No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RODOLFO RODRIGUEZ, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari

To The United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JERRY A. WALZ, Counsel of Record For Petitioner
New Mexico Bar No. 2846
WALZ AND ASSOCIATES, P.C.
133 EUBANK BLVD. NE
ALBUQUERQUE, NEW MEXICO 87123
TELEPHONE: (505) 275-1800
FACSIMILE: (505) 275-1802
E-MAIL: JERRYAWALZ@WALZANDASSOCIATES.COM

QUESTIONS PRESENTED

1. What is the appropriate standard to be applied in determining whether an encounter with police was consensual or an investigative stop?
2. Whether a law enforcement officer can continue to pursue a consensual encounter after an individual has attempted to terminate the contact?
3. What is the appropriate appellate standard of review for determining whether an individual has voluntarily given consent to a law enforcement officer to continue an encounter and to conduct a search and seizure?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodolfo Rodriguez, Jr. respectfully petitions for a writ of certiorari to be granted to review the judgement of the United States Court of Appeals for the Tenth Circuit, in Case No. 20-2173.

LIST OF ALL PROCEEDINGS

1. Proceeding in the United States District Court for the District of New Mexico; Docket No. 1:18-CR-01568 WJ; Case Caption, United States of America, Plaintiff, vs. Rodolfo Rodriguez, Jr., Defendant; Date of Entry of Judgment, December 1, 2020.
2. Proceeding in the United States Court of Appeals for the Tenth Circuit; Docket No. 20-2173; Case Caption, United States of America, Plaintiff-Appellee vs. Rodolfo Rodriguez, Jr., Defendant-Appellant; Date of Entry of Judgment, December 17, 2021.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED

The opinions of the United States District Court for the District of New Mexico are published and can be found at *United States v. Rodriguez*, 472 F. Supp. 3d 1098 (D.N.M. 2020). The opinion of the United States Court of Appeals for the Tenth Circuit is unpublished, but is available at *United States v. Rodriguez*, No. 20-2173, 2021 WL 5986841 (10th Cir. 2021 December 17, 2021).

JURISDICTION

The United States District Court for the District of New Mexico had original jurisdiction over Mr. Rodriguez's criminal case pursuant to 18 U.S.C. § 3231. The District Court entered judgment on December 1, 2020. The Court of Appeals for the Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and entered judgment against Mr. Rodriguez on December 17, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL PROVISION

This case involves the principles and protections of the Fourth Amendment which provides:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

In February 2018, Rodolfo Rodriguez Jr. was travelling on an AMTRAK train that had recently arrived in Albuquerque. [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 12]. Defendant Rodriguez (hereinafter "Defendant Rodriguez" or "Mr. Rodriguez") had boarded the train in Los Angeles, [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 134:18-19] and the train typically arrives in Albuquerque at 11:20, stopping for 28 minutes before departing at 11:48 [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 57:23-25].

While the train was stopped in Albuquerque, Mr. Rodriguez was approached by Special Agent Jarrell W. Perry, (hereinafter "Agent Perry" or "SA" Perry) a DEA Agent who was assigned to conduct "consensual encounters" with passengers, and to ask passengers for permission to examine their belongings for contraband. [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 56:16-25].

When Agent Perry approached Mr. Rodriguez, he identified himself as a police officer and asked "May I speak with you for a moment?" [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 26]. Mr. Rodriguez was in his seat with his eyes closed and maintains that he was sleeping at the time. [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 188:12]. Agent Perry testified that Mr. Rodriguez was only pretending to be asleep, had his eyes partially open, and was looking at Agent Perry. [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 65:3-7]. It took multiple attempts at initiating a conversation before Mr.

Rodriguez responded to Agent Perry. [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 82:25-83:10].

Mr. Rodriguez has maintained that his immediate response upon hearing Agent Perry requesting to speak with him was "No. I'm asleep. Here's my ticket." [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 14].

Special Agent Perry claims that, at the time of the encounter, he heard only "Here's my ticket." However, upon reviewing the audio tape to verify the transcript, Agent Perry at least admitted that he recognized the words "I'm asleep." [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 78:24-79:1]. He claims that he did not hear the word "no" even upon review of the recording. [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 76:15-18].

After receiving Mr. Rodriguez's ticket, Special Agent Perry said "Thank you, sir. Do you have ID with you, Mr. Rodriguez? May I see that, please?" [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 88:23-89:18].

Mr. Rodriguez complied with the request and gave his identification to Agent Perry. [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 89:16-18].

After viewing Mr. Rodriguez's identification, Special Agent Perry asked Mr. Rodriguez, "Do you have luggage on the train with you today, sir? I see you're shaking your head side to side. Does that mean no?" Mr. Rodriguez replied, "No, sir." [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 92:25-93:5].

Agent Perry testified that he pointed to a backpack next to Mr. Rodriguez and asked, "How about this bag here; is this your bag here?" Mr. Rodriguez responded "no." [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 67:3-15]. Mr. Rodriguez maintains that Agent Perry was pointing to a bag that was in the luggage rack at the time. [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 154:6-7].

Agent Perry asked again, "This is not your bag here?" Mr. Rodriguez claims he then pointed to the backpack next to him and said "This is my bag right here. This is all my bag right here." [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 223:16-19].

Agent Perry then asked for consent to search Mr. Rodriguez's backpack, and Mr. Rodriguez told Agent Perry that "There's nothing in there, okay?" and turned the backpack upside-down to demonstrate that it was empty. [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 16, 29]. A large, plastic laundry bag was also next to Mr. Rodriguez. [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 15]. The government contends that this bag fell out of the backpack. [Id.] Mr. Rodriguez maintains that the plastic laundry bag was next to him underneath the backpack before he turned over the backpack. [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 16].

Agent Perry asked for consent to search Mr. Rodriguez's bag, and Mr. Rodriguez said "Go for it." [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 29]. The government contends that this refers to the plastic laundry bag.

[Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 28-29]. Mr. Rodriguez contends that his consent only extended to the backpack. [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 42:16-19].

The District Court found that Agent Perry searched the plastic laundry bag and found vials containing a leafy green substance and a gummy bear, an edible cannabis product obtained from a medical dispensary. [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 15]. The testimony from Mr. Rodriguez that the cannabis was obtained from a medical dispensary was never challenged at the suppression hearing, and Rodriguez was never charged with possession of any amount of marijuana. Special Agent Perry's testimony concerning how he came to observe the plastic vials is inconsistent and includes three separate versions: (1) that Mr. Rodriguez opened the white plastic laundry bag to reveal them [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 96:1-6], (2) that Agent Perry opened the white plastic laundry bag to reveal them [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 96:10-12], and (3) that they fell out of Mr. Rodriguez's backpack when he shook it and emptied out the contents. [Grand Jury Testimony, Defendant's Ex. 12, May 8, 2018, Pet. App. 232:14-15]

Defendant Rodriguez opened up one of the closed vials and proceeded to eat the last gummy bear that was in that vial. Special Agent Perry told Mr. Rodriguez to stand up, and Officer Seth Chavez, Agent Perry's partner, who had been standing in back of the car, approached at that point. [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 15]

Mr. Rodriguez stated that the plastic laundry bag was not in plain view, but rather was on the seat next to him lying underneath the backpack and that the vials were under the plastic laundry bag. [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 16]. Defendant testified that he handed Agent Perry the empty backpack but Perry went for the plastic laundry bag and picked it up so that the vials were exposed. [Id.]

Agent Perry ordered Defendant to stand up and place his hands on the luggage rack above the seats so a pat down could be performed. [Id.] Defendant refused, saying he wanted to sleep. [Id.] Agent Perry again ordered Defendant to stand up and informed him that "I'm not asking you" noting that his partner Officer Chavez was standing by to assist. [Id.]

Defendant believed he had to comply with Agent Perry's order to stand up so a pat down search could be performed. [Id.] Agent Perry then conducted a pat-down search and as a result felt a large, round-shaped bundle underneath the Defendant's pants and in between his legs. [Id.] Agent Perry handcuffed the Defendant and escorted him off the train. [Id.]

This entire encounter took place within the span of three minutes and forty-four seconds, per the timing of the audio recording.

In a private area, off the train, Agent Perry opened up the zipper to Defendant's pants and saw a rolled-up bundle of U.S. currency attached to Defendant's underwear with a rubber band. [Id.] He also observed plastic tape attached to the Defendant's person holding a round-shaped bundle between Defendant's legs. [Id.]

Upon arriving at the offices of the Drug Enforcement Administration, SA Perry field-tested the contents of the round-shaped bundle and determined that the bundle contained approximately 1.10 gross kilograms of a mixture containing heroin. [Id.] The bundle of cash secured to the Defendant's underwear was likewise seized, which totaled $2,300.00 in U.S. currency. [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 17].

On May 14, 2018, Mr. Rodriguez was indicted and charged with one count of unlawfully, knowingly and intentionally possessing with intent to distribute a controlled substance, 1 kilogram and more of a mixture and substance containing a detectable amount of heroin. [Redacted Indictment, dated 05/09/2018, Pet. App. 236].

On May 8, 2018, during testimony before the Grand Jury, Agent Perry testified that he "asked for and received permission to speak with" Mr. Rodriguez. [Memorandum Opinion and Order, dated 07/15/2020, Pet. App. 35].

On December 12, 2018, Mr. Rodriguez filed his Motion to Suppress, arguing that the he did not consent to the encounter with Agent Perry and that all evidence obtained as a result of the encounter should be suppressed. [Motion to Suppress, dated 12/21/2018, Pet. App. 237-242].

On August 9, 2019, Mr. Rodriguez filed his Motion to Dismiss Indictment, arguing that he was prejudiced by Special Agent Perry's Grand Jury testimony in which he described the encounter as consensual and that the Indictment should be dismissed. [Motion to Dismiss Indictment, dated 08/09/2019, Pet. App. 243-247].

On June 26, 2020 a hearing was held on both motions. [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 44].

The District Court denied the Motion to Suppress and the Motion to Dismiss Indictment on July 15, 2020, [Memorandum Opinion and Order, dated 07/15/20, Pet. App. 12] and likewise denied the request for production of Agent Perry's presumed file to verify that he was in fact a DEA Agent at the time of the encounter. [Memorandum Opinion and Order, dated 12/16/2019, Pet. App. 248-253] At the suppression hearing SA Perry testified he was a DEA Agent and displayed his badge [Transcript of June 26, 2020 Motion Hearing, dated 08/05/20, Pet. App. 100:24-101:7].

Mr. Rodriguez entered into a Conditional Plea Agreement on August 10, 2020. [Conditional Plea Agreement, dated 08/10/2020, Pet. App. 254-263]. [1] Judgment was entered on December 1, 2020, and Defendant was sentenced to a term of imprisonment for 46 months, to be followed by a term of supervised release for three years. [District Court Judgment, dated 12/01/2020, Pet. App. 37-43].

Mr. Rodriguez appealed the district court's order denying his motion to suppress. The Tenth Circuit entered its Order and Judgment affirming the district court on December 17, 2021. [Tenth Circuit Order and Judgment, dated 12/17/2021, Pet. App. 1-11].

[1] Rodolfo Rodriguez Jr., *pro se*, filed a Motion to Vacate [Motion to Vacate Sentence, dated 11/24/2020, Pet. App. 264-305] pursuant to 28 U.S.C. § 2255 after the sentencing hearing but prior to entry of Judgment. The District Court dismissed the motion, without prejudice, as premature on March 31, 2021 [Memorandum Opinion and Order, dated 03/31/2020, Pet. App. 306-308].

REASONS FOR GRANTING THE PETITION

I. There are unsettled questions regarding the appropriate standard for evaluating the voluntariness of consent.

The question of consent is often a threshold issue in many criminal cases, and has been the subject of many rulings by this Court. As a result, the Court has issued many different principles for determining whether valid consent is present. A prosecutor "has the burden to show that consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). "[T]he question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). In the context of a consensual encounter "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

Courts have issued differing opinions on the nature of the inquiry, particularly whether it is an objective or subjective one. While many courts have treated the inquiry as an objective one, the language used strongly suggests subjectivity, i.e. whether the individual has, in her or his mind, agreed to the requests of law enforcement. In *Bostick*, this Court advanced a reasonable person standard, critically, however the Court seems to have utilized two distinct phrasings. "[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 436. But the same decision later states "[A] court must consider the circumstances surrounding the

encounter to determine *whether the police conduct would have communicated* to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter." *Id.* at 439. (emphasis supplied).

Although these are both objective standards, the subject of analysis is different in each. The first quote from *Bostick* indicates that the court should consider a hypothetical reasonable person in the same position as the individual being questioned. The second suggests that the courts should look instead to the actions of the officers and their conduct. Moreover, the two standards are not always in symmetry, as is the case here. For example, it was contested in this proceeding whether or not Agent Perry actually heard Mr. Rodriguez hear "No. I'm asleep" at the outset of the encounter.

The question then becomes whether it mattered at all whether Agent Perry heard those words. For a law enforcement officer to continue to press forward with a supposedly consensual encounter after an individual has told him he does not wish to speak with him certainly weighs against a finding that the encounter was consensual. Moreover, a reasonable person would be less likely to believe that he or she was free to leave under those circumstances. Regardless, if the Court looks only to the conduct of an officer, the failure to hear a defendant's words should have no bearing on the analysis.

The matter becomes still more complicated considering that the "reasonable person" in this context is uniquely less objective than in other contexts. This Court has expressly indicated that personal characteristics of the individual being

questioned must be considered. In *Schneckloth,* this Court approached the question of consent by conducting an analysis of this Court's prior case authority in determining whether a confession was voluntary given the characteristics of the accused. "In determining whether a defendant's will was overborne in a particular case, the Court has assessed… the characteristics of the accused… Some of the factors taken into account have included the youth of the accused, his lack of education, his low intelligence, the lack of any advice to the accused of his constitutional rights..." *Schneckloth*, 412 U.S. at 226 (internal citations omitted). The *Schneckloth* Court went on to state that "[w]hile *the state of the accused's mind*, and the failure of police to advise the accused of his rights, were certainly factors to be evaluated in assessing the voluntariness of an accused's responses, they were not in and of themselves determinative." *Id.* at 227 (emphasis supplied).

Despite *Bostick*'s indication that the standard is an objective one, courts have continued to apply the necessarily subjective standards identified in *Schneckloth*. "[C]ourts assess both the characteristics of the individual and the details of the encounter, including factors such as the age, intelligence, and educational background of the individual…" *United States v. Noe*, 342 Fed.Appx. 805, 807 (3rd Cir. 2009)(citing *Schneckloth*, 412 U.S. at 226). "[T]he test for voluntariness of consent accounts for some subjective characteristics of the accused[.]" *United States v. Easley*, 911 F.3d 1074, 1081 (10th Cir. 2018)(citing *Schneckloth*, 412 U.S. at 226). The result creates a confusing hybrid of objective and subjective standards. The analysis is focused on a hypothetical "reasonable person," but one who shares the

same level of education, degree of intelligence, awareness of civil rights, and, arguably, state of mind as the individual being questioned.

Courts have continually struggled with how far to extend the subjective considerations stated in *Schneckloth*. The Ninth Circuit considered race relevant to the "totality of the circumstances" analysis for this purpose when it held that what began as a consensual encounter had transformed into an unconstitutional seizure, noting "the publicized shootings by white Portland police officers of African-Americans." *United States v. Washington*, 490 F.3d 765, 773 (9th Cir. 2007). Other courts have specifically prohibited race from consideration in the voluntariness consideration. In fact, the Eleventh Circuit not only rejected the use of race in the context of determining whether an encounter was consensual or a seizure, but all subjective considerations. *United States v. Knights*, 989 F.3d 1281 (11th Cir. 2021)("The existence of a seizure is an objective question. We ask whether a reasonable person would have believed he was not free to leave in the light of the totality of the circumstances.")(internal citations omitted). This approach suggests that even the *Schneckloth* considerations are not relevant in the context of a consensual encounter.

The Eleventh Circuit, considering the question in the context of consent-to-search, that"[c]onsent is about what the suspect knows and does, not what the police intend… the only relevant state of mind for voluntariness is that of the suspect himself." *United States v. Spivey*, 861 F.3d 1207, 1215 (11th Cir. 2017)(citing *United States v. Farley*, 607 F.3d 1294, 1330 (11th Cir. 2010)). The *Spivey* Court relied in

part on this Court's statement (in a *Miranda* context) that "Coercion is determined from the perspective of the suspect." *Illinois v. Perkins*, 496 U.S. 292, 296 (1990). Some scholars have argued that consent-search doctrine is not aligned with traditional concepts of Fourth Amendment reasonableness.

This encounter between Agent Perry and Defendant Rodriguez presents the Court with a unique opportunity to examine the voluntariness of a consensual encounter when a defendant attempted to decline an encounter, which Agent Perry did not recognize as a declination of consent to an interview. Whether Rodriguez's statement "No. I'm asleep" is relevant to the circumstances turns on the question of the applicable standard for voluntariness.

The district court stated that it was not relevant whether Rodriguez said "No. I'm asleep" to Agent Perry, only whether Perry heard it. However, the Tenth Circuit did not address whether this was the correct legal standard, but affirmed the district court's ruling on the basis that the remainder of the encounter indicated it was consensual.

II. It remains unclear at what point a consensual encounter becomes an investigative detention.

The district court determined that Mr. Rodriguez consented to the encounter based upon his conduct. Mr. Rodriguez cooperated with Agent Perry and continued to answer his questions. The Tenth Circuit relied on its previous holding that "[c]onsent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer." [Pet. App. at 8](citing *Guerrero,* 472 F.3d 784, 789-790 (10th Cir. 2007)) See also

United States v. Benitez, 899 F.2d 995, 998-999 (10th Cir. 1990). The Tenth Circuit inappropriately applied the standard for existence of consent to search to the voluntariness of a consensual encounter. Because Mr. Rodriguez gave Agent Perry his ticket, his identification, and continued to answer his questions, the Tenth Circuit held that he consented regardless of whether he told Agent Perry that he was asleep.

This analysis is flawed as it conflates cooperation with consent. The fact that an individual complies with law enforcement's requests is no indication that the individual feels free to refuse those requests or remove himself from the encounter. It is even less indicative of whether the conduct of police officers would have communicated a right to refuse. More importantly, it ignores the free-to-leave standard to be applied in evaluating whether the interaction is a consensual encounter. If the question is whether Agent Perry's conduct would have communicated to a hypothetical reasonable person that he or she is free to leave, then Mr. Rodriguez's specific actions are irrelevant. They might be relevant if the question of consent is to be considered subjectively, by examining the state of mind of the individual to determine if consent was freely and voluntarily given. However, if that is an appropriate analysis, then the Tenth Circuit was incorrect to disregard the effect of Agent Perry continuing to question Rodriguez even he told Agent Perry "No. I'm asleep."

A question arises as to whether police may continually make requests for consent after it has been refused. The Fourth Circuit has stated, "If… police were permitted to disregard a suspect's attempts to ignore further questioning and to

persist until 'reasonable suspicion' was created or consent given, the Fourth Amendment would be greatly diminished in its intended role as the bulwark against 'overbearing or harassing' police conduct." *United States v. Wilson*, 953 F.2d 116, 126 (4th Cir. 1991). In *Wilson*, the Fourth Circuit found that a consensual encounter became a seizure after officers persisted in questioning an individual who had attempted to terminate the encounter. *Id.* at 120. The Tenth Circuit has taken the opposing position that multiple requests for consent, in the face of refusals, has no bearing on the validity of consent and is even an indication that the defendant had a subjective awareness of the right to refuse. *United States v. Manuel*, 992 F.2d 272, 275 (10th Cir. 1993)("the district court's finding that Mr. Manuel was aware of his right to refuse consent is supported by his steadfast exercise of that right…")

The question of whether or not police may persist in pursuing a consensual encounter with an individual who has denied those requests remains open. This case presents an opportunity for the Court to address and clarify the issue and to determine the limits of such a practice.

III. There is a clear split among the Federal Courts of Appeal and state high courts regarding the appropriate standard of review for a finding that an individual has consented to a search.

The Federal Circuit Courts of Appeals are deeply split on the appropriate standard of review in the context of voluntariness determinations. The Second, Third, and Tenth Circuits appear to agree that the appropriate standard of review is clear error. "We will not reverse a finding of voluntary consent except for clear error." *United States v. Snype*, 441 F.3d 119, 131 (2nd Cir. 2006). "The District Court's

finding of voluntary consent was not clearly erroneous." *United States v. Martinez*, 460 F. App's 190, 194 (3rd Cir. 2012). "Whether voluntary consent was given is a question of fact, determined by the totality of the circumstances and reviewed for clear error." *United States v. Silva-Arzeta*, 602 F.3d 1208, 1213 (10th Cir. 2010)(internal citations omitted).

Panels of other Circuit Courts have held that the determination of voluntariness should be reviewed *de novo*. "Because the 'voluntariness' of a search is a matter of law, it is reviewed de novo." *United States v. Carter*, 300 F.3d 415, 423 (4th Cir. 2002). "[W]e review *de novo* the voluntariness of consent to a search." *United States v. Asibor*, 109 F.3d 1023, 1038 (5th Cir. 1997). "The issue of consent to search is reviewed *de novo*." *United States v. Casey*, 825 F.3d 1, 14 (1st Cir. 2016). "Questions of law — that is, the legal conclusion of whether consent was voluntary and whether he was illegally seized — are reviewed *de novo*." *United States v. Wade*, 400 F.3d 1019, 1021 (7th Cir. 2005). "We review the ultimate question of voluntariness de novo but uphold the district court's factual findings unless they are clearly erroneous." *United States v. Magness*, 69 F.3d 872, 874 (8th Cir. 1995)(citations and internal quotations omitted).

Regardless, in certain instances, these Circuit Courts have rendered contradictory standards in different cases. "The voluntariness of consent to search is a factual question, and as a reviewing court, we must affirm the determination of the district court unless its finding is clearly erroneous." *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996). ("Typically, whether consent is voluntary turns on

questions of fact, determinable from the totality of the circumstances. For that reason, a finding of voluntary consent (other than one based on an erroneous legal standard) is reviewable only for clear error[.]" *United States v. Fornia-Castillo*, 408 F.3d 52, 62 (1st Cir. 2005)(internal citations omitted). "[W]e will reverse a district court's finding of voluntary consent only if it is clearly erroneous." *United States v. Jones*, 614 F.3d 423, 425 (7th Cir. 2010). "We review the district court's determination of whether a voluntary consent to a search was given under the clearly erroneous standard." *United States v. $231,930.00 in U.S. Currency*, 614 F.3d 837, 844 (8th Cir. 2010)(internal citations omitted). A Sixth Circuit panel has recognized its prior history of contradictory standards before adopting a "clear error" on the question of consent. "As for the question of consent, this court has inconsistently announced both a de novo and a clearly erroneous standard of review… We will therefore review the question of consent under the "clear error" standard. *United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015). The Sixth Circuit based its decision on the fact that its holding that consent is a question of fact predates later holdings that the question of consent is reviewed *de novo*, and that its earlier decisions are binding. *Id.* The *Lee* Court therefore made its decision on the "absence of an en banc review or an intervening opinion on point by the Supreme Court." *Id.*

Multiple state high courts have come to different conclusions on the question of consent. The Arizona Supreme Court has held that "[v]oluntariness is a question of fact, and we review the trial court's voluntariness finding for abuse of discretion." *State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013)(en banc)(internal citations and

quotations omitted). The Supreme Court of Vermont however, came to the opposite conclusion. "[W]e hold that a trial court's decision on the question of the voluntariness of a consent to search, and thus the ultimate constitutional validity of the search, must be reviewed independently by this Court on appeal." *State v. Weisler*, 35 A.3d 970, 983 (Vt. 2011). The Supreme Court of Texas has come to yet a different standard of abuse of discretion as to appellate review of both fact and law. "Whether a consent to search was voluntary under the circumstances involves questions of both fact and law… Accordingly, we hold that an abuse of discretion standard of review applies[.]" *State v. $217,590.00 in U.S. Currency*, 18 S.W.3d 631, 633 (Tex. 2000).

In summary, there is also little uniformity among the states on the applicable standard of review. The Supreme Court of Vermont conducted a comprehensive analysis of case authority from a variety of jurisdictions on this question. *Weisler*, 35 A.3d at 976-983. The *Weisler* court noted that those jurisdictions that follow a "clear error" review cite this Court's holding in *Schneckloth*, 412 U.S. 218, 227 (1973)("[T]he question whether a consent to search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstance") as a basis for their decision. *Weisler*, 35 A.3d at 976. The Supreme Court of Vermont noted this Court's holding in *Miller v. Fenton*, 474 U.S. 104, 110 (1985)("The ultimate issue of 'voluntariness' is a legal question requiring independent factual determination.") to highlight the fact that a "highly contextual, fact-specific inquiry" may be subject to an independent review on appeal. *Weisler*, 35 A.3d at 977. This Court's decision in *Miller* concerned the voluntariness

of a confession, rather than the voluntariness of a consent to search. Facially, there appears to be no reason why a different standard of review should be applied to voluntariness in one context and not in the other. There is clear confusion and split in authority among the courts on this matter, which will almost certainly continue until this Court addresses the question directly.

CONCLUSION

Mr. Rodriguez's petition for a writ of certiorari should be granted based on the split of authority among the Circuit Courts as to the standard of review, including the split of authority among the state courts regarding their respective and different interpretations of this Court's precedent.

JERRY A. WALZ, Counsel of Record For Petitioner
New Mexico Bar No. 2846
WALZ AND ASSOCIATES, P.C.
133 EUBANK BLVD. NE
ALBUQUERQUE, NEW MEXICO 87123
TELEPHONE: (505) 275-1800
FACSIMILE: (505) 275-1802
E-MAIL: JERRYAWALZ@WALZANDASSOCIATES.COM

March 7, 2022