR-hes". Based on this information I interpreted the name as Adrian Torres. I searched through Sharenet and I located an Adrian Torres DOB 06/07/1990. After looking at Torres' Mug photo I believed this male had the same facial features, height and build as the male that was in the video. When I ran Torres' name I discovered he was on Probation for PC 30305(a)-Felon in possession of ammunition and he currently had a probation warrant.

It was later learned that the Adrian Torres I located in Sharenet was not the same Torres I found on Facebook under "Reckit DaP." The Torres on Facebook who was listed as "Reckit DaP" was in fact the same Torres who was arrested and found to be in possession of the firearm.

Based on my training and experience with gang investigations I am aware that gang members often possess and transfer stolen firearms from one gang member to another for the purpose of benefiting the gang. I am also aware that gang members conceal firearms on their persons for Offensive and Defensive purposes from Rival gangs. I was aware that Gonzales is an associate of the College Street Bulldogs and I have seen Gonzales displaying gang hand signs on his Snap chat video.

Detective Wilkin and Detective Carlos assisted me by taking over surveillance at 705 N Ferger Ave while I attempted to conduct further research and prepare a search warrant for the residence. During surveillance Detective Wilkin and Detective Carlos saw Torres leaving the residence and walking north towards Muir Elementary School. Torres ran from the Detectives and was captured after a short foot pursuit, Refer to Detective Wilkin's supplemental report regarding his contact and capture of Raul Adrian Torres DOB 08/03/1997.

During this time of surveillance, I was not at this location. When I discovered that Torres was leaving the residence and he ran away from Detectives I immediately responded to assist with capturing Torres. I believed at this time that Torres would be armed with the handgun he was displaying in the video.

When I arrived there were two males watching Torres as he was being arrested. I was advised that the male with the pony tail was with Torres prior to him running. This male with the pony tail was identified as Juan Daniel Delacruz DOB 06/23/1995. There was a juvenile with Delacruz who was identified as Gage Gonzales DOB 11/16/2001. Gonzales resides at 705 N. Ferger Ave. These males were also detained however they did not attempt to flee as Torres did. Both Delacruz and Gage were later released as it was determined they were not involved with the illegal possession of a firearm.

I met with Detective Wilkin and Detective Carlos to find out what they discovered. I was advised that the unknown male who was seen in the Snap Chat video was identified as Raul Adrian Torres DOB 08/03/1997 and not Adrian Torres DOB 06/07/1990 as I originally thought. I learned that Torres was on Felony Probation for PC 243(f)(1) and open to search and seizure. I also learned that Torres was a wanted person on the DCB for the following open charges, PC 273.5(a), PC 273.6(a), PC 211, and PC 273a(b). The DCB was confirmed as still being active for Fresno PD Case number 18013987.

During a search of his person Torres was found to be in possession of a loaded and concealed 9mm Beretta. This Beretta was concealed inside of Torres' backpack which was on his person when he was arrested. The Beretta was loaded with 10 rounds of 9mm ammunition. There was a second gun magazine and additional ammunition found in his backpack. The serial numbers to the firearm were obliterated and scratched off of the Beretta, making the firearm untraceable. Thefirearm was black in color with chrome lining inside of the barrel of the gun. I was able to positively identify this firearm as being the same firearm I saw Torres and Gonzales with on the Snap Chat video. While viewing the firearm I did not have any latex gloves on me when I was unloading the firearm to make the gun safe.

After running a records check I discovered Torres was convicted of PC 273.5(a) on 08/30/2016. Torres is a previous convicted Felon and is prohibited from possession any firearms/ammunition. Torres was also in possession of a rose gold colored iphone with a white face. This cell phone was in Torres' possession during his arrest. Torres identified this phone as being his cell phone during his arrest. Refer to Detective R. Flowers report regarding spontaneous statements that were made by Torres after his arrest.

Torres was arrested in the alleyway south of Dudley Ave and east of Ferger Ave. When Torres was captured he was arrested approximately 40 yards away from the Muir Elementary School. Torres was walking towards the school prior to being contacted by Detectives and he was captured in possession of a firearm within 1,000 ft. of a school zone which is a violation of PC 626.9(b).

During my investigation I also saw Nicholas Gonzales standing outside of his residence after Torres' arrest. I called for Gonzales to come over and talk to me but Gonzales walked back into the house. Due to the firearm having an obliterated serial number and Gonzales being in possession of this firearm he was also in violation of PC 23900.

I spoke with Gonzales' mother outside of her residence. Gonzales' mother was identified as Michelle Gonzales DOB 08/31/1973. During my conversation with Michelle she told me she did not have any control over what Nicholas does and she couldn't make him come outside if he didn't want to. I tried to explain the circumstances to Michelle regarding the investigation of the possession of the illegal firearm. When I asked Michelle if I could search her residence for any additional firearms she initially denied consent.

Assisting Detectives were able to knock on the front door and speak with Nicholas Gonzales. Gonzales came out of the residence at his own will. Gonzales was placed in custody for being in possession of a firearm with obliterated serial numbers.

After further explaining and reasoning with Michelle she provided me consent to search Gonzales' bedroom and the detached garage only. Michelle also allowed me and assisting Detectives to conduct a protective sweep of the residence. Michelle told me her only concern was that she didn't want the Detectives to break anything inside of her house. I recorded Michelle's consent to search her residence using my Axon body camera.

I conducted a protective sweep of the residence along with additional Detectives. During a search of the residence Detective Wilkin advised me he located a container which contained different types of ammunition. There were multiple loose rounds which consisted of 38 special and.32 caliber ammunition. This ammunition was located inside of a speaker box which was located in the garage.

Prior to interviewing Torres I advised Torres of his Miranda warnings using my department issued Miranda card. I asked Torres if he understood his Miranda warnings and he said "Yes sir." My interview with Torres was recorded using my Axon body camera. The following is a summary of my recorded interview with Torres.

During my interview with Torres he admitted to being in possession of the 9mm Beretta. Torres admitted to purchasing the firearm for 500 dollars with knowledge that the serial numbers were scratched off of the firearm. Torres refused to tell me who he purchased the firearm from. Torres also told me he knew it was illegal to

possess a firearm with scratched serial numbers and he knew hewas going to get charged with it. Torres told me he was on the run because he didn't check into his probation. Torres has been staying with Gonzales at 705 N Ferger Ave because he didn't have anywhere to go. Torres stated he is good friends with Gonzales. Torres told me the gun belonged to him and it did not belong to Gonzales. When I asked Torres if Gonzales' fingerprints were going to be on the gun he said, "Probably when I told him to hold it for me, while I fixed my pants."

During the interview I asked Torres about his gang affiliation. Torres told me he used to be Pleasant Street Bulldog, but he is now a drop out. Torres had a tattoo of the letter "P" tattooed on the right side of his neck. Torres also had a tattoo of "NS" tattooed on his right hand. Torres told me the NS stood for North Side but he was going to get it covered. Torres explained to me that he dropped out of the Pleasant Street Bulldogs because the Bulldogs didn't back him up during a fight in the County Jail.

Torres stated one of his friends from the Fly Boy gang helped him during the fight and this is why he switched gangs. Torres told me he was just "Put on" with the Fly Boys criminal street gang and he is an active participate with the Fly boys gang. Torres explained to me that he has a lot of enemies and he carries the gun for protection. Torres stated he normally doesn't carry his guns in his backpack. Torres told me he was not planning on changing and I would see him out on the streets again with a different gun. This concluded my interview with Torres. Torres later stated he should have carried the gun on his hip so he could "shoot it out" with the cops.

I advised Gonzales of his Miranda warnings using my department issued Miranda advisement card. I asked Gonzales if he understood his Miranda warnings and he shook his head up and down, indicating yes. Gonzales continued to talk to me, which implied that he understood his Miranda warnings and he continued to speak with me. The following is a summary of my recorded interview with Gonzales.
During an interview with Gonzales he admitted to being in possession of the handgun. When I asked Gonzales why he possessed the gun he told me "because I'm dumb." I then Asked Gonzales why he took a video holding the gun with a mask on his face. Gonzales stated he just wanted a picture with the gun and the mask because he thought it was "Tight." When I asked Gonzales if he knew the gun was stolen he told me "I know for a fact it's probably stolen." Gonzales was hesitant on provide details regarding the firearm but did admit to wearing a ski mask while holding the gun as I saw in the Snap Chat video. This concluded my interview with Gonzales.

Gonzales self-admitted to being an active participant of the College Street Bulldogs. Gonzales also showed me tattoos on his right leg, which identified him as a College Street Bulldog gang member. Gonzales had a tattoo on his right leg of the letter "C." The letter C has a Fresno State Bulldog face designed within the letter C. Gonzales also has a tattoo of a Major league baseball symbol on his leg. Based on my training and experience with gang investigations this tattoo symbolizes and identifies a gang member as being a "Hitter." Gonzales also has the letters "FS" tattooed on his leg and a Bulldog tattooed on his upper right arm.
Based on my training and experience with gang investigations I am aware that gang members from different gangs often pass guns from one to another to prevent law enforcement from discovering the firearms. Gang members often display firearms in videos and pictures to gain status and notoriety from other gang members and their peers. Gang members also post videosand pictures with firearms in order to instill fear into their rival gang members. I am also aware that gang members often prefer to buy and possess firearms which have scratched serial numbers to prevent law enforcement from discovering that the firearms are stolen. The above described actions benefit both the gang and the gang members by preventing law enforcement from catching a gang

member with a firearm that was used to commit a crime. Based on the video evidence and statements obtained by both Gonzales and Torres I believe they both possessed the firearm and posted the video at the benefit of the gang which is a violation of PC 186.22(a).

Gonzales was arrested for being in possession of a firearm with obliterated serial numbers, which is a violation of PC 23900 and PC 186.22(a). Gonzales was positively identified by his fingerprints and mug photo.

Torres was arrested for PC 29800(a)(1), PC 30305(a)(1), PC 25400(a)(2), PC 25800(a), PC 23900, PC 626.9(b), and PC 186.22(a) and PC 1203.2(a). Torres was also arrested for the DCB charges in Fresno PD case number 18013987 for the charges of PC 273.5(a), PC 273.6(a), PC 211, and PC 273a(b). Torres was positively identified by his fingerprints and mug photo. Both were transported and booked into the Fresno County Jail.

My Axon body camera was uploaded the system. The firearm was booked into evidence at Headquarters, pending latent print comparison and examination. All other evidence was booked at Headquarters in the evidence lockers. The cell phone was taken as evidence pending a search warrant and forensic examination of the cell phone.

CONCLUSIONS / DEDUCTIONS:

On 03/15/2018 I conducted an investigation regarding an illegal possession of a firearm. During the course of my investigation I arrested Raul Torres and Nicholas Gonzales for several gun related charges.

DISPOSITION:

1) See Detective Wilkin's supplemental report regarding his use of force and apprehension of Torres.
2) See Detective Flowers' supplemental report regarding his contact with Torres and Torres' arrest tag
3) Suspects booked into FCJ
4) All Evidence booked at HQ
5) Axon body camera footage downloaded to server
6) EPCD's completed for Torres and Gonzales

RELATED REPORTS

CASE PD:18013987 Comment:

EXHIBIT B

LAW ENFORCEMENT REPORT FORM
FRESNO POLICE DEPARTMENT
2323 MARIPOSA MALL, FRESNO CA 93721
Phone: (559)621-7000
CA0100500

Event: 18AL2664 **Supplement - Case: 18-018041**

INCIDENT INFORMATION

Report #: 3 of 6 **Report Type:** OTHER CRIME **District:** CE **Beat:** F **Zone:** 2454
Definition and Class: PC29800(A)(1) - FELON/ETC POSS/ETC F/ARM - Lvl F
Occurred From: 03/15/18 15:13 Thu **Occurred To:** 03/15/18 16:57 Thu **Received Date:** 03/15/18 15:13 Thu
Location: 705 N FERGER AV FRESNO
Cross Street: E THOMAS AV
How Rcv:: O

CASE FACTORS

EVIDENCE
EVIDENCE.COM AUDIO/VIDEO UPLOADED
FOLLOWUP
SUSP ARRESTED
INVESTIGATION
SCENE PROCESSED CSI SECTION, SCENE PROCESSED BY OFFICER, SUSP INJURIES PHOTOGRAPHED
SOLVABILITY FACTORS
ADULT BOOKED, WEAPON INVOLVED
SPECIAL FACTORS
ADDITIONAL INFO, ELECTRONIC REPORT, FORCE USED, GANG RELATED

APPROVALS AND ROUTING

Close Class: 4X3 - WEAPONS OFFENSE **Open Class::** 2R
Premise: O **# of Premises:** 1 **CAS Code:** WEAP
Printed: 3/21/2018 9:22:36 AM **Printed By:** ESCALANTE (V3911), RICH(S166) **Printed From:** R10392
Press Log
Rpt #: 3 **Type:** SUPP **Report Time:** 0 **Investigation Time:** 0 **Officer:** WILKIN (V3114), DAVID #P1297
Clerk: WILKIN (V3114), DAVID #P1297 **Created:** 03/15/18 18:09 **Filed Date:** 03/15/18 15:13
Assigned Date: 03/15/18 18:09
Approved By: ESCALANTE (V3911), RICH #S166 **Date Approved:** 3/16/2018 6:06:54 PM
Reviewed By: VASQUEZ (V2005), EVA #T93 **Date Reviewed:** 3/21/2018 6:02:36 AM
Routing: None

NAMES

Inv: ARRESTED # 1 **Adult/Juvenile:** A **Type:** PERSON
Name: GONZALES,NICHOLAS RAY
Race: H **Sex:** M **DOB:** 10/16/1996 **Age:** 21 **Height:** 508 **Weight:** 145 **Hair:** BLK **Eyes:** BRO
Occupation: UNEMPLOYED
Language: ENGLISH **Birth City:** FRESNO **Birth State:** CA

Physical Desc:

Category	Type
POSS GANG VALIDATION	ADMITS GANG MEMBERSHIP
POSS GANG VALIDATION	ASSOCIATES WITH KNOWN GANG MEMBERS
EMOTIONAL STATE	CALM
INJURY	NONE
HAIR LENGTH	SHORT
HAIR TYPE	THICK
FACIAL HAIR	CLN SHAVE
GENERAL APPEARANCE	CASUAL

Scars, Marks and Tattoos:

Location	Feature	Description
CHK	PRCD	PIERCING ON L-CHEEK
L EAR	PRCD	FAKE DIAMOND EARING
NECK	TAT	MICHELLE
LF ARM	TAT	SMALL DOG PAW
FGR	TAT	"FRESNO" ON LEFT MIDDLE FINGER

L ANK	TAT	"B"
R ANK	TAT	"96"
CHEST	TAT	"LOVE NONE"
L HND	TAT	"CATH"
L ARM	TAT	DICE WITH NUMBERS 624

Identification: SCH - 493686 - | DL - Y2188073 - CA
Home: 705 N FERGER AV, FRESNO, CA 93701
Phone: (559)519-5100 **Phone2:** (559)412-4778
***** **Charge Information** *****

Section	Code	Lvl	Description	Counts	Bail	Warrant
23900	PC	F	ALTER/ETC F/ARM ID MARK	1		

Judicial District: FRESNO MUNI

MO

None

OTHER FACTORS

None

NARRATIVE

Source:

On 03-15-2018 at approx. 1350 hours, while assigned to the Multi-Agency Gang Enforcement Consortium (MAGEC) Investigations Team, I assisted Detective C. Martinez on surveillance at 705 N Ferger, Fresno.

Investigation:

Detective Martinez had advised us he was monitoring a Snapchat account when he saw a post of a male holding a gun. Detective Martinez advised the male was Raul Torres who was on felony probation for domestic violence. He also provided us with a picture of Torres holding what appeared to be a large caliber handgun. Detective Martinez stated the suspect was at 705 N Ferger. He also stated the suspect was wanted for PC 273.5 and was a Bulldog Criminal Street Gang Member.

At approx. 1451 hours myself and Special Agent J. Carlos with the Department of Homeland Security Investigations were watching the house from N Ferger south of E Thomas. We were in plain clothes in an unmarked Ford Expedition. The residence is situated on the northwest corner of Thomas and Ferger. At this time I watched two males exit the fence line from the backyard of 705 N Ferger on E Thomas Av from between the residence and the detached garage. The males walked east on the north side of E Thomas. One male was wearing a black beanie, jacket, jeans, with a small black backpack. The other male was wearing a black hat, black shirt, had a ponytail, and a dog. We advised Detective Martinez of this and he stated the male with the black beanie had a felony warrant. I was able to clearly see the face of the male with the beanie and immediately recognized him as Suspect Torres who was armed with a gun in the photograph provided by Detective Martinez. The two males then began walking north on N Ferger, on the west sidewalk.

Detective Martinez had identified this person as Raul Torres 08-03-1997. I had been provided with information that he was a Bulldog Gang Member, armed with a handgun, on felony probation, and was wanted for a felony domestic violence warrant. Myself and SA Carlos were the only investigators watching the house as Detective Martinez had left to

author a search warrant for the house.

At this time we notified MAGEC units. I put on by body armor and my department issued load bearing tactical vest. The vest has an approx. 5" tall grey badge with the words "Fresno Police" emblazoned across it in black located in the right chest pocket area. The words "POLICE MAGEC" are emblazoned across the back at shoulder blade height and our approx. 12 inches across and 5 inches tall. I was wearing a thigh holster with by badge pinned next to my department issued firearm. My badge was clearly visible from the front. This uniform has been in use by various tactical teams with the Fresno Police Department for at least 14 years and is standard issue for the MAGEC Unit.

We watched as the two subjects crossed east across N Ferger to the east side of the street and continue north. At this time SA Carlos drove north on N Ferger and stopped approx. three houses south of E Dudley, and just south of Suspect Torres. I was seated in the front passenger's seat and SA Carlos was driving. At this time I exited the vehicle and drew my department issued firearm. I yelled "Fresno Police, let me see your hands". The two males looked at me. The male in the black hat stopped. Suspect Torres looked at me and began to walk fast. I again stated "Police, Stop!" Suspect Torres then began running at a full sprint, north on N Ferger. He turned east on E Dudley. SA Carlos gave chase in his UC vehicle and I continued pursuing on foot, yelling "Police, Stop!identified myself a "Police" and ordered Suspect Torres to stop approx. five clear and distinct times. He failed to stop.

Suspect Torres then turned south into the alley between N Ferger and N Wilson. At this time he was directly across the street from Muir Elementary School, well within 50 feet of the school. Suspect Torres ran south through the alley. SA Carlos was able to catch up to him and drive next to him. I could hear SA Carlos yelling from his open window at Suspect Torres to stop, which he did not. SA Carlos then drifted to the left in an attempt to slow Suspect Torres down. (At no time did SA Carlos's vehicle come into contact with Suspect Torres). As SA Carlos was driving next to Suspect Torres, Torres tried to stop abruptly. This caused him to slip and fall backward in loose dirt. I was approx. 15 yards behind him at this time. As I kept running Suspect Torres jumped up and turned towards me. He saw me and clenched his fists, bladed his stance and raised his fists to his waist. At this time I believed Suspect Torres was going to attack me.

At this time I knew Suspect Torres was armed earlier in the day with a handgun. I knew he was wanted and on felony probation. I also knew he was a Bulldog Gang Member. In my training and experience Bulldog Gang Members are known to be uncooperative and violent with law enforcement, especially when armed or wanted for a crime. I also know Bulldog Gang Members are known to carry weapons on their person when they go out to protect themselves from rival gang members or commit crimes. I knew Suspect Torres saw me wearing clothing which easily identifies myself as a police officer. I knew Suspect Torres made a decision to run away despite lawful orders to stop from both myself and SA Carlos. Additionally I knew Suspect Torres turned, saw me, and took a fighting stance towards me.

Suspect Torres's actions did not suggest he was giving up or submitting to our authority in any way. I believed he was going to fight to escape because he was armed, wanted, or both. I believed Torres was an immediate threat to my partner and myself, including the fact that my partner was in very close proximity from Torres when he stopped his vehicle. I also became concerned that if he were to get away, he would put citizen's safety in jeopardy as I believed him to be an armed and fleeing felon and next to an elementary school.

At this time I was within 15 feet on Suspect Torres. Due to the rapidly evolving nature of the incident I did not have time to access my Taser or any other tool in order to overcome Torres's resistance. I believed that body strikes were the most appropriate use of force to defend myself and partner from attack. I used my left foot to strike Torres in upper torso chest as I ran up to him. This caused Suspect Torres to fall back and me to fall on my back as well. SA Carlos was able to exit the vehicle and take hold of Torres's upper body. Torres immediately rolled to his stomach, placed his hands and

knees under him and began to get up. I was able to position myself on Torres's right side. I pushed on Suspect Torres's back and told him to get on the ground several times as did SA Carlos. Suspect Torres continued to resist and pushed up. I believed Torres was trying to stand up in order to fight or access a firearm. I was on top of Suspect Torres and using my hands to try and control him. I was unable to access any other tools at this time to overcome his resistance. Because of this, in order to defend myself and SA Carlos from injury and take Suspect Torres into custody, I punched Suspect Torres in the right portion of his mid to lower back once with my right hand. I told him "Get on the ground" as we tried to pull his hands from under him and put handcuffs on him. Suspect Torres did not comply. I then used my right knee and struck him in the right rib cage. I ordered him toget on the ground and give us his hands. He did not comply despite pulling on his hands and arms to place him in handcuffs. Suspect Torres was cursing at us and calling us "bitches" saying "fuck you" throughout his resisting and fighting. Based on his actions I knew he was not submitting or complying in anyway.

At this time, based on his level of resistance, I became increasingly concerned he was armed with the handgun he was depicted in the picture with. He had not submitted to arrest despite multiple lawful orders and physical force being used in an attempt to take him into custody. Believing he was armed and a serious threat to mine and my partners safety I struck Suspect Torres in the lower to mid right hand portion of his back with my left fist again and ordered him to give me his hands. Suspect Torres was still trying to push his way up and refusing to put his hands behind his back. I used my right knee and struck him twice in the right rib cage, ordering him to get on the ground and put his hands behind his back. At this point he fell to the ground on his stomach and pulled his hands underneath him towards his waistband area. I know this area to be a common area where armed subjects keep weapons, and I knew Suspect Torres had been armed with a gun.

SA Carlos was pulling on Suspect Torres's arms in an attempt to get them behind his back with no success. I then pushed my right forearm into the right side of Suspect Torres's face and told him to give up and that he was not going to get away. Suspect Torres responded by saying "Fuck you bitch" and continued to pull his hands away. I then reached my right arm around the underside of his neck and chest to pull him up so SA Carlos could gain control of his hands. I was able to pull Suspect Torres's head and chest back enough for SA Carlos to pin both Torres's hands to the side, out from under his body. At this time SA Carlos applies his weight to Suspect Torres's upper body and I pulled his right arm to his back and placed a handcuff on his wrist. I then pulled his left hand towards his back and placed his left wrist in handcuffs. SA Carlos then retrieved a pair of leg shackles from his vehicle and placed them on the suspect's ankles.

While waiting for additional units to arrive Suspect Torres continued to curse at me. SA Carlos asked him why he ran and he said "Cause I have a gun." I then opened his backpack and found a Beretta handgun with a loaded magazine seated in the magazine well. At this time I stood up. Suspect Torres stated "I'm gonna smoke you!" I know "smoke" means to shoot someone and kill them. I said "What did you say to me?" He again said "I'm gonna smoke you". I then called to SA Carlos who was standing at the back of the vehicle. I asked him if he heard it. At this time Suspect Torres said he stated "I need to smoke". I told him I knew that was not what he said and it was a crime to threaten a police officer and Federal Agent. Suspect Torres tried to roll over and face me. Due to his combativeness and threats to shoot me I pushed his side back down and told him to stay on his stomach. At this time Detective Flowers arrived on scene and we placed Suspect Torres in the back of the patrol car. He, his backpack and the gun were turned over to Detective Martinez.

I, Bureau Tech Sanchez responded to the scene. She photographed Suspect Torres who appeared to have scratches and redness to his neck, scratches to his face and forehead, minor bleeding to his right cheek (where he had a piercing), and minor scratches to the right side of his back. She also photographed a small scratch to my left wrist which I received as a

result of Suspect Torres resisting arrest. Also, my Oakley brand sunglasses had been knockedoff my head and fell in the dirt. I had just purchased the new lenses two days prior and the lenses became scratched in the dirt. These lenses cost $65.

Please refer to Detective Flowers's follow-up report for additional threats Torres made regarding law enforcement. Additionally, please see Detective Martinez's original report for further.

Conclusions / Deductions:

On 03-15-18 at 1451 hours Suspect Torres left 705 N Ferger with a concealed handgun and wanted on open charges. When I attempted to detain him he ran. When I caught him he took a fighting stance and resisted. I feared Torres was trying to pull out a gun to shoot my partner and I. I used body strikes to overcome the resistance and ensure their safety in order to take Suspect Torres into custody. Once in custody Suspect Torres threated to "smoke" an office. Suspect Torres is in violation of PC 69. For the additional charges please refer to the original report.

Disposition:

1. I. Bureau photographed Suspect Torres's injuries.
2. I. Bureau photographed the damage to me sunglasses as well as the cut on my wrist.
3. I completed and submitted an EPCD.
4. Suspect Torres was turned over to Detective Martinez.
5. I can testify to the above facts.

RELATED REPORTS

CASE PD:18013987 Comment:

EXHIBIT C

LAW ENFORCEMENT REPORT FORM
FRESNO POLICE DEPARTMENT
2323 MARIPOSA MALL, FRESNO CA 93721
Phone: (559)621-7000
CA0100500

Event: 18AL2664 **Supplement - Case: 18-018041**

INCIDENT INFORMATION

Report #: 4 of 7 **Report Type:** OTHER CRIME **District:** CE **Beat:** F **Zone:** 2454
Definition and Class: PC29800(A)(1) - FELON/ETC POSS/ETC F/ARM - Lvl F
Occurred From: 03/15/18 15:13 Thu **Occurred To:** 03/15/18 16:57 Thu **Received Date:** 03/15/18 15:13 Thu
Location: 705 N FERGER AV FRESNO
Cross Street: E THOMAS AV
How Rcv:: O

CASE FACTORS

EVIDENCE
EVIDENCE.COM AUDIO/VIDEO UPLOADED
FOLLOWUP
SUSP ARRESTED
INVESTIGATION
SCENE PROCESSED CSI SECTION, SCENE PROCESSED BY OFFICER, SUSP INJURIES PHOTOGRAPHED
SOLVABILITY FACTORS
ADULT BOOKED, WEAPON INVOLVED
SPECIAL FACTORS
ADDITIONAL INFO, ELECTRONIC REPORT, FORCE USED, GANG RELATED

APPROVALS AND ROUTING

Close Class: 4X3 - WEAPONS OFFENSE **Open Class::** 2R
Premise: O **# of Premises:** 1 **CAS Code:** WEAP
Printed: 6/13/2018 12:27:13 PM **Printed By:** FLOWERS (V3756), RON G(P1022) **Printed From:** A76605
Press Log
Rpt #: 4 **Type:** SUPP **Report Time:** 0 **Investigation Time:** 0 **Officer:** FLOWERS (V3756), RON G #P1022
Clerk: FLOWERS (V3756), RON G #P1022 **Created:** 03/16/18 12:03 **Filed Date:** 03/15/18 15:13
Assigned Date: 03/16/18 12:03
Approved By: FLOWERS (V3756), RON G #P1022 **Date Approved:** 3/23/2018 10:33:53 AM
Reviewed By: SORIANO (V3862), GAYLA #T523 **Date Reviewed:** 3/27/2018 8:13:15 AM
Routing: None

MO

None

OTHER FACTORS

None

NARRATIVE

SOURCE:

On 3-15-18 at approx. 1513 hrs., I was working as a member of M.A.G.E.C. in a marked patrol vehicle assisting other members with surveillance of a subject who was armed with a handgun. We had been briefed by case agent and M.A.G.E.C member Det Chris Martinez.

* - I was not wearing my bodycam as a re-charge failed.

INVESTIGATION:

We had been conducting surveillance of 705 N Ferger Av. M.A.G.E.C. member Det D Wilkin and Special Agent Joe Carlos observed the subject exit with another male. They made contact and detained the male. A firearm was found on his person. I arrived to assist. I placed the male in the rear

portion of my patrol vehicle. The male was angry and began to make comments of injuring police officers. He said if he had known Det Wilkin and Special Agent Carlos were cops, he would have either drew the weapon and "shot it out" with them or he would have placed the weapon to his head and pulled the trigger.

This male identified himself as Raul Torres. He was on felony probation and believed he was wanted or had a warrant. I asked for his information to run him on my computer. As I did, he said repeatedly that he would have shot at the cops, and that he "put that on Fly Boys". Essentially, what he was doing was swearing allegiance to the Fly Boy gang and giving his word to execute the actions he described. I was surprised by this as he appeared to be a Bulldog gang member and not a Fly Boy. He went on to say that he was a Bulldog drop out. He had issues with his former Bulldog gang from North Side Pleasant Street. He told me that his "niggas" from Fly Boys were there for him when he needed help. He felt abandoned by his former Pleasant Street associates. According to Torres, this was evident during a recent lock up at the Fresno County Jail.

Torres continued to speak freely unsolicited. I excused myself from my vehicle to examine the firearm recovered. The serial number had been obliterated. Other than that, the weapon appeared functional. I shared the information Torres provided with Det Martinez. I returned to my patrol vehicle where Torres continued to speak on his own.

Torres said he had been pursued and shot at several times by gang members from Pleasant Street (Bulldogs). He said he had "funk" and knows he's going to die soon. He didn't care about living anymore. He said he had been trying to die, and takes very high dosages of Xanax in an attempt to end his life. He told me that the family at 705 N Ferger Av were like his god kids and that they had nothing to do with the gun he was carrying. He added that someone wanted to buy his weapon for $600 but he turned them down. He needs the gun for protection and his willing to shoot it out with anyone. He continued and added that the folks at 705 N Ferger Av were College Street Bulldogs, and the only Bulldogs he currently associates with. He told me if they weren't close like family, he would have shot them all.

Torres continued to speak freely. He told me that as soon as he gets out, he's going to get some money to buy another. He said he won't hesitate to shoot it out with police or whoever and that was on "2600 block".

CONCLUSIONS / DEDUCTIONS:

Please refer to the original case report.

DISPOSITION:

Subject detained and provided unsolicited information.

RELATED REPORTS

CASE PD:18013987 Comment:

A P P E N D I X 5

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CA No. 20-10112

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAUL ADRIAN TORRES, Defendant-Appellant.	)	D.C. No. 1:18-cr-00147-DAD

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HONORABLE DALE A. DROZD
United States District Judge

CARLTON F. GUNN
Attorney at Law
65 North Raymond Ave., Suite 320
Pasadena, California 91103
Telephone (626) 667-9580

Attorney for Defendant-Appellant

PAGES NOT PERTINENT TO PETITION FOR

WRIT OF CERTIORARI OMITTED

CA No. 20-10112

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAUL ADRIAN TORRES, Defendant-Appellant.	D.C. No. 1:18-cr-00147-DAD

I.

STATEMENT OF JURISDICTION

This is an appeal from a conviction for felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Judgment was entered on March 11, 2020, *see* ER 40-46, and a timely notice of appeal was filed on March 17, 2020, *see* ER 38-39.

* * *

II.

STATEMENT OF ISSUES PRESENTED

A. DID THE DISTRICT COURT ERR IN RULING THERE WAS PROBABLE CAUSE FOR AN ARREST WITHOUT HOLDING AN EVIDENTIARY HEARING?

1. Did the Officers Have Probable Cause to Arrest Mr. Torres for Resisting Arrest Under California Penal Code § 148 Only if They Had Probable Cause to Make the Arrest that Mr. Torres Resisted, Because Section 148 Applies Only to Resisting Lawful Police Conduct?

2. Did the District Court Abuse Its Discretion in Denying an Evidentiary Hearing Because It Based the Denial on an Erroneous Interpretation of Section 148 and There Were Sufficiently Contested Issues of Fact?

B. MUST A GUN FOUND IN THE SEARCH OF A BACKPACK BE SUPPRESSED REGARDLESS OF THE LAWFULNESS OF THE ARREST?

1. Did the Search Incident to Arrest Exception Fail to Justify the Search Because the Search Took Place After Mr. Torres Had Been Handcuffed and Shackled and There Were Intervening Acts Including One Officer Walking to and from a Vehicle, a Question About Why Mr. Torres Had Run, and at Least Some Delay?

2. Did the Government Fail to Carry Its Burden of Proving Inevitable Discovery Through an Inventory Search Because the Government Presented No Evidence of an Inventory Search Policy?

C. MUST POST-ARREST STATEMENTS BY MR. TORRES BE SUPPRESSED AND/OR BE THE SUBJECT OF A FURTHER EVIDENTIARY HEARING?

1. Must the Answer to a Question of Why Mr. Torres Ran Be Suppressed Because the Question Was Custodial Interrogation that Did Not Come Within the Public Safety Exception to Miranda?

a. Was the question custodial interrogation requiring Miranda warnings?

b. Did the public safety exception apply?

2. Is an Evidentiary Hearing Needed to Resolve the Admissibility of Other Statements?

a. Is an evidentiary hearing needed to resolve the question of whether statements made to a detective without express questioning were a product of custodial interrogation in the form of conduct that was reasonably likely to elicit an incriminating response?

b. Is an evidentiary hearing needed to resolve the question of whether Miranda warnings preceding a final set of statements were rendered ineffective by the prior unMirandized statements, under *Missouri v. Seibert*, 542 U.S. 600 (2004)?

D. DID THE DISTRICT COURT ERR IN FAILING TO RECOGNIZE AND CONSIDER A FUNDAMENTAL FAIRNESS EXCEPTION TO A GENERAL RULE THAT STATE COURT PROMISES CANNOT PRECLUDE A FEDERAL PROSECUTION?

III.

BAIL STATUS OF DEFENDANT

Mr. Torres is presently serving the sentence the district court imposed, which was 78 months. His projected release date is August 28, 2025.

IV.

STATEMENT OF THE CASE

A. INVESTIGATION AND ARREST.

On March 15, 2018, a Fresno Police Department detective named Christopher Martinez was monitoring social media to identify gang members and monitor gang activity. ER 147. He observed a video on a SnapChat account that belonged to a gang member named Nicholas Ray Gonzales. ER 147-48. The video showed Mr. Gonzales and another "Hispanic male" wearing a black beanie, pointing a gun and making gang signs. ER 148. The video had a background Detective Martinez recognized as Mr. Gonzales's residence. *See* ER 148.

Detective Martinez went to Mr. Gonzales's address to conduct surveillance and watch for the men in the video. ER 148. The detective searched through Mr. Gonzales's Facebook friends in an effort to identify the other man in the video and found a man named "Reckit DaP." ER 148. This "Reckit DaP" identified himself in his own Facebook profile as "Ay-dree-en TOR-hes." ER 148. Detective Martinez searched a law enforcement database for the name "Adrian Torres" and

found an Adrian Torres with a date of birth in 1990, whom Detective Martinez decided was the man in the video. ER 62, 148. This Adrian Torres had a prior conviction for felon in possession of ammunition and an outstanding probation violation warrant. ER 62, 148.

Detective Martinez had two other officers – Fresno Police Department Sergeant David Wilkin and Immigration and Customs Enforcement Agent Joe Carlos – take over the surveillance so Detective Martinez could "conduct further research and prepare a search warrant for the residence." ER 149. Detective Martinez sent the other two officers a screenshot of the previously unknown man in the video so they would be able to recognize him. ER 63.

Sergeant Wilkin and Agent Carlos were in plain clothes in an unmarked vehicle. ER 155. Two men left the house while the officers were watching, and the officers recognized one of the men, who was wearing a black beanie and had a small backpack, as the previously unknown man in the video. ER 155. They advised Detective Martinez of this, and he informed them the man had a felony warrant. ER 155.

Sergeant Wilkin put on a tactical police vest, and the officers followed the two men who had left the house. ER 156. After a short distance, Sergeant Wilkin got out of the vehicle, drew his gun, and yelled, "Fresno Police, let me see your hands." ER 156. The man whom the officers did not recognize stopped, but the man whom they recognized from the video started walking faster, and he began to run when Sergeant Wilkin again stated, "Police, Stop." ER 156.

Sergeant Wilkin ran after the man, while Agent Carlos pursued him in the vehicle. ER 156. Agent Carlos caught up to the man and drove next to him,

yelling at him to stop. ER 156. Agent Carlos "then drifted to the left in an attempt to slow [the man] down." ER 156. The man tried to stop, slipped, and fell. ER 156. He got up and turned toward Sergeant Wilkin, supposedly clenching his fists and raising them to his waist, and taking what Sergeant Wilkin described as "a fighting stance." *See* ER 156.

Sergeant Wilkin decided "body strikes were the most appropriate use of force" and kicked the man in the chest. ER 156. Both the man and Sergeant Wilkin fell to the ground. ER 156. Agent Carlos got out of the vehicle and grabbed the man. ER 156. The man tried to get up and cursed the officers while they held him down. ER 156-57. Sergeant Wilkin punched him and kneed him "in order to defend myself and [Agent] Carlos from injury and take [the man] into custody." ER 157. Sergeant Wilkin was eventually able to handcuff the man's hands behind him. ER 157. Agent Carlos then went to the vehicle and retrieved leg shackles to put on the man's legs. ER 157.

The officers waited for additional units to arrive, and the man continued to curse the officers. *See* ER 157. At some point while they were waiting, Agent Carlos asked the man why he had run, and the man replied, "Cause I have a gun." ER 157. Sergeant Wilkin opened the backpack after hearing this and found a loaded handgun. ER 157. He claimed the man stated, "I'm gonna smoke you" after the gun was found. ER 157.

Another officer, Detective Ron Flowers, arrived and put the man in his patrol car. ER 157, 160-61. The man was angry and "began to make comments of injuring police officers," saying that if he had known Sergeant Wilkin and Agent Carlos were officers, he would have either shot it out with them or shot himself.

ER 161. Detective Flowers "asked for his information to run him on my computer," and the man continued saying he would have shot at the officers. ER 161. The man identified himself not as the Adrian Torres with a date of birth in 1990, but as Raul Adrian Torres, the appellant in this case, whose date of birth is in 1997. *See* ER 149, 161. He also made additional statements about gang associations, conflicts with gang members, having been shot at himself, needing the gun for protection and being willing to shoot it out, and knowing he was going to die. *See* ER 161.

Detective Martinez also responded to the scene. ER 149, 157. He read Miranda warnings to Mr. Torres[1] and questioned Mr. Torres about the gun. ER 150. Mr. Torres again made statements admitting possession of the gun, explaining his gang associations and conflicts, and explaining he needed the gun for protection. *See* ER 150-51.

B. STATE CHARGES AND DISPOSITION.

Mr. Torres was initially charged with felon in possession of a firearm and other gun charges in state court. *See* ER 126. He also faced other state charges, including violation of probation that had been imposed for a domestic violence conviction and a new domestic violence charge. *See* ER 98, 129-30. He agreed to a global disposition of those charges on June 7, 2018. *See* ER 110-21.

The disposition agreement was not written, but was put on the record orally

[1] "Mr. Torres" as used in this brief refers to the appellant, Raul Adrian Torres. The older Adrian Torres who had the probation violation warrant is referred to as "Adrian Torres."

in state court proceedings. The prosecutor summarized the agreement as:

> If he admits the violation in case ending 940, with the four-year term, the People are going to dismiss case ending 870 in light of that violation. And the People are going to move to dismiss case ending 871 in light of a federal prosecution.

ER 113-14.

The court summarized the agreement after that. It told Mr. Torres before taking his admissions:

> [Y]ou will be admitting the following violations of probation in docket ending 940, that is: Failing to drug test, as ordered by the Court, failing to obey all laws, and failing to report to your probation officer on February 28, 2018.
>
> If you do that, the People are requesting that the Court commit you to the middle term of four years.
>
> . . . [T]he People will also agree to dismiss your remaining two felony cases . . . .

ER 116. After accepting Mr. Torres's admissions and sentencing him to the four years, the court stated that the other cases were dismissed, "pursuant to the plea agreement in this case." ER 119.

Mr. Torres's understanding from all this, as stated in a later declaration, was:

> Although I was advised the federal government might take-over the charges in case F18901871 (felon in possession of a firearm), it was my understanding and belief that the case was still pending in state court and my accepting the 4 years would result in a full dismissal of those charges.

ER 103.

C. FEDERAL INDICTMENT AND MOTIONS.

Mr. Torres was indicted in federal court despite his understanding, less than

a month after the state court proceedings. *See* CR 10. *See also* ER 162-63 (superseding indictment).[2] Mr. Torres initially entered into a plea agreement and pled guilty, *see* CR 17, 19, but subsequently decided his attorney had not effectively represented him, *see* CR 29 (attorney motion to withdraw). New counsel was appointed, and Mr. Torres withdrew his guilty plea. *See* CR 30, 34.

After several status conferences, the new attorney filed motions. One was a motion to dismiss based on Mr. Torres's understanding that the state court agreement disposed of the gun charges. *See* ER 97-133. The government's response to this motion was that there was no misunderstanding and there was no constitutional bar. *See* ER 92-96.

A second motion was a motion to suppress evidence. *See* ER 134-61. That motion made Fourth Amendment arguments challenging both the arrest and the search of the backpack. *See* ER 139-41. It argued a warrantless search of the backpack was unlawful even if the arrest was lawful because the search took place after Mr. Torres had been placed in restraints. *See* ER 141. It argued the arrest was unlawful because Mr. Torres was not the Adrian Torres the officers had probable cause to arrest. *See* ER 139-41. It attached reports from Sergeant Wilkin and Detective Martinez that contradicted each other. *See* ER 144-58. Detective Martinez's report indicated he had informed Sergeant Wilkin and Agent Carlos that the previously unknown man in the video was Adrian Torres, with the 1990 date of birth. *See* ER 148-49. Sergeant Wilkin's report stated Detective Martinez

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[2] The superseding indictment added an allegation that Mr. Torres knew he had been convicted of a crime punishable by imprisonment exceeding one year, as required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Compare* ER 162-63 (superseding indictment) *with* CR 10 (original indictment).

identified the man as Raul Adrian Torres, the appellant in this case, with his 1997 date of birth. *See* ER 155.

The suppression motion also made Fifth Amendment arguments seeking suppression of Mr. Torres's statements. It argued the statement to Sergeant Wilkin and Agent Carlos and the statements to Detective Flowers should be suppressed because they had been made without Miranda warnings. *See* ER 141-42. It argued the Miranda warnings before the statements to Detective Martinez were ineffective under *Missouri v. Seibert*, 542 U.S. 600 (2004). *See* ER 142.

The government responded with declarations from the four officers adopting the individual reports they had prepared. *See* ER 63-64, 72, 75, 78. The government also provided a sample screenshot of Mr. Torres in the video and a photograph of the Adrian Torres who had the prior felon in possession of ammunition conviction and probation violation warrant. *See* ER 52, 54. The government argued the officers had reasonably mistaken Mr. Torres for Adrian Torres. *See* ER 50-55. It argued the search of the backpack was a proper search incident to arrest. *See* ER 56-57. It also argued the gun would have been inevitably discovered in a subsequent inventory search, but presented no evidence about an inventory search policy. *See* ER 56-57. It argued the question about why Mr. Torres had run was proper under the "public safety exception" to Miranda, that the statements to Detective Flowers were "spontaneous [and] unsolicited," and that the statements to Detective Martinez were made after a voluntary Miranda waiver. ER 57-60. It added an argument at the hearing that the question about why Mr. Torres had run was "not designed to elicit an incriminating response." ER 25.

Defense counsel argued the court needed to hold an evidentiary hearing. *See* ER 4. In addition to the conflict in the Sergeant Wilkin and Detective Martinez reports, he pointed out the Adrian Torres the officers had supposedly mistaken Mr. Torres for was eight (actually closer to seven) years older and had prominent tattoos Mr. Torres did not have. *See* ER 6, 8. He also challenged the officers' version of how the statements were made. *See* ER 9-10. He argued, "we believe that we have submitted enough confusion over what information was provided," ER 8, and "there is enough information provided to the Court to order an evidentiary hearing here to clear the air on all these issues," ER 9-10.

The court asked questions of the prosecutor suggesting it agreed there were factual disputes that could be resolved only with an evidentiary hearing, *see* ER 22-23, 26; *see also infra* pp. 20-21, and the prosecutor even conceded this at one point, *see* ER 26. The court ultimately decided it did not need to resolve the disputed issues, however, and denied the motion without an evidentiary hearing. *See* ER 36. Its rationale was that probable cause to make the originally intended arrest did not matter because Mr. Torres's resistance created probable cause to arrest for the separate offense of obstructing an officer. *See* ER 27-28, 32; *infra* p. 15. It suggested the statement about the gun did not matter because the officers would have found the gun anyway. *See* ER 32; *infra* p. 34. It did not comment on the other issues. *See* ER 36 (simply "incorporat[ing] its argument in the questions just asked and answers" and denying motion).

The court also denied the motion to dismiss without an evidentiary hearing. First, it reasoned that "there is no double jeopardy issue," citing the Supreme Court's recent decision in *Gamble v. United States*, 139 S. Ct. 1960 (2019). ER

35. Second, it reasoned that "the state court had no authority to indicate to the federal government, specifically the Department of Justice, what they could or couldn't do with any federal court prosecution." ER 35.

After the motions were denied, Mr. Torres entered into a new plea agreement with the government. *See* CR 56. This agreement provided for a conditional guilty plea allowing Mr. Torres to appeal the denial of his motions. *See* CR 56, at 8.

V.

SUMMARY OF ARGUMENT

There are multiple Fourth and Fifth Amendment errors in this case that require either an evidentiary hearing or outright reversal. The first error was in the court's ruling on the arrest. The district court recognized an evidentiary hearing was necessary to resolve whether there was probable cause to arrest Mr. Torres based on the mistaken belief he was Adrian Torres. The court declined to hold an evidentiary hearing on that question only because it believed there was independent probable cause to arrest Mr. Torres for resisting arrest. This was a legal error which overlooked an important limitation on the California resisting arrest statute – that it is violated only when the officer is acting lawfully. This means there was probable cause to arrest Mr. Torres for resisting arrest only if there was probable cause for the arrest he was resisting. The court could not avoid that question the way it thought it could.

Next, the search of Mr. Torres's backpack was unlawful even if the arrest

was lawful. It was not justified as a search incident to arrest because the search incident to arrest exception is based on concerns for officer safety and/or preventing the destruction of evidence. Those concerns were not implicated here because, first, Mr. Torres had been handcuffed and shackled, and, second, the search was not conducted only after several intervening acts. Those intervening acts included Agent Carlos going to and from the vehicle, the questioning of Mr. Torres about why he had run, and at least some time spent waiting for additional officers.

The government's backup inevitable discovery argument also fails, because the government presented no evidence of an inventory search policy. The government bears the burden of showing there in fact would have been inevitable discovery. Where the inevitable discovery theory is an inventory search theory, the government must prove, first, there was an inventory search policy satisfying constitutional requirements, and, second, that policy would have required the search in question. The government proved neither of these things here.

There are also Fifth Amendment violations to be considered. Agent Carlos's question about why Mr. Torres had run was custodial interrogation because, first, it was express questioning, and, second, it was reasonably likely to elicit an incriminating response. The public safety exception does not apply because that exception applies only to narrowly tailored questions focused on a danger to public safety. The question here was a general question focused on any wrongdoing that might have led Mr. Torres to run. That general question was custodial interrogation not narrowly focused on public safety, and Mr. Torres's answer to the question must be suppressed.

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Hartmax Corp., 496 U.S. at 405).[5]

B. THE GUN FOUND IN THE SEARCH OF THE BACKPACK MUST BE SUPPRESSED REGARDLESS OF THE LAWFULNESS OF THE ARREST.

1. Reviewability and Standard of Review.

Defense counsel argued the search of Mr. Torres's backpack was an unlawful warrantless search. *See* ER 141. The government offered two arguments in response. Its primary argument was that the search was justified as a search incident to arrest. *See* ER 56. A backup argument was that the officers "would have inevitably discovered the firearm inside [Mr. Torres's] backpack during his booking inventory search once he had been transported back to the police department or the jail for processing." ER 57.

The district court did not clearly indicate which government theory it was adopting. *See* ER 36. It simply referenced "the questions just asked and answers." ER 36. Those questions had focused on the court's Penal Code § 148 theory for the arrest, and what would have followed inevitably from that, not the justification for the search once the arrest had been made.

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[5] It would have been an abuse of discretion to refuse to hold an evidentiary hearing even without the legal error. The court's exchange with the prosecutor recognized there was "an offer of proof 'sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the [arrest] are in question," *Supra* p. 16 (quoting *United States v. Dicesare*, 765 F.2d 890, 895-96 (9th Cir. 1985), and *United States v. Ledesma*, 499 F.2d 36, 39 (9th Cir. 1974)). Denying an evidentiary hearing when there is such a showing is an abuse of discretion even when the denial is not based on a legal error. *See Dicesare*, 765 F.2d at 895-96.

> He created probable cause for a 148 arrest.
>
> And once that occurred, they were going to find the gun whether he admitted it or not, whether they asked the question that could have been in violation of Miranda or not. They're going to find the gun. They're not going to suppress it.

ER 32. *See also* ER 33 ("[B]ecause of the probable cause based on what your client did, when he was told to stop, and the officers identified themselves as officers, then all of the things you're wanting to suppress would have been found anyway. It's inevitable discovery, is it not?").

Whether a search is justified as a search incident to arrest is reviewed de novo. *United States v. Smith*, 389 F.3d 944, 950 (9th Cir. 2004); *United States v. Vasey*, 834 F.2d 782, 785 (9th Cir. 1987). Whether the inevitable discovery exception applies is reviewed for clear error. *United States v. Lundin*, 817 F.3d 1151, 1157 (9th Cir. 2016).

2. The Search Incident to Arrest Exception Did Not Justify the Search Because the Search Took Place After Mr. Torres Had Been Handcuffed and Shackled and There Were Intervening Acts Including Agent Carlos Walking to and from the Vehicle, the Question About Why Mr. Torres Had Run, and at Least Some Delay.

a. Conceded facts establish that the search incident to arrest exception did not justify the search.

The search incident to arrest exception is one of "a few specifically established and well-delineated exceptions" to the Fourth Amendment warrant

requirement. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). It "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Gant*, 556 U.S. at 338. It allows the police to search only "the arrestee's person and the area 'within his immediate control' – . . . mean[ing] the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 339 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). This limitation "ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee may conceal or destroy." *Gant*, 556 U.S. at 339. "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.*

It would seem to follow that officers may not conduct a search incident to arrest once a defendant has been handcuffed and officers have taken control of the container at issue. *See Gant*, 556 U.S. at 343 (holding exception "authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"). Still, some courts have held this is not always the case. This Court so held in *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015). The defendant there had been ordered to the ground at gunpoint and handcuffed immediately upon being arrested. *See id.* at 1197. The court held the handcuffing was "significant, but not dispositive," *id.* at 1200, and pointed to "other countervailing facts that we must consider," *id.* at 1199.

> The search, both quick and cursory, was "spatially and temporally incident to the arrest." [*United States v.*] *Camou*, 773 F.3d [932,] 937 [(9th Cir. 2014)]. It occurred immediately after Officer Knight arrived on the scene, as Cook was being taken into custody. Cook's backpack was right next to him. And, within 20 to 30 seconds, as soon as Officer Knight determined that the backpack contained no weapons, he immediately stopped the search. The brief and limited nature of the search, its immediacy to the time of arrest, and the location of the backpack ensured that the search was "commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that [Cook] might conceal or destroy." *Gant*, 556 U.S. at 339.

Cook, 808 F.3d at 1199-1200.

In other cases in which the defendant was handcuffed – collected in *Camou* – the Court has held searches were not justified by the search incident to arrest exception. The Court explained in *Camou* that there are two questions: (1) "was the searched item 'within the arrestee's immediate control when he was arrested'"; and (2) "did 'events occurring after the arrest but before the search ma[k]e the search unreasonable'?" *Camou*, 773 F.3d at 938 (quoting *United States v. Maddox*, 614 F.3d 1046, 1048 (9th Cir. 2010), and *United States v. Turner*, 926 F.2d 883, 887 (9th Cir. 1992)). The answer to the second question, which the Court labeled the "contemporaneity requirement," depends on whether the arrest and search are "separated in time or by intervening acts." *Camou*, 773 F.3d at 938. The Court noted that in some cases, it has relied on the number of minutes that passed, and, in other cases, it has relied on "a more impressionistic sense of the flow of events that begins with the arrest and ends with the search." *Id.* (quoting *United States v. Caseres*, 533 F.3d 1064, 1073 (9th Cir. 2008)).

In *Camou*, there was both a lengthy time separation of an hour and 20 minutes and intervening acts that made the search incident to arrest exception

inapplicable. *Id.*, 773 F.3d at 939. The intervening acts included (1) restraint of the arrestees with handcuffs; (2) movement of the arrestees from a checkpoint area to security offices; (3) processing of the arrestees; (4) moving and inventorying the cell phone which was later searched; and (5) multiple interviews of the arrestees. *Id.*

Camou also discussed three prior cases in which there had been lesser intervening acts that made a search incident to the arrest improper. In *United States v. Vasey*, 834 F.2d 782 (9th Cir. 2014), the defendant had been handcuffed, there had been a 30 to 45 minute delay in the search, and the officers had several conversations with the defendant between the arrest and the search. See *Camou*, 773 F.3d at 939 (summarizing *Vasey*). In *Caseres*, there was an unquantified delay, characterized by the district court as "well after," and intervening events of police questioning of the defendant, conversations between police, and police moving back and forth between the site of the arrest and the car which was searched. *See Camou*, 773 F.3d at 938 (summarizing *Caseres*). In *Maddox*, just handcuffing the defendant and placing him in a patrol car were held to be sufficient intervening acts. *See Camou*, 773 F.3d at 938-39 (summarizing *Maddox*).

It is *Camou*, *Maddox*, *Caseres*, and *Vasey* which should be treated as controlling here, not *Cook*. To begin, *Cook* should be read narrowly to apply only when there is a search of an item right next to the defendant immediately after handcuffing with no intervening events. Even on these facts, the Court has characterized the question as a "close call." *See United States v. Gordon*, 694 Fed. Appx 556, 557 (9th Cir. 2017) (unpublished) (characterizing search on

comparable facts as "a close call"). *See also id.* at 558 (Paez, J., concurring) ("I would reverse the denial of the motion to suppress, in accordance with *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) and our decision in *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014), if not for *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015)."). It at least creates a tension with *Gant*, if not an outright conflict, to allow a search when the defendant is restrained with handcuffs. It would create even more of a tension to allow such a search when the defendant is restrained with both handcuffs and leg shackles, as Mr. Torres was. A defendant who is restrained with both handcuffs and leg shackles is even less likely to break away, open a backpack, and grab something out of the backpack.[6]

Further, facts conceded in the police reports establish that there were several intervening events similar to those in *Camou* and the other cases it summarizes. First, there was a delay in conducting the search. The officers did not conduct the search immediately like the officers in *Cook*, but were "waiting for additional units to arrive." ER 157 ("While waiting for additional units to arrive . . ."). While the length of the delay is unclear, there was a delay.

Second, one of the officers, Agent Carlos, was back and forth between Mr. Torres and another location, namely, the vehicle. The agent went to his vehicle to get the leg shackles after Mr. Torres was handcuffed. *See* ER 157 ("SA Carlos then retrieved a pair of leg shackles from the vehicle and placed them on the suspect's ankles."). He was back at the vehicle at the time Sergeant Wilkin found

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[6] *Cook* cannot be reconsidered by just the panel assigned to this case, but it should be reconsidered by the Court en banc if the panel views it as controlling. As Judge Paez implied in *Gordon*, *Cook* creates a tension, if not an outright conflict with *Camou* and *Gant*.

the gun and Mr. Torres said, "I'm gonna smoke you." *See* ER 157 ("I then called to SA Carlos who was standing at the back of the vehicle.").

Third, there was conversation and police questioning. Initially, there was conversation in which Mr. Torres was cursing at the officers, who may or may not have answered. Then there was the questioning by Agent Carlos about why Mr. Torres had run and Mr. Torres's answer that he had a gun. This last exchange is particularly noteworthy, because it qualifies as custodial interrogation, *see infra* pp. 35-38, and suggests an investigative purpose. The officer safety purpose that justifies a search incident to arrest had been superseded by the investigative purpose of finding out why Mr. Torres had run.

These intervening events conceded in the police reports distinguish *Cook* and make the present case more like *Camou*, *Maddox*, *Caseres*, and *Vasey*. The search cannot be found to be a search incident to arrest based on just these conceded facts.

b. If the conceded facts are not sufficient, there are ambiguous facts which must be resolved in an evidentiary hearing.

If the conceded facts just discussed – that Mr. Torres was placed in both handcuffs and leg shackles; that there was a delay after the arrest; that one of the officers moved back and forth; and that there was police questioning that rises to the level of custodial interrogation – are not sufficient to distinguish *Cook* and bring the case closer to the other cases, there are other relevant facts which must be clarified. That requires an evidentiary hearing.

First, an evidentiary hearing would clarify the length of the delay in conducting the search. Did it approach the 30 to 45 minute delay in *Vasey* that this Court held vitiated the search incident to arrest rationale? Or was it a minimal delay that would undercut the exception to a lesser extent?

Second, to the extent the officers' subjective purpose – and the reasonableness of that purpose – might be relevant, *see Camou*, 773 F.3d at 936 (noting agent "did not assert that the search was necessary to prevent the destruction of evidence or to ensure his or anyone else's safety"); *Vasey*, 834 F.2d at 787 (noting officers "exhibited no fear nor testified to any fear that Vasey would try to get out of the police vehicle to grab a weapon or evidence"), an evidentiary hearing would shed light on that. Is there any evidence of an officer safety purpose after Mr. Torres was restrained in handcuffs and leg shackles, let alone a *reasonable* officer safety purpose?[7]

Third, an evidentiary hearing would shed light on where the backpack was in relation to Mr. Torres and the officers at the time the officers searched it. Was the backpack right next to Mr. Torres after he was handcuffed and shackled, like the backpack in *Cook* after the defendant there was handcuffed (but not placed in leg shackles)? Or was it some feet away, and were the officers between Mr. Torres and the backpack? *Compare United States v. Knapp*, 917 F.3d 1161, 1169 (10th Cir. 2019) (search of purse not justified as search incident to arrest when "the purse was closed and three to four feet behind [the defendant], and officers

[7] The police reports indicate there were safety concerns that led the officers to knock Mr. Torres down, pin him to the ground, and place him in handcuffs and leg shackles, but it is difficult to believe those concerns reasonably continued after Mr. Torres had been restrained.

had maintained exclusive possession of it since placing her in handcuffs"), *with United States v. Shakir*, 616 F.3d 315, 318-19 (3d Cir. 2010) (search of bag justified as search incident to arrest even when defendant handcuffed because defendant was standing and "his bag was right next to him"; distinguishing *United States v. Myers*, 308 F.3d 251 (3d Cir. 2002), where defendant was lying on floor and bag was three feet away and zipped shut). Assuming Mr. Torres could somehow squirm and wriggle to another spot while on his stomach in handcuffs and leg shackles with an officer holding him down, how far did he have to squirm and wriggle?

The defense believes the facts conceded in the officer's reports are sufficient to distinguish *Cook* and make the other cases controlling. If they are not sufficient, there should be an evidentiary hearing to clarify the facts that remain unclear.

3. The Government Did Not Carry Its Burden of Proving Inevitable Discovery Through an Inventory Search Because the Government Presented No Evidence of an Inventory Search Policy.

Inevitable discovery is an exception to the exclusionary rule. *See Nix v. Williams*, 467 U.S. 431 (1984). It applies "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Id.* at 444, *quoted in United States v. Ruckes*, 586 F.3d 713, 718 (9th Cir. 2009). This requires more than mere speculation about what might have happened. There must be "historical facts

capable of ready verification or impeachment." *Nix*, 467 U.S. at 444-45 n.5, *quoted in United States v. Young*, 573 F.3d 711, 722 (9th Cir. 2009). As summarized in *Ruckes*:

> [T]he government is still required to prove, by a preponderance of the evidence, that there was a lawful alternative justification for discovering the evidence. *Nix*, 467 U.S. at 444. "[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Id.* at 444 n.5. . . . [T]he district court must conduct a case-by-case inquiry to determine whether a lawful path to discovery – such as inevitability – exists in each case.

Ruckes, 586 F.3d at 719 (citations omitted)

There are cases that have found this burden to be carried on a theory like that advanced by the government here – that there would have been a valid inventory search. *See, e.g., United States v. Peterson*, 902 F.3d 1016, 1019-20 (9th Cir. 2018) ("The officers testified that Peterson's backpack would have been searched during the booking process, written policies supported their testimony, and the policies were sufficiently detailed regarding the situation at hand."); *United States v. Antonio*, 386 Fed. Appx. 678, 680 (9th Cir. 2010) (unpublished) (noting "the officers' testimony that property taken into police custody is routinely inventoried for any weapons before transport"); *Ruckes*, 586 F.3d at 719 (noting officer testimony at suppression hearing "that because no one was available to remove the car from the side of Interstate Highway 5, it was standard procedure to impound it" and "[a]n inventory search would have necessarily followed"); *United States v. Mancera-Londono*, 912 F.2d 373, 375-76 (9th Cir. 1990) (describing agent testimony about DEA policy to return rental car to rental agency, complete inventory of car before return, and search any containers found in vehicle); *United*

States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986) (noting government "showed that the cocaine would have been discovered through a lawful inventory procedure"). This requires evidence of two things, however. First, there must be evidence of an inventory search policy that satisfies Fourth Amendment requirements, which include "standardized criteria, or established routine, [that] regulate the opening of containers found during inventory searches," *Florida v. Wells*, 495 U.S. 1, 4 (1990); *see also Mancera-Londono*, 912 F.2d at 375 (noting policy must require that "discretion [must be] exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity" (quoting *Colorado v. Bertine*, 479 U.S. 367, 374 n.6 (1987))). Second, there must be evidence the policy would require the search in question. *See Mancera-Londono*, 912 F.2d at 375-76 (describing testimony about policy requiring search of all containers found in vehicle). *Compare United States v. Perryman*, 716 Fed. Appx. 594, 596 (9th Cir. 2017) (unpublished) (rejecting inevitable discovery based on inventory search where policy would not necessarily have required search).

Application of the inevitable discovery exception based on an inventory search policy has been rejected where such evidence has not been presented. One example is *Perryman*, where the government attempted to prove the existence of a policy, but failed because the state law did not always authorize the impoundment and inventory search the government claimed would have taken place. *See id.*, 716 Fed. Appx. at 596. Another example may be found in *United States v. Avendano*, 373 Fed. Appx. 683 (9th Cir. 2010) (unpublished), where the government "concede[d] that it failed to meet its burden of proving a standardized

local procedure and compliance with that procedure." *Id.* at 685. A third example may be found in *United States v. Gaines*, 918 F.3d 793 (10th Cir. 2019), where "the government presented no evidence of standardized criteria for impoundment [of a vehicle]," and there was no "proof of a community-caretaking rationale" for impoundment. *Id.* at 801.

In the present case, the government did not present evidence like that in the cases where application of the inevitable discovery exception has been upheld. It did not even present deficient evidence like it presented in *Perryman*. It presented no evidence at all, as in *Avendano* and *Gaines*. The government was apparently asking the district court to simply assume there was an inventory policy and simply assume the policy would have permitted seizure and search of Mr. Torres's backpack. That is, as in *Young*, "nothing more than speculation – not the 'demonstrated historical facts capable of ready verification' required by *Nix*." *Young*, 573 F.3d at 723 (quoting *Nix*, 467 U.S. at 444-45 n.5).[8]

* * *

[8] While inevitable discovery findings are reviewed under the more deferential clear error standard, *see supra* p. 23, the district court did not make a clear finding to give deference to. The district court did use the words, "inevitable discovery," at one point, *see* ER 33, but it is not clear the court was referring to an eventual inventory search rather than a search incident to arrest at the scene. In any event, the government's complete failure to present any evidence at all makes any inevitable discovery finding the district court might have made clearly erroneous.

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A P P E N D I X 6

CA No. 20-10112

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAUL ADRIAN TORRES, Defendant-Appellant.	D.C. No. 1:18-cr-00147-DAD

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HONORABLE DALE A. DROZD
United States District Judge

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CA No. 20-10112

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAUL ADRIAN TORRES, Defendant-Appellant	D.C. No. 1:18-cr-00147-DAD

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Defendant-appellant, Raul Adrian Torres, petitions for rehearing en banc so the Court may reconsider search incident to arrest and harmless error case law – *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015), and *United States v. Lustig*, 830 F.3d 1075 (9th Cir. 2016) – that the panel and/or a majority of the panel viewed as controlling in this case. The Court should review conflicts between this case law and other authority pointed out by Judge Paez, concurring in *United States v. Gordon*, 694 Fed. Appx. 556 (9th Cir. 2017) (unpublished), and Judge Watford, concurring in *Lustig*. Judge Paez pointed out that *Cook*, which approved a search very like that in the present case – the search of a defendant's backpack as a search incident to arrest even after he had been handcuffed – conflicts with *Arizona v. Gant*, 556 U.S. 332 (2009), and *United States v. Camou*, 773 F.3d 932

(9th Cir. 2014). Judge Watford pointed out that application of harmless error analysis to a conditional guilty plea conflicts with the language of the conditional plea rule, Rule 11(a)(2) of the Federal Rules of Criminal Procedure. There is also Judge McKeown's dissent in the present case, which highlights the panel majority's misapplication of the harmless error standard and highlights the need to clarify the standard if *Lustig* is not overruled.

Respectfully submitted,

DATED: May 6, 2021

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

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I.

INTRODUCTION

There are two errors in the precedent the panel in the present case treated as controlling and a need to clarify precedent the panel majority interpreted incorrectly. First, the case of *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015), which held a search like that here – of a backpack after the defendant had been handcuffed – is a lawful search incident to arrest, conflicts with Supreme Court and other Ninth Circuit case law. That case law allows a search incident to arrest only when the arrestee is both unsecured and close enough to the place or object searched to access it.

Second, the application of harmless error analysis to conditional guilty pleas allowed in *United States v. Lustig*, 830 F.3d 1075 (9th Cir. 2016), should be reconsidered, because (1) it conflicts with the plain language of the conditional guilty plea rule; (2) there are other mechanisms for preserving harmless error arguments; and (3) a harmless error inquiry is impractical where there has been no trial. Even if harmless error analysis does apply, the panel majority here misapplied it, as Judge McKeown pointed out in her dissent on this point. The Court should clarify the extremely demanding standard in a conditional guilty plea case, clarify that the focus is the effect on the defendant's decision to plead guilty, and hold there must be objective manifestation of that effect, not appellate court speculation.

II.

STATEMENT OF CASE

A. ARREST, SEARCH, AND QUESTIONING.

On March 15, 2018, a Fresno Police Department detective who was monitoring social media for gang members observed a video showing Mr. Torres and another man pointing a gun and making gang signs. *See* ER 147-48. He mistakenly identified Mr. Torres as another man who had a prior felon in possession of ammunition conviction and outstanding warrant. *See* ER 62, 148. Officers surveilling the house where the video was recorded observed Mr. Torres and another man leave. *See* ER 155-56. Mr. Torres fled when the officers tried to detain the men, the surveilling officers caught him, and the officers handcuffed Mr. Torres's hands behind him and retrieved leg shackles from their vehicle which they placed on his legs. *See* ER 156-57.

While waiting for additional units, one of the officers asked Mr. Torres why he had run, and Mr. Torres replied, "Cause I have a gun." ER 157. The other officer then opened the backpack and found a gun. ER 157. Another officer who had responded placed Mr. Torres in a patrol car, asked him for biographical information, and discovered he was not the man with the prior felon in possession of ammunition conviction, though he was on felony probation. *See* ER 161. The original detective returned, read Miranda warnings to Mr. Torres, and questioned him. ER 150. Mr. Torres made additional statements about the gun, including that he was in possession of it, knew it had obliterated serial numbers, and needed

it for protection. *See* ER 150-51.

B. INDICTMENT, MOTIONS, AND CONDITIONAL GUILTY PLEA.

Mr. Torres was indicted for felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). *See* CR 10; ER 162-63 (superseding indictment adding allegation required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019), of knowledge convicted of crime punishable by imprisonment exceeding one year). He eventually filed several motions, including a motion to suppress which made multiple Fourth and Fifth Amendment arguments. *See* ER 134-61. One of the arguments was that the search of the backpack was not a lawful search incident to arrest because it took place after Mr. Torres was handcuffed. *See* ER 141. Another argument was that the "Cause I have a gun" statement in response to the why did you run question should be suppressed because it was in response to questioning without Miranda warnings. *See* ER 141-42. Defense counsel also argued there needed to be an evidentiary hearing. *See* ER 4.

The district court denied the motion without an evidentiary hearing. It focused largely on whether there was probable cause to arrest Mr. Torres despite the mistaken identification. *See* ER 22-24, 27-33. It seemed to recognize the why did you run question was interrogation, *see* ER 25-26, but suggested the statement did not matter because the officers would have found the gun anyway, *see* ER 28, 32. The court did not comment on the other issues. *See* ER 36 (simply "incorporat[ing] its argument in the questions just asked and answers" and denying motion).

Mr. Torres subsequently agreed to enter a conditional guilty plea allowing him to appeal denial of his motions. *See* CR 56, at 8.

C. APPEAL AND DISPOSITION.

Mr. Torres raised his Fourth and Fifth Amendment claims again on appeal. A panel of this Court affirmed in a memorandum disposition.[1] It upheld the search of the backpack as a search incident to arrest, holding, "This case is controlled by *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015), which held that the search incident to a lawful arrest exception applied even though the individual searched was on the ground in handcuffs when his backpack was searched nearby." Memorandum, at 4. Regarding Mr. Torres's "'Cause I have a gun" statement, a panel majority held any error in admitting the statement[2] was harmless, pointing to "the already substantial evidence that Torres knew his possession of a gun was illegal." Memorandum, at 6.

Judge McKeown dissented on the latter point.[3] She agreed with a defense argument that the statement tended to establish the additional element recently recognized in *Rehaif v. United States*, 139 S. Ct. 2191 (2019) – that Mr. Torres

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[1] The memorandum and accompanying dissent are attached as an appendix and cited as "Memorandum" and "Memorandum Dissent."

[2] It assumed without deciding that the issue did not come within the "public safety" exception to *Miranda*. *See* Memorandum, at 4.

[3] Judge McKeown also decided the underlying issue that was simply assumed by the majority – that the questioning did not come within the "public safety" exception. *See* Memorandum Dissent, at 1-2.

knew he was a person with a felony conviction. *See* Memorandum Dissent, at 4-5; Appellant's Reply Brief, at 9-10. Judge McKeown also recognized the "high bar" for harmless error in a conditional guilty plea case, requiring there be not even a "reasonable possibility" the erroneously admitted evidence "contributed to [the] decision to plead guilty," which the government will "*rarely, if ever*," be able to show. Memorandum Dissent, at 3 (quoting *United States v. Lustig*, 830 F.3d 1075, 1089 (9th Cir. 2016), and adding emphasis).

III.

ARGUMENT

A. THE COURT SHOULD GRANT EN BANC REVIEW BECAUSE THE *COOK* OPINION THE PANEL DEEMED CONTROLLING CONFLICTS WITH BOTH THE SUPREME COURT'S AND THIS COURT'S REITERATION OF THE LIMITS OF THE SEARCH INCIDENT TO ARREST EXCEPTION.

1. The Court Should Overrule *Cook*.

The panel did not independently analyze the question of whether a backpack can be searched incident to arrest even after an arrestee had been handcuffed. It instead deemed *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015), controlling. There is disagreement about whether *Cook* was correctly decided, however. Judge Paez expressed that disagreement in the later case of *United States v. Gordon*, 694 Fed. Appx. 556 (9th Cir. 2017) (unpublished), where a duffel bag was searched

after the defendant was handcuffed, *see id.* at 556. Judge Paez stated that, but for *Cook*, he would have reversed in *Gordon*, "in accordance with *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), and our decision in *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014)." *Gordon*, 694 Fed. Appx. at 558 (Paez, J., concurring).

Judge Paez is correct that *Cook* was wrongly decided. The search incident to arrest exception, as explained in *Chimel v. California*, 395 U.S. 752 (1969), allows a search of only "the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The underlying purpose is "protecting arresting officers and safeguarding any evidence of the offense of arrest" by "'remov[ing] any weapons [the arrestee] might seek to use'" and "'prevent[ing] [the] concealment or destruction' of evidence." *Gant*, 556 U.S. at 339 (quoting *Chimel*, 395 U.S. at 763). "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 556 U.S. at 339.

Gant reemphasized *Chimel*'s rationale in reconsidering *New York v. Belton*, 453 U.S. 454 (1981). The Court expressed concern that lower courts' broad reading of *Belton* to allow searches of vehicles incident to arrest even when the arrestee had been fully restrained "untether[ed] the rule from the justifications underlying the *Chimel* exception." *Gant*, 556 U.S. at 43. "Accordingly," the Court "reject[ed] this reading of *Belton* and [held] that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only

when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. (Footnote omitted.)" *Gant*, 556 U.S. at 343. The search in *Belton* was permissible only because there was "a single officer confronted with four unsecured arrestees." *Gant*, 556 U.S. at 344.

This Court recognized the reasoning of *Gant* applies to non-vehicle searches in *Camou*, where the item searched was a cell phone. The Court noted that "the first requirement" for a search incident to arrest is the "immediate control" requirement. *Id.*, 773 F.3d at 937. The Court then explained that requirement and its purposes, quoting from *Gant*:

> The "immediate control" requirement ensures that a search incident to arrest will not exceed the rule's two original purposes of protecting arresting officers and preventing the arrestee from destroying evidence: "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 556 U.S. at 339. (Footnote omitted.)

Camou, 773 F.3d at 937.

The *Cook* case distinguished *Gant* on the ground that the defendant in *Gant* was locked inside a patrol car while the defendant in *Cook* was "easily within 'reaching distance'" of his backpack. *Cook*, 808 F.3d at 1200. But this is not a sufficient distinction. The reason the search in *Gant* was not a proper search incident to arrest was that the arrestees there "had been handcuffed and secured" so they could not access their vehicle. *Id.*, 556 U.S. at 344. *Gant* stated that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured *and* within reaching distance of the passenger compartment at the time of the search. (Footnote omitted.)" *Gant*, 556 U.S. at 343 (emphasis added). "Within reaching distance" does not

matter if the arrestee is secured so that he cannot reach.

The defendant in *Cook* and Mr. Torres were secured – the *Cook* defendant with handcuffs, and Mr. Torres with both handcuffs and leg irons. Secured in this fashion, they could not reach into the backpacks. Reaching into a backpack or other container and accessing its contents when one's hands are handcuffed behind one's back – and, in Mr. Torres's case, one is shackled with leg irons as well – is no more physically possible than accessing the vehicle was in *Gant*.

The Court should therefore overrule *Cook*. It should recognize, as did Judge Paez, that *Gant* and *Camou* preclude a search incident to arrest when the defendant is handcuffed – and, in Mr. Torres's case, shackled with leg irons as well.

2. The Court Should Strictly Limit *Cook* if It Does Not Overrule It.

If the Court does not overrule *Cook*, it should strictly limit it to cases where there is a factual finding or undisputed facts showing the backpack or other container is right next to the arrestee, as it apparently was in *Cook* and *Gordon*. The Third Circuit has drawn this distinction. *See United States v. Shakir*, 616 F.3d 315, 318-19 (3d Cir. 2010) (search of bag justified as search incident to arrest even when defendant handcuffed because defendant was standing and "his bag was right next to him"; distinguishing *United States v. Myers*, 308 F.3d 251 (3d Cir. 2002), where defendant was lying on floor and bag was three feet away and zipped shut).

This would require reversal in the present case – or at least remand for an

evidentiary hearing. There was no factual finding of where the backpack was while Mr. Torres was lying on the ground in handcuffs and leg irons. There was not even any evidence of where the backpack was, either disputed or undisputed.

B. THE COURT SHOULD GRANT EN BANC REVIEW TO RECONSIDER THE APPLICABILITY OF HARMLESS ERROR ANALYSIS TO A CONDITIONAL GUILTY PLEA AND CLARIFY THE EXTREMELY DEMANDING STANDARD IF IT CONTINUES TO ALLOW HARMLESS ERROR ANALYSIS.

A second reason to grant en banc review in this case is to reconsider the applicability of harmless error analysis to conditional guilty pleas and clarify the standard if the Court continues to allow harmless error analysis. The Court did hold in *United States v. Lustig*, 830 F.3d 1075 (9th Cir. 2016), that harmless error analysis applies, though with disagreement from Judge Watford, *see id.* at 1092-94 (Watford, J., concurring). But the Court set an extremely demanding standard, which was recognized in the present case only by Judge McKeown. The government must show there is no "reasonable possibility" that the erroneously admitted evidence "contributed to [the] decision to plead guilty." *Id.* at 1089, *quoted in* Memorandum Dissent, at 3. And because "only the defendant is in a position to evaluate the impact of a particular erroneous refusal to suppress evidence," *Lustig*, 830 F.3d at 1089, *quoted in* Memorandum Dissent, at 6, "an appellate court will *rarely, if ever*, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision [to plead

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARLIN LEE GOUGHER, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 3rd day of August, 2021, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was served on the Solicitor General of the United States, by electronic mail, at supremectbriefs@usdoj.gov, as consented to by the Solicitor General's office and authorized by this Court's order issued April 15, 2020 in light of the ongoing public health concerns relating to COVID-19.

Respectfully submitted,

August 3, 2021

s/ Carlton F. Gunn
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