

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

PETITIONER'S APPENDIX

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FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

December 17, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RODOLFO RODRIGUEZ, JR.,

Defendant-Appellant.

No. 20-2173
(D.C. No. 1:18-CR-01568-WJ-KBM-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **BALDOCK** and **BRISCOE**, Circuit Judges.

Defendant appeals the district court's order denying his motion to suppress evidence. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

The historical facts of this case center on an encounter between Defendant and Special Agent Jarrell Perry of the DEA. On February 1, 2018, Defendant travelled on an Amtrak train that arrived in Albuquerque for a scheduled stop after departing Los Angeles. Agent Perry, who specializes in consent searches on trains and buses carried

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

out in plain clothes, boarded the train when it arrived in Albuquerque. On this occasion, Agent Perry wore plain clothes, carried a concealed firearm, and an audio recorder which recorded his interaction with Defendant. Agent Perry found Defendant seated in a window seat at the front of the train car in a sprawled-out position with at least one bag, a backpack, in the aisle seat next to him. The parties dispute whether there was another bag on the seat next to Defendant when Agent Perry made contact with him. According to Agent Perry, there was a backpack in the seat and a plastic bag was inside it. Defendant claims that the plastic bag was underneath the backpack on the seat next to him. Nonetheless, Agent Perry approached Defendant, identified himself as a police officer, and asked Defendant if he could speak with him. According to Agent Perry, Defendant responded by simply handing him his ticket. Defendant, on the other hand, contends that he replied “no, I’m asleep, here’s my ticket” and then handed his ticket to Agent Perry. Agent Perry examined Defendant’s ticket and asked for identification, which Defendant provided. Agent Perry proceeded to ask Defendant if he had any luggage with him on the train. Defendant initially responded by shaking his head, a gesture Agent Perry confirmed was an answer in the negative. Undeterred, Agent Perry inquired about the backpack on the seat next to Defendant. At first Defendant denied owning the backpack, but confirmed it belonged to him after further questioning. Defendant, however, contends that Agent Perry’s inquiry was directed at a bag in the rack above his seat, which is why he initially denied ownership. Nevertheless, Agent Perry asked Defendant for permission to search the backpack and Defendant responded by

emptying its contents. At this point, the accounts diverge again. Agent Perry testified that a plastic bag marked “laundry” fell out of the backpack when Defendant upended it. Defendant, however, claims he emptied his backpack before the train arrived in Albuquerque and that the plastic bag was underneath the empty backpack. Regardless, Agent Perry proceeded to ask Defendant for permission to search “this bag here” and Defendant replied, “go for it.” Agent Perry then searched the plastic bag where he found several vials, one of which contained a gummy bear and another of which contained a “green leafy substance” that Agent Perry believed was marijuana. Defendant opened one of the vials and ate the gummy bear. At that point, Agent Perry ordered Defendant to stand for a pat-down. Defendant refused at first, but ultimately complied. With his partner at hand to assist, Agent Perry performed the pat-down and felt a bulge, which he thought was a pouch of drugs. Agent Perry arrested Defendant and escorted him to a private area to search him. The search revealed a bundle of cash hidden in Defendant’s underwear and a second bundle taped to Defendant’s leg. Agent Perry field tested the second bundle and determined it contained heroin. In total, Agent Perry found 1.10 kilos of heroin and \$2,300 of cash in Defendant’s possession. Based on this evidence, a grand jury indicted Defendant with possession of one kilogram or more of heroin with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A).

Defendant filed a motion to suppress the evidence found by Agent Perry and a motion to dismiss the indictment. Defendant raised two arguments before the district court that are relevant to this appeal. First, Defendant argued his initial encounter with

Agent Perry was not consensual and therefore violated the Fourth Amendment. Second, Defendant asserted he did not consent to the search of the plastic bag and this search contravened the Fourth Amendment. After a hearing, the district court rejected Defendant's arguments and denied both motions. Defendant subsequently entered a conditional guilty plea, which enabled him to appeal the district court's denial of his motion to suppress and related motion to dismiss the indictment. This appeal followed.

II.

We review a district court's denial of a motion to suppress by "consider[ing] the totality of the circumstances and view[ing] the evidence in a light most favorable to the government." *United States v. Kimoana*, 383 F.3d 1215, 1220 (10th Cir. 2004) (citing *United States v. Long*, 176 F.3d 1304, 1307 (10th Cir. 1999)); *United States v. Snyder*, 793 F.3d 1241, 1243 (10th Cir. 2015). In so doing, we "accept the district court's factual findings unless those findings are clearly erroneous." *Kimoana*, 383 F.3d at 1220 (citing *Long*, 176 F.3d at 1307). Determinations of witness credibility and the weight afforded to evidence are "the province of the district court." *Id.* (citing *Long*, 176 F.3d at 1307). "The ultimate determination of reasonableness under the Fourth Amendment, however, is a question of law reviewed de novo." *United States v. Madden*, 682 F.3d 920, 924–25 (10th Cir. 2012) (citing *Kimoana*, 383 F.3d at 1220).

III.

On appeal, Defendant presents three arguments. First, Defendant alleges the district court erred in finding that he consented to the encounter with Agent Perry.

Second, Defendant argues that the district court erred in finding that he consented to Agent Perry's search of the plastic bag. Finally, Defendant asserts the district court erred in finding Agent Perry's testimony credible. We consider each argument in turn.

We have previously recognized three types of interactions between police officers and individual citizens:

(1) [C]onsensual encounters which do not implicate the Fourth Amendment; (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause.

United States v. Hammond, 890 F.3d 901, 904 (10th Cir. 2018) (cleaned up) (quoting *United States v. Davis*, 94 F.3d 1465, 1467–68 (10th Cir. 1996)). “A consensual encounter is the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer. If the individual is free to leave at any time during the encounter, he or she is not seized under the Fourth Amendment.” *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996). Thus, the question of consent fundamentally turns on “whether the police conduct would have conveyed to a reasonable person that he or she was not free to decline the officer’s requests or otherwise terminate the encounter.” *Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991)). We consider several factors in making this determination:

[T]he location of the encounter, particularly whether the defendant is in an open public place where he [is] within the view of persons other than law enforcement officers; whether the officers touch or physically restrain the defendant; whether the officers are uniformed or in plain clothes; whether

their weapons are displayed; the number, demeanor and tone of voice of the officers; whether and for how long the officers retain the defendant's personal effects such as tickets or identification; and whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent.

United States v. Zapata, 997 F.2d 751, 756–57 (10th Cir. 1993) (cleaned up and citations omitted). These factors guide our analysis but are not individually dispositive. *See United States v. Rogers*, 556 F.3d 1130, 1138 (10th Cir. 2009) (citing *United States v. Thompson*, 546 F.3d 1223, 1226 (10th Cir. 2008)).

Defendant first contends that the district court erred in finding his encounter with Agent Perry consensual. As a threshold matter, Defendant argues the district court failed to “consider the special circumstances indicating that [Defendant] was not in an open public place.” According to Defendant, the fact that he “was in an area of the train absent from other passengers” meant “he was effectively isolated, and the interaction was more private than public.” Defendant believes this information, and the district court’s apparent failure to expressly consider it in its analysis, counsels in favor of finding that the encounter with Agent Perry was not consensual. We reject this contention.

As we have previously recognized, “[w]e can affirm a lower court’s ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court.” *United States v. Mabry*, 728 F.3d 1163, 1166 (10th Cir. 2013) (quoting *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012)). The record shows Defendant was on a public train car and that, although he was seated by himself at the front of the car, there were other passengers seated in the rear. Existing case law from our circuit leads us to

conclude that these facts are insufficient to defeat the district court's finding of consent. In *United States v. Little*, we addressed the question of what, if any, expectation of privacy an Amtrak passenger had in a roomette, and whether it impacted the analysis of consent. *See* 18 F.3d 1499, 1504–05 (10th Cir. 1994) (en banc). In answering those questions, we rejected the idea that a train roomette was analogous to a hotel room and went on to state “[w]hile a person's higher expectation of privacy in his or her train compartment would have some relevance if we were reviewing a search of the compartment, it has limited relevance to the question of whether a reasonable person would believe that he or she is unable to terminate the encounter.” *Id.* at 1505 (cleaned up) (quoting *United States v. Bloom*, 975 F.2d 1447, 1453 n.6 (10th Cir. 1992)). Thus, we expressly dismissed the notion that the location of an encounter compelled a finding that it was non-consensual and “constituted an unlawful seizure.” *Id.* at 1501. *Little*, therefore, forecloses Defendant's argument.

Defendant next claims his statement “no, I'm asleep” in response to Agent Perry's attempt to speak with him was sufficient to terminate the encounter and render it nonconsensual. The district court did not credit this argument. Rather, it reasoned that Agent Perry had not heard Defendant's statement and was free to continue the interaction.¹ *See United States v. Rodriguez*, 472 F. Supp. 3d 1098, 1107 (D.N.M. 2020).

¹ Defendant argues that the district court applied the wrong legal standard in reaching this conclusion. Because the district court's subsequent analysis is correct and because we
Continued . . .

The district court went on to conclude that, even if Agent Perry was aware of Defendant's statements, the encounter was still consensual. *See id.* at 1107–09. In reaching that conclusion, the district court cited appropriate authority from our circuit—*United States v. Guerrero*, 472 F.3d 784 (10th Cir. 2007) and *United States v. Manuel*, 992 F.2d 272 (10th Cir. 1993)—in support. *See Rodriguez*, 472 F. Supp. 3d at 1107–09.

We find ample support in the record and our case law to conclude Defendant's encounter with Agent Perry was consensual. First, Defendant did not state “no, I'm asleep” to Agent Perry in a vacuum. Rather, Defendant also, and almost simultaneously, said “here's my ticket” and handed his ticket to Agent Perry. Agent Perry then requested, rather than demanded, that Defendant produce his identification. We have previously established that there is no requirement for verbal consent and 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.” *Guerrero*, 472 F.3d at 789–90 (citing *United States v. Benitez*, 899 F.2d 995, 998–99 (10th Cir. 1990)). These facts fall squarely within that principle. Evaluating the other relevant *Zapata* factors, we note that Agent Perry did not restrain Defendant until he had established probable cause for a pat-down and that he wore plain clothes and concealed his firearm. Additionally, Agent Perry's tone and demeanor were non-confrontational and he only retained possession of Defendant's ticket and identification for a brief period of time. While Agent Perry did

are free to affirm on any grounds supported in the record, we need not resolve this question here. *See Mabry*, 728 F.3d at 1166.

not specifically advise Defendant of his right to terminate the encounter, we have not recognized any obligation to do so. *See, e.g., United States v. Ledesma*, 447 F.3d 1307, 1315 (10th Cir. 2006) (“[A]n officer’s failure to inform the defendant that she is free to leave, standing alone, does not make an encounter nonconsensual.” (citation omitted)). Viewing this evidence in the “totality of the circumstances and . . . in a light most favorable to the government,” we conclude Defendant consented to the encounter with Agent Perry. *See Kimoana*, 383 F.3d at 1220 (citing *Long*, 176 F.3d at 1307).

As for Defendant’s second argument, he asserts the district court erred when it concluded Agent Perry’s search of the plastic bag was consensual. There are two relevant search requests here. First, Agent Perry requested permission to search Defendant’s backpack. Second, Agent Perry sought permission to search the plastic bag marked “laundry.” Defendant challenges the district court’s findings as to the second search. At bottom, Defendant contends that he did not consent to the search of the plastic bag and that both Agent Perry’s request and his grant of consent were directed at the backpack.²

The district court found that Agent Perry’s search request referred to the plastic bag, rather than the backpack as Defendant has suggested. In reaching that conclusion, the district court relied on the audio recording of the encounter as well as the transcript of

² This is our understanding of Defendant’s argument. Defendant devotes most his discussion of this issue explaining why, in his view, the district court erred when it found Agent Perry’s testimony credible. Credibility is a distinct issue from consent, and we consider them separately.

that recording. *See Rodriguez*, 472 F. Supp. 3d at 1110–13. Specifically, the district court noted the following relevant facts from the recording. First, Agent Perry had already confirmed the backpack belonged to Defendant before his initial request for permission to search. *Id.* at 1112. Second, there were jostling sounds on the recording after Agent Perry’s first search request, indicating that Defendant upended his backpack in response to Agent Perry’s request. *Id.* Third, the district court emphasized there was “a distinct inflection on the word ‘this’ in Perry’s request for consent to ‘search *this* bag here.’” *Id.* (emphasis in original). The district court found this inflection indicated Agent Perry’s second request referred to a different bag than the backpack, namely the plastic bag. *Id.* We accept the district court’s factual findings unless they were “clearly erroneous.” *Kimoana*, 383 F.3d at 1220 (citing *Long*, 176 F.3d at 1307). After independently reviewing the recording in question, we agree with the district court’s assessment and conclude its findings were not “clearly erroneous.” *See id.*

Finally, Defendant argues the district court erred in finding Agent Perry’s testimony credible. Defendant points to apparent inconsistencies in Agent Perry’s testimony as well as decisions from various courts in this Circuit, including our own, that either found Agent Perry was not credible or otherwise questioned his conduct. We have repeatedly explained, however, that we owe the district court significant deference when reviewing its credibility determinations and its evaluation of witnesses. *See, e.g., id.* at 1220 (“The credibility of witnesses, the weight to be given evidence, and the reasonable inferences drawn from the evidence fall within the province of the district court.”

(citation omitted)); *id.* at 1226 (“We give special deference to such credibility determinations, which can virtually never be clear error.” (quoting *United States v. Pedroza*, 269 F.3d 821, 826 (7th Cir. 2001)); *United States v. McIntyre*, 997 F.2d 687, 708 (10th Cir. 1993) (“We are bound to accept the resolution of conflicting evidence and the assessment of the credibility of witnesses as they are found by the trial judge as the trier of fact.” (citing *United States v. Youngpeter*, 986 F.2d 349, 353 (10th Cir. 1993))). Here, the district court observed Agent Perry’s testimony and found him to be a credible witness. *See Rodriguez*, 472 F. Supp. 3d at 1106–07, 1111–12. Viewing the district court’s determinations in light of the deference we owe, we have no difficulty concluding that the district court did not err in finding Agent Perry’s testimony credible.

IV.

For the foregoing reasons, we AFFIRM the district court’s judgment.

Entered for the Court

Bobby R. Baldock
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 18-1568 WJ

RODOLFO RODRIGUEZ, JR.,

Defendant.

**MEMORANDUM OPINION AND ORDER
DENYING DEFENDANT'S MOTION TO SUPPRESS
and
DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT**

THIS MATTER comes before the Court upon these motions:

- Defendant's Motion to Suppress, filed December 21, 2018 (**Doc. 27**); and
- Defendant's Motion to Dismiss Indictment, filed August 9, 2019 (**Doc. 56**)

Having reviewed the parties' pleadings and the applicable law, and carefully considering the evidence and arguments presented at the hearing held in this matter, the Court finds that Defendant's motion is not well-taken and, therefore, is denied.

In February 2018, as a result of a passenger search, Special Agent Perry recovered a kilogram or more of heroin from Defendant Rodriguez who was traveling on an AMTRAK train going eastbound through Albuquerque. Defendant is charged with 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, in violation of 21 U.S.C. §841(a)(1) and (b)(1)(A). He contends that the drugs should be suppressed because Agent Perry searched him without consent.

The pivotal questions to be resolved are (1) whether Defendant agreed to speak with Agent Perry in the initial encounter and (2) assuming he did, whether Defendant later consented to have Perry search the white plastic bag which held vials containing marijuana.¹ Defendant's position is that he refused to speak with Agent Perry when Perry first approached him and so the encounter should have ended at that point and Perry should have moved on. Defendant contends that Agent Perry's failure to do so violated Defendant's Fourth Amendment rights and requires suppression of all the evidence obtained as a result of the search.

As one might expect, the parties dispute the critical facts underlying the encounter, and resolution of many of those facts will rest on credibility findings. A hearing was held on June 26, 2020. Both Agent Perry and Defendant testified at the hearing. The most pertinent exhibits admitted during the hearing are audio recordings and transcripts of these recordings. To eliminate confusion in the discussion of these exhibits, the Court describes these particular exhibits and will refer to them as follows:

- “Original Recording”: audio recording of the encounter from Agent Perry’s belt tape (Gov’t Ex. 1);
- “Original Transcript”: transcript from the Original Recording, done by Russin Reporting, LLC (Gov’t Ex. 3);
- “Corrected Transcript”: transcript of encounter with corrections after Agent Perry listened to the Original Recording with Bose headphones, also done by Russin Reporting (Gov’t Ex. 2);
- “Enhanced Recording”: audio recording after defense audio consultant reduced background noise (Def’t’s Ex. 15); and
- “Enhanced Transcript”: transcript from enhanced audio recording, done by Paul Baca Professional Court Reporters (Def’t’s Ex 4).

¹ The plastic bag, admitted as Defendant’s Ex. 3, was also referred to at the hearing as a “laundry bag” because of the lettering on the white plastic bag. Defendant testified that he used the bag for dirty clothes. Hrg. Tr. at 69.

BACKGROUND

I. Facts: Initial Encounter

On February 1, 2018, Agent Perry and Task Force Officer Seth Chavez were at the Amtrak Train Station conducting consensual encounters with passengers on the train. When Agent Perry and Officer Chavez boarded the train, Defendant was sprawled across the front first seat in front of the coach car, lying with his head on the armrest. While Officer Chavez remained standing at the back of the train car, Agent Perry approached Defendant.

In the Government's version of the facts, Agent Perry approached Defendant and identified himself as a police officer. He asked permission to speak with Defendant who then unfolded his train ticket and without being asked, handed it to Perry stating that it was his ticket. Perry reviewed the ticket and immediately returned it to Defendant. Agent Perry then requested to see Defendant's identification and in response, Defendant handed him a California identification card in the name of Rodolfo Rodriguez, Jr. with a Janesville, California address. Perry immediately returned the identification card to the Defendant.

Defendant claims that he was asleep with his eyes closed when Agent Perry entered the car, but was partially awakened by the noise of the train car door opening. Agent Perry spoke to Defendant, introducing himself as a police officer and asking to speak with him for a moment. Defendant contends that he did *not* agree to speak with Agent Perry, but instead stated: "no, I'm asleep, here's my ticket" and then handed Perry his train ticket. Defendant admits that he then presented his identification to Agent Perry on Perry's request but claims he did so because "he did not feel he could refuse" while Perry continued to ask questions.

II. Facts: Luggage Search and Pat-down Search

According to the Government, after handing back Defendant's identification, Agent Perry asked Defendant if he had any luggage that belonged to him. Defendant shook his head and Perry requested clarification whether that meant "no." Defendant replied "No, sir." Agent Perry then asked if an unzipped gray backpack on the passenger seat next to the Defendant belonged to him. Defendant initially denied it was his, then stated that it was his bag. Perry next asked if Defendant had any other luggage and again Defendant shook his head to a side-to-side motion. Perry then asked if Defendant would consent to a search of his bag and he responded by picking up the grey backpack and emptying the contents of the backpack on the empty aisle seat directly next to him. Amidst the contents emptied from the backpack, Agent Perry observed a plastic bag within the emptied contents and asked for permission to search it. Defendant said, "Go for it." In the plastic bag, Perry observed several vials including one that contained a green leafy substance and one from a dispensary that consisted of an edible gummy bear.

Defendant picked up the vials and attempted to hide them behind his seat, declaring that they were all medication. Perry instructed the Defendant to stop trying to hide the vial which he believed to be marijuana, and Defendant opened up one of closed vials and proceeded to eat the last gummy bear that was in the vial. Based on Agent Perry's training and experience as a DEA agent, he believed the green leafy substance was marijuana and that the gummy bear was medically prescribed marijuana. Agent Perry told Defendant to stand up, and Officer Chavez, who had been standing in back of the car, approached at that point.

Defendant's version is different. He testified that Agent Perry initially pointed to luggage on the top rack of the train car that did not belong to him and which he so indicated to Perry. When Agent Perry then asked for consent to search Defendant's backpack, he told Perry that "There's

nothing in there, okay?” and upended the backpack to show it was empty. Defendant testified that he had emptied the backpack earlier in case he was “harassed.” He stated that the plastic bag was not in plain view, but was on the seat next to him lying underneath the backpack and that the vials were under the bag. 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. Defendant stated that he opened the vial containing the one remaining gummy bear and ate it because it “belongs to me.” Hrg. Tr. at 30:15-17.²

III. Facts: Pat-down Search

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. Defendant refused, saying he wanted to sleep. Special 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. Defendant eventually complied with Agent Perry’s order to stand up so a pat down search could be performed. Perry conducted a pat-down search incident to arrest and during the search, Perry felt a large, round-shaped bundle underneath the Defendant’s pants and in between his legs which Perry believed to be illegal narcotics. Perry handcuffed the Defendant after there was some resistance and escorted him off the train. In a private area off the train, 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. Perry also observed plastic tape attached to the Defendant’s person holding a round-shaped bundle between Defendant’s legs. Upon arriving at the offices of the Drug Enforcement Administration (“DEA”), Perry field-tested the contents of the round-shaped bundle and determined that the

² On cross-examination, Defendant testified that he decided to eat the gummy bear “[b]ecause I couldn’t find another better time.” Hrg. Tr. at 58:24-25.

bundle contained approximately 1.10 gross kilograms of heroin. The bundle of cash secured to the Defendant's underwear was likewise seized, totaling to an amount of \$2,300.00 in U.S. currency.

DISCUSSION

The Fourth Amendment protects “people” against unreasonable searches and seizures conducted by law enforcement officers or other government agents. U.S. Const. amend. IV; *Katz v. United States*, 389 U.S. 347, 351 (1967) (holding that the “Fourth Amendment protects people, not places”). In determining whether a seizure comports with the strictures of the Fourth Amendment, courts have identified three categories of police citizen encounters: (1) consensual encounters which do not implicate the Fourth Amendment, (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity, and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause. *Latta v. Keryte*, 118 F.3d 693, 698 (10th Cir. 1997).

Searches conducted without a warrant are per se unreasonable under the Fourth Amendment, “subject only to a few specifically established and well-delineated exceptions.” *Id.* at 357. One such exception to the warrant requirement is “a search that is conducted pursuant to consent.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). In order for a search by consent to be valid, the Government has the burden of proving that consent was: (1) unequivocal, “freely and voluntarily given”; and (2) without duress or coercion, express or implied. *Schneckloth* at 222; *U.S. v. Guerrero*, 472 F.3d 784, 789 (10th Cir. 2007). Mere submission to lawful authority does not equate to valid consent. *United States v. Manuel*, 992 F.2d 272, 275 (10th Cir. 1993). On a motion to suppress, the burden of proving that consent to search was given freely and voluntarily is always on the Government. *U.S. v. McKneely*, 6 F.3d 1447, 1453 (10th Cir. 1993).

Courts apply an objective reasonableness test to measure the scope of a person's consent, based on a totality of the circumstances surrounding the search. *United States v. Kimoana*, 383 F.3d 1215, 1223 (10th Cir. 2004). In determining whether the Government has met its burden, the Court must consider the totality of the circumstances. *United States v. Price*, 925 F.2d 1268, 1270 (10th Cir. 1991) (citing *Schneckloth*, 412 U.S. at 227, 232–33, 249)). The Court may exclude unlawfully seized evidence in criminal prosecutions where a defendant's Fourth Amendment rights have been violated. *United States v. Herrera*, 444 F.3d 1238, 1248 (10th Cir. 2006) (citing *Illinois v. Krull*, 480 U.S. 340, 347 (1987)).

Defendant contends that Agent Perry should have immediately ended the encounter after he told him "no, I'm asleep" and that by continuing the encounter, Perry violated his Fourth Amendment rights by continuing the initial encounter. Any evidence recovered from the subsequent search of his backpack or belongings should therefore be suppressed as a result of the alleged Fourth Amendment violation. Defendant also maintains he consented to the search of his backpack by turning it upside down but did not consent to the search of the plastic bag in which the vials were found and thus any evidence found subsequent to that search must be suppressed on that basis as well.

I. Initial Encounter

The question here is whether Defendant refused to speak with Agent Perry and whether Perry continued the encounter in violation of Defendant's Fourth Amendment rights.

Agent Perry testified that he did not hear Defendant either refusing to speak with him or telling him he was asleep. Perry's report is consistent with Perry's testimony as it does not indicate Defendant said he was asleep. The report states that: Perry displayed his DEA badge, identified himself as a police officer, asked for permission to speak with Defendant and that Defendant

unfolded his Amtrak train ticket folder and handed it to Perry while stating, “This is my ticket.” Deft’s Ex. 11 at 4. However, the three transcripts admitted at the hearing show different responses by Defendant after Agent Perry identified himself as a police officer and asking Defendant if he could speak to him “for a moment”:

Original Transcript: “INAUDIBLE” where Defendant claims he told Perry he was asleep. Ex. 3 at 2:5.

Corrected Transcript: “I’m asleep. Here’s my ticket.” Ex. 2 at 2:5-6.³

Enhanced Transcript: “No, I’m asleep. Here’s my ticket.” Ex. 4 at 2:7-8.

The Court is able to hear the word “I’m asleep” when listening to the Enhanced Recording, but this perception may be partially due to the assistance of both the Corrected and Enhanced Transcripts. The Court, however, was not able to make out the word “no” clearly at all—it sounds more like a low groan on the audio recording.

Regardless of whether or not Defendant actually told Agent Perry that he was asleep, the relevant inquiry is whether Agent Perry *heard* it, which raises credibility issues.

At this point, the Court finds it necessary to address some concerns raised by defense counsel pertaining to Agent Perry’s credibility. Defendant suggests that Agent Perry’s credibility is suspect because in *U.S. v. Rangel*, the Tenth Circuit called Agent Perry’s credibility into question. 519 F.3d 1258 (10th Cir. 2008). An issue of perjury arose in *Rangel* because of “contradictions” between sworn statements by Agent Perry and testimony by the bus driver and a passenger relating to who saw defendant remove a bag containing cocaine from a larger bag he carried onto a Guadalajara Tours bus in El Paso. *Id.* at 1259. Defendant also points to two decisions by United States District Judge Martha A. Vazquez, *U.S. v. Muse* and *U.S. v. Garcia-*

³ Agent Perry testified that although he did not hear Defendant say he was asleep during the encounter, he was able to hear “I’m asleep” when he listened to the Original Recording with his Bose headphones.

Guzman, in which the court granted motions to suppress largely because the court did not find Agent Perry to be credible. *See U.S. v. Darius Muse*, 17-CR-02008 MV, Doc. 71, filed Dec. 20, 2019 and *U.S. v. Garcia-Guzman*, 19-CR-1086 MV, Doc. 42 filed Jan. 7, 2020.

None of these decisions offer any basis to discredit Agent Perry's credibility in this case. First, *Rangel* never found that Perry gave false testimony or was not credible. Second, there is no justification to apply credibility findings in one case to another. Each case and all testimony should be considered independently. As the Government points out, Judge Vazquez recently credited Perry's testimony as credible and denied defendant's motion to suppress. *U.S. v. Manuel Delgado-Salazar*, 19cr01195 MV, Doc. 57.

A. The Court Favors Agent Perry's Testimony

Defendant claims that he made it clear to Agent Perry that he refused to speak with him, while Agent Perry contends that he did not hear Defendant say "no" and that Defendant did not appear to be asleep." Defendant testified that he said "no" "half a dozen times," although the transcripts do not reflect this. Perry stated that Defendant's eyes were open, squinting and looking at him. Defendant stated that he may have mumbled something while he was "groggy" from sleep, Hrg. Tr. at 22:13-14, but if Defendant was prone to talking while asleep, Perry was not obliged to make an inquiry into Defendant's sleep habits before continuing the encounter. The Court finds that, after considering all the evidence and testimony, Defendant's version of events contains certain weaknesses and allows the Court to credit Agent Perry's version of events for these reasons:

(1) First, the Court finds it somewhat questionable that Defendant was able to make these statements, tell Perry he was asleep, and then immediately hand Perry his train ticket—all within a few seconds—and all while he was "asleep" or even "groggy."

(2) Agent Perry's testimony that he did not hear Defendant saying "No, I'm asleep" is bolstered by the fact that even Defendant found it necessary to enhance the audio recording in order to make those words audible.

(3) Defendant testified that he had prior encounters with Perry:

(a) he first met Perry several years in 2016 getting off an Amtrak train coming from California to purchase Native American "trinkets." Hearing Transcript ("Hrg. Tr.") at 3. On reboarding the train, he saw Agent Perry on the train bent over and looking through luggage and started asking Defendant questions. Defendant told Perry that he wanted to go back to his seat and that he was blocking the hallway. Perry excused himself and Defendant returned to his seat.

(b) Defendant met up with Agent Perry a second time prior to 2018 while riding a Greyhound bus. Defendant told Perry when he approached, "I don't have time for you"—after which Agent Perry walked away.

(c) A third encounter occurred on a train in 2017. Defendant testified that Perry asked for his ticket and then tried to get him off the train and Defendant told him he would not get off the train because he was asleep, and Perry walked away. Hrg. Tr. at 5. Defendant also believes that he may have seen Perry a fourth time sometime in 2017 or 2018 in Janesville, California leaving a house of an acquaintance from Mexico, but there was no interaction between Defendant and Agent Perry in that instance.

There is some significance, although limited, to these prior encounters between Defendant and Agent Perry: Defendant's testimony that Perry moved on when he refused to speak with him bolsters Perry's testimony that he ends the encounter when a passenger unequivocally refuses to speak with him. Additionally, Defendant's testimony about prior encounters with Perry undercuts

Defendant's claim that Perry "harassed" him with questions during the initial encounter and renders credible Perry's testimony that he did not hear Defendant say "No, I'm asleep." Defendant claims to have said "no" half a dozen times, Hrg. Tr. at 22:19-20, but there is no evidence to support this, either from the transcripts or Defendant's Enhanced Recordings.

(4) Defendant claims that he made other statements to Agent Perry that are absent from the recording. He contends that either the recording was altered or Agent Perry rewound his belt tape in order to erase his statements because he heard a "zipper" sound on the recording which could be the sound of Perry's belt tape rewinding.

Defendant testified that he partially awoke when he heard Agent Perry open the train car door and approach him while he was lying across the front seat. He recognized Perry's voice even before he identified himself from several prior encounters (described above). As Perry started to speak, Defendant interrupted him and stated: "I know who you are and know you can't search me." The Court attributes no weight to Defendant's claim that the audio recording was modified or that Agent Perry rewound it to erase Defendant's initial statements to him. On cross-examination, Defendant conceded that the defense team's own audio expert who enhanced the recording found there was no evidence of manipulation or alteration "in any way." Hrg. Tr. at 53:21-25; 54:1-5. Moreover, Defendant did not testify that he heard the rewind sound during the encounter, but rather he testified that he heard this rewind sound afterward when listening to the recording itself. Hrg. Tr. at 12:13-20. Thus, the Court does not credit Defendant's testimony that he made the statement "I know who you are and know you can't search me."

For these reasons, the Court finds credible Agent Perry's testimony that he did not hear Defendant tell him he was asleep and so Perry did not violate Defendant's Fourth Amendment rights by continuing the encounter and asking Defendant for identification.

B. Defendant Indicated Consent to Continue Encounter

The Government argues that even if Agent Perry heard Defendant say “no, I’m asleep,” Defendant’s subsequent gesture—handing over his ticket—constituted consent to continue the encounter, and the Court agrees.

Non-verbal consent may validly follow a verbal refusal. *United States v. Guerrero*, 472 F.3d 784, 790 (10th Cir. 2007) (a palms-up signal indicated consent where defendant initially refused consent but then eventually extended both hands palm up in request for consent a second time) (citing *United States v. Flores*, 48 F.3d 467, 468–69 (10th Cir.1995)). Consent must be unequivocal and specific but it need not be verbal and “may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer.” *Guerrero*, 472 F.3d at 789–90). Even assuming that Defendant was barely awake when he handed Perry his ticket, there is no legal authority for the proposition that being wakened from sleep attenuates the voluntariness of subsequent actions, although a court would be able to take this into account as just one of the factors in a “totality” approach to the analysis. However, handing over the ticket to Agent Perry weighs heavily against finding that Defendant did so involuntarily because he had been asleep, particularly because Defendant then also presented identification to Perry on request.

Defendant nonetheless maintains that this was not a consensual encounter. He testified that he handed over his ticket—and then his identification—because he felt obliged to cooperate with Perry’s requests and hoped that Perry would leave. However, repeated requests for consent do not violate the Fourth Amendment, even where consent is initially refused. *See U.S. v. Manuel*, 992 F.2d 272, 275 (10th Cir. 1993) (finding that the officers’ repeated requests for consent—even where defendant refused consent—the presence of more than one officer, and the failure to be

advised of his right to refuse consent did not render consent involuntarily in totality of circumstances). Agent Perry was not required to back off as long as the encounter was consensual. *United States v. West*, 219 F.3d 1171, 1176 (10th Cir.2000) (A consensual encounter is a voluntary exchange between the officer and the citizen in which the officer may ask non-coercive questions). Defendant may claim he complied with Perry's requests because he felt obliged to do so, but his nonverbal conduct relayed to Agent Perry that Defendant consented to continue the encounter. *See United States v. Gordon*, 173 F.3d 761 (10th Cir.1999) (fact that defendant later complained that he "felt obligated to comply" with the officer's order did not eliminate or attenuate the voluntariness of the consent).

Defendant also contends that Agent Perry should have ended the encounter after he returned Defendant's identification but this argument conflates a consensual encounter with a detention which is based on an officer having reasonable suspicion to stop an individual. In such a situation, the Fourth Amendment requires that the duration of the stop be limited to the scope and duration of its purpose. *See, U.S. v. De La Cruz*, 703 F.3d 1193, 1197 (10th Cir. 2013) (Once reasonable suspicion has been dispelled, "[e]ven a very brief extension of the detention without consent or reasonable suspicion violates the Fourth Amendment"; *United States v. Rosborough*, 366 F.3d 1145 (10th Cir. 2004) (an investigative stop must be "temporary and last no longer than is necessary to effectuate the purpose of the stop") (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)). Here, however, the encounter was consensual.

An encounter, on the other hand, is consensual when a reasonable person would believe he was free to leave or disregard the officer's request for information. *U.S. v. Manjarrez*, 348 F.3d 881, 885-86 (10th Cir. 2003). The question of whether an individual consents to further questioning is based on the totality of the circumstances. *Id.* Defendant voluntarily handed over

his ticket to Perry and then continued to participate in the encounter by immediately providing his identification papers on request.

Courts have identified several factors that lead a reasonable person to believe he is not free to disregard the police officer, including: the threatening presence of several officers, the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or small enclosed space; and absence of other members of the public. *See United States v. Zapata*, 997 F.2d 751, 757 (10th Cir. 1993); *see also United States v. Abdenbi*, 361 F.3d 1282, 1291 (10th Cir. 2004) (the list of relevant factors is non-exhaustive and no one factor is dispositive). There is no evidence of coercion during this encounter based on the following evidence:

- There was no show of force or physical contact: only Agent Perry and Officer Chavez had boarded the train, and Defendant testified that he first noticed Officer Chavez only when Perry told Defendant to stand after his luggage was searched.
- Perry testified that he was armed, but the weapon was not visible;
- The recording supports a finding that no aggressive communications were used;
- Perry immediately returned both Defendant's ticket and identification;
- Defendant contends that he was not advised of his "right to refuse to answer questions" (Doc. 35 at 4), but police do not have to inform an individual of his right to refuse or disregard further questioning for the encounter to be consensual. *U.S. v. Manjarrez*, 348 F.3d 881, 885-86 (10th Cir. 2003);
- Defendant claims that Perry "harassed" him and "kept stalking" him, repeatedly asking to engage him in the encounter and refusing to speak with Perry three times: (1) first telling Perry, "I know who you are and no, you can't search me"; (2) then after Perry introduced himself as a police officer; and then finally (3) after Perry identified himself as "security," to which Defendant responded, "No, I'm asleep" and handed Perry his ticket. Hrg. Tr. at

8:13-16. However, the Enhanced Recording (Deft's Ex. 15) indicates that Perry asked him to participate in the encounter only once.

Perry: Hello, sir. How are you doing today?

Deft: Good.

Perry: How are you doing, sir? Sir, I'm a police officer. I check the train here for security. May I speak to you for a moment?

Deft: No, I'm asleep.

Deft's Ex. 4 at 2:1-8. As the Government noted, the exchange between Defendant and Agent Perry lasted only a few seconds. Defendant handed over his ticket without being asked and while Perry did ask for identification, he handed it back to Defendant after reviewing it.⁴ The Court therefore finds no evidence of coercion or harassment during this encounter.

Defendant contends that he felt obligated to comply with Perry's requests, but his testimony on whether there was egress from the train contradicts this claim. Defendant testified that he *did* feel free to walk away but did not because he "didn't do nothing wrong." Hrg. Tr. at 24:8-10. Even at the point when Agent Perry found the vials and the marijuana gummy bear, Defendant felt that he "could walk away." In other words, Defendant did not leave the train because he was unable to leave; Defendant did not leave the train because he felt he had done nothing wrong. Hrg. Tr. at 31:22-25;32:1-2. Also, early in his testimony, Defendant claimed that Officer Chavez was blocking the aisle to the right while Perry was blocking the exit to the left. *Id.* at 10:12-15. However, he later testified that he did not notice Officer Chavez until Agent Perry told him to stand. *Id.* at 36:16-20 ("I didn't know he was standing back there, because the chairs

⁴ Defendant relies on a Ninth Circuit case, *Garcia v. Long*, for the proposition that a suspect need only "articulate his desire" to remain silent in order for a reasonable officer to understand the statement to be a request to remain silent. 808 F.3d 771, 777 (9th Cir. 2015); see Doc. 73 ("Notice of Supp. Auth."). *Garcia* is not relevant to the instant case because *Garcia* involved a *Miranda* issue during detention and here, Defendant was never in a "custodial interrogation.". See *Miranda v. Arizona*, 884 U.S. 436 (1996). Also, *Garcia* does not alter the analysis for consensual encounters under Tenth Circuit law.

are so high you can't see behind you. The chairs are up to here, so you can't just turn around and see"). Thus, even crediting his later testimony, Defendant would not know his egress was blocked by Officer Chavez until after his luggage was searched and Perry told him to stand.

Agent Perry testified that he made certain that he did not block the aisleway and that there was egress from the train during the encounter and that Defendant "could have got up and walked away either through [the sliding door in the front of the train] or walked to the rear and went down the aisleway." Hrg. Tr. at 6:9-17. Perry also testified that when he showed Defendant his badge when identifying himself as a law enforcement officer and when he received and returned identification papers, he stepped forward and then back again to the opposite seat so as not to block the aisle. The Court finds this testimony to be credible. Perry did not explicitly advise Defendant that he was free to leave, but he was not required to do so. *See United States v. White*, 584 F.3d 935, 944-45 (10th Cir. 2009) (an explicit advisement that a citizen has a right to terminate an encounter with police is not required but is merely a factor to be considered in the totality of the circumstances); *U.S. v. Ledesma*, 447 F.3d 1307, 1315 (10th Cir. 2006) ("The Supreme Court has admonished . . . that an officer's failure to inform the defendant that she is free to leave, standing alone, does not make an encounter nonconsensual.").

For these reasons, the Court finds that Agent Perry did not violate Defendant's constitutional rights by continuing the encounter after returning Defendant's identification because the encounter remained consensual and therefore did not implicate the Fourth Amendment.

II. Search of Defendant's Belongings

Based on a review of the audio recordings and transcripts, the encounter continued to be consensual in nature: Agent Perry's tone and demeanor did not change; egress from the train

remained clear and there was no indication from Defendant that he no longer wished to engage with Perry.

A. Agent Perry's Requests for Consent to Search

After returning Defendant's identification, Perry asked him whether he had luggage on the train.⁵ Defendant testified that he had emptied out his backpack earlier and removed the vials out from the plastic bag because he "kind of knew" that someone was going to harass him when the train hit Albuquerque. Hrg. Tr. at 14:11-20. He also "made sure" that the vials were not in plain view. Hrg. Tr. at 15:5-7. Defendant stated that his backpack was lying in the seat next to him on top of the plastic bag and the vials were under the plastic bag. Hrg. Tr. at 14:3-4.

Defendant testified that when Perry asked to search his luggage, he told Perry there was nothing in the backpack, turned it upside down and shook it in order to show that Perry that it was empty. *Id.* at 11:1-9; 27:8-12; 69:12-13. Perry then reached for the plastic bag without Defendant's consent, pulled the bag back and saw the vials that were lying underneath. *Id.* at 30:1-10. Defendant then reached down, grabbed one of the vials and opened it and ate the one gummy bear that was inside one of the vials. Tr. at 30:12-17.

The Government contends that Defendant gave consent to search the plastic bag. Agent Perry testified that after Defendant identified the backpack as his, Perry asked him for consent to search the bag for contraband. Defendant then "mumbled something," picked up the backpack, turned it upside-down and immediately dumped out its contents onto the empty aisle seat directly beside him. Hrg. Tr. at 13:2-7. Perry described Defendant as "agitated at the time." *Id.* Agent Perry testified that a "plastic shopping bag, like you get at the grocery store," came out of the bag

⁵ The encounter continued as consensual even at this point. Agent Perry's demeanor did not change (based on review of audio recording or transcript); egress was not blocked; nor did Defendant make it clear that he no longer wished to engage with Perry.

and was lying on the seat. He asked Defendant for consent to search the plastic bag and Defendant responded “Go for it.” Perry found the vials inside the plastic bag. The Enhanced Transcript contains the exchange between Agent Perry and Defendant with respect to the search of the backpack and plastic bag:

14 (p. 2) Perry: 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]?⁶

17 Deft: No, sir.

18 Perry: How about this bag here, is this your bag here?

20 Deft: No.

21 Perry: This is not your bag here?

23 Deft: This is my bag right here. This is only my bag right – so –

25 Perry: **There’s nothing else though? Okay. Would you consent for a search of your bag for contraband, sir?**

3 (p. 3) Deft: There’s nothing in there. Okay? Alrighty. Right?

5 Perry: **Do you give me permission to search this bag here?**

7 Deft: Go for it.

8 Perry: Thank you, sir. I believe everything – and you have no luggage downstairs?

10 Deft: No, sir.

11 Perry: What’s that?

12 Deft: It’s nothing. It’s medication.

14 Perry: I see that. I see what it was, sir.

16 Deft: It’s medication. All that is medication.

18 Perry: Sir, you need to stop. Okay?

20 Deft: Yes, sir.

21 Perry: All right. Here you go. All right. It’s not medication. All right. You have no luggage downstairs? Okay. Can you stand up for me, sir?

25 Deft: (Inaudible)

1 (p. 4) Perry: I’m sorry.

2 Deft: Please, sir, I’m trying to go to sleep.

4 Perry: Okay. Sir, I need you to stand up for me.

6 Deft: I’m not going to ---

⁶ One can hear “no” on the Enhanced Recording although it is not included in the Enhanced Transcript. Numbers preceding the phrases indicate the corresponding lines and pages of the Enhanced Transcript.

Def't's Ex. 4 (Enhanced Transcript) at 2-4 (emphasis added). The transcript reflects that Agent Perry asked Defendant for permission to search twice, once at page 2, line 25 and again at page 3, line 5. Defendant acknowledges that Perry asked for consent to search his luggage twice. Hrg. Tr. at 27:9-11; 65:12-13. However, his testimony is inconsistent as to which of his belongings are the subject of those requests. On direct examination, Defendant testified that both of Perry's requests for consent refer to the backpack. Hrg. Tr. at 27:8-12. In response to the first request, Defendant told Perry there was nothing in the backpack, and in response to the second, Defendant told Perry to "Go for it." On cross-examination, Defendant testified that Perry's first request referred to some luggage across the aisle on top of the luggage rack that was not his, *id.* at 65:15-19 and only the *second* request referred to the backpack. *Id.* at 66-67 ("... but I guess what you don't see is when he steps up to me, he's not point at that black bag [backpack] I'm laying on, he's pointing at another bag across the aisle on top of the luggage rack on that corner").

Defendant's account is inconsistent and is directly contradicted by Defendant's own audio exhibit, the Enhanced Recording, Exhibit 15. This recording resolves the matter definitively and persuades the Court that Perry's second request and Defendant's response "Go for it" both refer to the plastic bag:

- Defendant clarified that the backpack was his—and the luggage on the top rack across the aisle was not—*prior* to Perry's first request for consent and therefore Perry's first request had to refer to Defendant's backpack and not the luggage on the top rack that was not his;
- On the recording and immediately *after* Perry's first request for consent, one can hear rattling and jostling sounds identified by Defendant as occurring when he upended the backpack and shook it. Hrg. Tr. at 67:5-8. The sounds last for a full ten seconds and are followed by Defendant's statement, "There's nothing in there. Okay? Alrighty. Right?" It makes no sense that Perry would then again seek consent to search a bag that had just been emptied. The only logical conclusion is that the second request had to refer to a different bag;

- One can hear a distinct inflection on the word “this” in Perry’s request for consent to “search *this* bag here,” signifying that the second request went to a bag that was in fact different from the backpack that had just been emptied;
- Defendant suggested that the sounds were from the clanking of the backpack straps against the armrest of the train seat rather than from the contents being dumped out. Hrg. Tr. at 57:22-25, at 67:5-8. This suggestion is difficult to accept as credible. Ten seconds seems like an inordinately long time to be emptying out an “empty” backpack. Further, the Court finds that the sounds are consistent with the sounds of contents being dumped out of a bag.

Based on the evidence and the testimony, the Court finds Agent Perry’s testimony to be credible and consistent with the Government’s position that Defendant consented to a search of his backpack as well as the plastic bag.

Defendant consented to a search of his backpack by upending it and shaking it. Defendant does not challenge the significance of upending the backpack and shaking it as a nonverbal consent to search. As mentioned earlier, consent can be given nonverbally and “may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer.” *See United States v. Guerrero*, 472 F.3d at 789–90); *see also United States v. Gordon*, 173 F.3d 761 (10th Cir.1999) (finding implied consent where, in response to officer’s question whether defendant could open a locked bag, defendant handed the officer the key). In this case, Defendant’s conduct in emptying his backpack in response to Agent Perry’s request was a willing and unforced act that manifested consent.

The Court also finds, based on the evidence and testimony, that Defendant consented to a search of the plastic bag with his response, “Go for it.” Therefore, Agent Perry’s search of the plastic bag did not violate Defendant’s Fourth Amendment rights.

C. Probable Cause for Pat-Down and Arrest

Defendant contends that Agent Perry did not have a legal basis to search him for other drugs based on what was in the vials.

Agent Perry's search of the backpack and plastic bag (both of which the Court has determined to be legal searches) uncovered four plastic vials. Defendant's Exhibit 1 is a photo showing four plastic vials, three of which are clear and colored (white, purple and green) and one which is an opaque blue. Another photo is a closeup of the clear purple vial labeled "Medical Cannabis" which appears to contain rolling papers. *See* Hrg. Tr. at 48:1-3.

Defendant testified that the vials contained rolling paper and an empty vape pen, and that the vials did not contain any cannabis except for the gummy bear, which was "prescribed" although he conceded that there might have been "residue" in the vials. Hrg. Tr. at 15:13-18; 17:6-7; 47:1-10. Defendant stated that the clear vial "probably" contained the THC gummy bear. Hrg. Tr. at 48:1-5. Defendant was asked whether he could observe any marijuana or "leafy substance" in the green vial, but said he could not "make it out" and did not know what it was.

Agent Perry testified that when he opened the plastic bag, he observed several vials. One or two were empty; one contained a gummy bear of edible THC and one contained a green leafy substance. Perry testified that, based on his experience and training and seeing those canisters "numerous times" in his career, he believed the contents were marijuana. Hrg. Tr. at 13:22-25; 14:1-12.

Defendant contends that there was no probable cause for arrest because he had a medical prescription for the gummy bears and because marijuana is legal in some states, Hrg. Tr. at 31:22-25; 32:1-3; 58:7-10, but these arguments miss the mark. Marijuana possession is a federal crime under 21 U.S.C. § 844 and marijuana remains contraband under federal law whether or not it is legal for medicinal and recreational purposes. *See United States v. Schostag*, 895 F.3d 1025, 1028 (8th Cir. 2018) (citing cases therein). Thus, possession of marijuana—with or without a medical prescription for it—is still a federal offense, providing a law enforcement officer with probable

cause to arrest. The physical evidence as well as Defendant's own testimony supports Agent Perry's account regarding his observations following the search of the plastic bag and the Court finds this account to be credible. The evidence and testimony also support a finding that Agent Perry had probable cause to arrest Defendant for possession of marijuana and to conduct a search incident to arrest, under the totality of circumstances:

- A green leafy substance is visible through the clear green vial in Defendant's Exhibit 1. Taken together with the other evidence under a totality approach, Agent Perry could reasonably believe he had probable cause to arrest Defendant for possession of marijuana;
- Defendant testified that when Agent Perry saw the vials, he opened the one containing the gummy bear and "threw it in my mouth." Hrg. Tr. at 58:8-19. Defendant also testified that he tried to cover up the vials and Perry told him to "stop it." *Id.* at 31:13-17; 32:1-8. Perry could reasonably infer from this conduct that Defendant was trying to either hide or eliminate incriminating evidence;
- Defendant admitted that he was under the influence of cannabis at the time of the encounter. *Id.* at 59:4-6.

Defendant also claims that a full pat-down search was not justified based solely on an empty bottle of marijuana gummy bears. This argument ignores the evidence as well as the relevant law.

A warrantless search preceding an arrest is a legitimate "search incident to arrest" as long as there is (1) a legitimate basis for the arrest prior to the search, and (2) the arrest must follow quickly thereafter. *United States v. Torres-Castro*, 470 F.3d 992, 997–98 (10th Cir. 2006) (citing *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998)). Further, an officer may arrest a person for "even a very minor criminal offense" committed in his presence without violating the Fourth Amendment). *Texas v. Brown*, 460 U.S. 730, 742 (1983); *see Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185, 1191 (10th Cir. 2007); *see also United States v. Ludwig*, 641 F.3d 1243, 1252 (10th Cir. 2011) (probable

cause standard is something less than a preponderance, as it does not even require that an officer's suspicion about the presence of contraband be "more likely true than false").

The pat-down search was justified under these circumstances because Agent Perry had probable cause to arrest Defendant and the search occurred simultaneously with the arrest. *Anchondo*, 156 F.3d at 1045 ("whether or not the officer intended to actually arrest the defendant at the time of the search is immaterial to whether search incident to arrest is legitimate). Perry believed that he had probable cause to arrest Defendant based on the marijuana he observed and at that point wanted to confirm if Defendant had anything else on his body such as "any type of contraband or weapon, or other bundles of illegal narcotics. Hrg. Tr. at 16:9-19. Perry's experience has taught him that when people "had personal use amounts of marijuana or other drugs, . . . then they have other larger bundles on their bodies or in their bags. *Id.* Defendant initially resisted Perry's directives to stand up and put his hands on the overhead luggage compartment area, Hrg. Tr. at 38-39, but eventually complied.⁷ During the pat-down, Perry felt a "very hard, round-shaped bundle that was pretty large" in the crotch area between Defendant's legs. Hrg. Tr. at 21-25;17:1-4. Agent Perry "knew" from experience that the "bundle, the location, the concealment method, and then the hardness and the shape, was a bundle of illegal narcotics that I had seen strapped to people's bodies in the past on numerous occasions." *Id.*⁸

The Court accepts Agent Perry's testimony regarding his observations and conclusions made as a result of his experience. For the above reasons, the Court finds that Agent Perry's

⁷ Defendant admitted that he resisted "briefly" when Perry told him to put his hands up, and that there was a "minor struggle." Hrg. Tr. at 38-39.

⁸ Defendant did not challenge either the scope or manner of the pat-down search either in his brief or at the hearing, and the Court will not address arguments that are not presented. See *United States v. Sinjeneng-Smith*, 140 S. Ct. 1575 (2020) (a court must "rely on the parties to frame the issues for decision" and that courts have "the role of neutral arbiter of matters the parties present").

luggage search and pat-down of Defendant were legally justified and did not violate Defendant's Fourth Amendment rights.

III. Motion to Dismiss Grand jury Indictment

Defendant also moves to dismiss the indictment (Doc. 56), claiming that his Fifth Amendment rights are violated because he is being held to answer for a crime without a valid indictment of a Grand jury. Specifically, he claims that Agent Perry misled the grand jury by testifying that he asked for and received permission to speak with Defendant when in fact Defendant refused to do so.

A court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendant. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). Dismissal of an indictment returned by a grand jury is a very drastic action. *United States v. Hillman*, 642 F.3d 929, 933–34 (10th Cir. 2011) (quoting *United States v. Pino*, 708 F.2d 523, 530 (10th Cir.1983)). Whether to dismiss or not hinges on whether the asserted grand jury error falls into two categories: a technical or procedural error which only affects a grand jury's finding of probable cause versus an error that threatens a defendant's right to fundamental fairness in the criminal process. See *United States v. Lopez-Gutierrez*, 83 F.3d 1235, 1244 (10th Cir. 1996).⁹ The common thread, therefore, is that a showing of deliberate government attempt to influence a grand jury is required. *Doran v. Stratton*, 1991 WL 35249, at *2 (10th Cir. 1991) (unpublished opinion).

Defendant contends that he was prejudiced in the Grand jury proceedings when Perry testified that he asked for and received, permission to speak with him when in fact, when in fact

⁹ See also *United States v. Crockett*, 435 F.3rd 1305, 1316 (10th Cir. 2006) (defendant failed to establish that the witness uttered a false statement, but even if he had, there was no showing of any deliberate attempt by the prosecution to unfairly sway the grand jury); *United States v. Mohawk*, 20 F.3rd 1480, 1483 (9th Cir. 1994) (there was nothing in the record suggesting that the officer knowingly gave false testimony or that the prosecutor knowingly used false testimony).

Defendant responded, “no, I’m sleeping.” By continuing the encounter, Defendant claims that Special Agent Perry violated Defendant’s Fourth Amendment rights and conducted an illegal search of Defendant’s bag; and by his testimony, Agent Perry led the Grand jury to believe he had conducted a legal, consensual search of Defendant and therefore there was probable cause for his arrest.

In light of the Court’s findings that the encounter and luggage search was consensual, and that Agent Perry had probable cause to arrest Defendant and conduct a pat-down search after discovering the vials in the plastic bag, Defendant has no grounds on which to seek dismissal of the indictment. The Court also found Perry’s testimony to be credible and supported by the relevant audio recordings and transcripts. Also, Perry’s testimony to the grand jury is not necessarily suspect, since the Defendant’s comment that he was asleep is inaudible in the Original Recording. As discussed above, Agent Perry himself did not hear the comment until he reviewed the Original Recording with his Bose headphones, after which Perry corrected the transcript to read “I’m asleep.” Thus, Perry’s testimony to the grand jury that he obtained Defendant’s consent to continue the encounter is both plausible and credible, and there is no technical or procedural error which might have affected the grand jury’s finding of probable cause. Therefore, Defendant’s motion to dismiss the indictment is denied.

CONCLUSION

For the reasons described in this Memorandum Opinion and Order, Defendant’s Motion to Suppress (**Doc. 27**) and Defendant’s Motion to Dismiss Indictment (**Doc. 56**) are hereby DENIED.

IT IS SO ORDERED.



CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
District of New Mexico

UNITED STATES OF AMERICA

Judgment in a Criminal Case

V.

RODOLFO RODRIGUEZ, JR.,Case Number: **1:18CR01568-001WJ**USM Number: **47735-079**Defendant's Attorney: **Jerry A. Walz****THE DEFENDANT:**

pleaded guilty to count(s) **Indictment**.
 pleaded nolo contendere to count(s) which was accepted by the court.
 was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<i>Title and Section</i>	<i>Nature of Offense</i>	<i>Offense Ended</i>	<i>Count</i>
21 U.S.C. Sec. 841(b)(1)(A)	Possession with Intent to Distribute 1 Kilogram and More of Heroin	02/01/2018	

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 . The Court has considered the United States Sentencing Guidelines and, in arriving at the sentence for this Defendant, has taken account of the Guidelines and their sentencing goals. Specifically, the Court has considered the sentencing range determined by application of the Guidelines and believes that the sentence imposed fully reflects both the Guidelines and each of the factors embodied in 18 U.S.C. § 3553(a). The Court also believes the sentence is reasonable, provides just punishment for the offense and satisfies the need to impose a sentence that is sufficient, but not greater than necessary to satisfy the statutory goals of sentencing.

The defendant has been found not guilty on count(s) .
 Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/18/2020

Date of Imposition of Judgment

/s/ William P. Johnson

Signature of Judge

**Honorable William P. Johnson
Chief United States District Judge**

Name and Title of Judge

12/1/2020

Date

DEFENDANT: RODOLFO RODRIGUEZ, JR.,
CASE NUMBER: 1:18CR01568-001WJ

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **46 months**.

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends FCI Big Spring, TX.

- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at on .
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on .
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RODOLFO RODRIGUEZ, JR.,
CASE NUMBER: 1:18CR01568-001WJ

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **3 years**.

If the Defendant does well and is compliant, he may be considered for early release from his term of supervised release.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(Check, if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, require you to notify that person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **RODOLFO RODRIGUEZ, JR.**,
CASE NUMBER: **1:18CR01568-001WJ**

SPECIAL CONDITIONS OF SUPERVISION

You must not use or possess alcohol.

You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic cannabinoids, synthetic cathinones, etc.) that impair your physical or mental functioning, whether or not intended for human consumption.

You must reside in a residential reentry center for a term of (up to) 180 days. You must follow the rules and regulations of the center.

You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to pay all, or a portion, of the costs of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer may disclose the presentence report, any previous substance abuse evaluations and/or other pertinent treatment records to the treatment provider.

You must submit to a search of your person, property, residence, vehicle, papers, computers (as defined in 18 U.S.C. 1030(e)(1)), other electronic communications or data storage devices or media, or office under your control. The probation officer may conduct a search under this condition only when reasonable suspicion exists, in a reasonable manner and at a reasonable time, for the purpose of detecting drugs, firearms, knives or any other illegal contraband . You must inform any residents or occupants that the premises may be subject to a search.

You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing may include urine testing, the wearing of a sweat patch, a remote alcohol testing system, an alcohol monitoring technology program, and/or any form of prohibited substance screening or testing. You must not attempt to obstruct or tamper with the testing methods. You may be required to pay all, or a portion, of the costs of the testing. You are subject to a maximum of up to 4 tests a month. Probation may request modification of the testing requirements.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: RODOLFO RODRIGUEZ, JR.,
CASE NUMBER: 1:18CR01568-001WJ

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
	\$100	\$0.00	\$0.00	\$ 0.00	\$0.00

The determination of the restitution is deferred until . An *Amended Judgment in a Criminal Case* will be entered after such determination.
 The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A In full immediately; or
 B \$ due immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Based on the defendant's lack of financial resources, the Court will not impose a fine or a portion of a fine. The Court concludes the total combined sanction without a fine or alternative sanction is sufficiently punitive.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 _____)
4 UNITED STATES OF AMERICA,) No. 1:18-CR-01568-WJ
5 Plaintiff,)
6 vs.) Pete V. Domenici U.S. Courthouse
7 RODOLFO RODRIGUEZ, JR.,) Cimarron Courtroom
8 Defendant.) Albuquerque, New Mexico
9 _____) Friday, June 26, 2020
10 _____) 9:30 A.M.

11 10 TRANSCRIPT OF PROCEEDINGS

12 11 MOTION HEARING

13 12 MOTION TO SUPPRESS (Doc. 27),
14 13 MOTION TO DISMISS INDICTMENT (Doc. 56),
15 14 and SUPPLEMENTAL MOTION TO SUPPRESS (Doc. 73)
16 15 BEFORE THE HONORABLE WILLIAM P. JOHNSON
17 16 CHIEF UNITED STATES DISTRICT JUDGE

18 17 APPEARANCES:

19 18 For the Plaintiff: DAVID M. WALSH
20 19 UNITED STATES ATTORNEY'S OFFICE
21 20 District of New Mexico
22 21 Post Office Box 607
23 22 Albuquerque, New Mexico 87103

24 23 For the Defendant: JERRY A. WALZ
25 24 ALFRED CREASY
26 25 WALZ AND ASSOCIATES
27 26 133 Eubank Blvd., N.E.
28 27 Albuquerque, New Mexico 87123

29 28 Reported by: MARY K. LOUGHAN, CRR, RPR, NM CCR #65
30 29 United States Court Reporter
31 30 Phone: (505)348-2334
32 31 Email: Mary_Loughran@nmd.uscourts.gov

33 32 Proceedings reported by machine shorthand and transcript
34 33 produced by computer-aided transcription.

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1 (In Open Court at 9:47 A.M.)

2 THE COURT: This is United States vs. Rodolfo
3 Rodriguez, 18-CR-1568.

4 would counsel enter their appearances for the record,
5 please.

6 MR. WALSH: Dave Walsh on behalf of the United
7 States. Also at counsel table is Special Agent Perry of the
8 Drug Enforcement Agency, and Daniel Kingery, a technology
9 assistant.

10 MR. WALZ: Good morning. Jerry Walz and Alfred
11 Creasy for the Defendant, and the Defendant is present,
12 Mr. Rodolfo Rodriguez, Jr.

13 THE COURT: All right, this is on the docket -- well,
14 there are two matters, the Motion to Suppress and then the
15 Motion to Dismiss Indictment. Seems like we ought to proceed
16 first with the Motion to Suppress.

17 MR. WALSH: I agree. I think the evidence is going
18 to take care of both motions.

19 THE COURT: I've reviewed the pleadings. Did you
20 want to proceed initially with testimony, or do you have
21 opening statements, or how do counsel want to proceed?

22 MR. WALSH: No need for opening statements from the
23 Government. Just as a precursor of things to come, we have
24 some exhibits. We have two audio files, one from the
25 Government and the defense has one that was enhanced. We have

1 different versions of transcripts. I don't think we have
2 objections to any of the exhibits. And I'll save legal
3 arguments until the end.

4 THE COURT: Okay.

5 MR. WALZ: Your Honor, I'd like to make a brief
6 opening statement and, of course, make my arguments after.

7 THE COURT: Sure, go ahead.

8 MR. WALZ: Thank you.

9 Your Honor, much of the exhibits will be the same,
10 and we've already stipulated to the admissibility, so that
11 should go in quickly. There are transcripts, as Mr. Walsh
12 stated, of a very important tape-recording that was made by
13 Agent Perry during his encounter with Mr. Rodriguez on the
14 Amtrak train. By and large, the transcripts are almost
15 identical, and I say almost because the Government's
16 transcript, itself, went through a couple of alterations at a
17 very early point in the interaction. And I'm not accusing the
18 transcriptionist of doing anything inappropriate here, I just
19 want to be very clear, but there was a change, and an important
20 change, even in the Government's transcript, from the very
21 first one where Agent Perry encounters Rodolfo. They seem to
22 go right into a conversation about where he's going and what's
23 he doing, versus Mr. Rodolfo Rodriguez's response in the first
24 transcript where he says, "I'm asleep." That shows up in a
25 later Government transcript from that same recording.

1 Now, when myself and Mr. Creasy got the recording
2 from Mr. Walsh in discovery, we listened to it very carefully,
3 and after Agent Perry introduces himself and asks if,
4 basically, he can engage in a consensual encounter -- now, I'm
5 paraphrasing that, but you'll read the transcript --
6 Mr. Rodriguez says, "No," and then there's a pregnant pause,
7 and he says, "I'm asleep," and then it goes on from there.
8 It's our contention that based on well-established case
9 authority from the United States Supreme Court, Tenth Circuit,
10 and this jurisdiction, the minute that Mr. Rodriguez said, no,
11 absent Agent Perry being able to articulate reasonable
12 suspicion or probable cause at that point, at that point he
13 needed to break off his attempt to further communicate,
14 question, interact with Mr. Rodriguez. If the law would have
15 been followed at that point, all the fruits from what we
16 believe to be the illegal search would be fruits of the
17 poisonous tree. As the Court knows from law school 101, even
18 when we went to law school, under Wong Sun vs. the United
19 States, that's all inadmissible.

20 Now, instead of breaking off the conversation, it
21 continues, and then we must look, pursuant to Tenth Circuit and
22 United States Supreme Court case authority, Your Honor, at each
23 and every interaction and transaction that occurred with Agent
24 Perry from that point forward. The Court is going to hear
25 testimony that Agent Perry was also being assisted by a field

1 officer on the task force by the name of Steve Chavez. We're
2 going to hear time-wise that from the time that Agent Perry
3 first initiated the contact with Mr. Rodriguez -- and we still
4 don't know why. It's not in any of the reports why he singled
5 out Mr. Rodriguez. We'll find out why he even approached
6 Mr. Rodriguez, but we don't know from any of the reports why he
7 even encountered him to start this conversation.

8 As this matter continues, Mr. Rodriguez dumps his
9 backpack belongings on a seat, and there's some kind of a
10 laundry bag there, as well. We'll show you pictures and you'll
11 hear testimony. Anyway, there are a couple empty cannabis
12 prescription -- I say empty. One I believe had a gummy bear,
13 and another might have had some leafy substance in it that
14 clearly appeared to be prescription cannabis. No effort was
15 made to validate whether those were, in fact, prescriptions and
16 whether they were legally in the possession of Mr. Rodriguez.
17 But we do know that Agent Perry candidly answered a Grand Jury
18 question asking about the marijuana, and Agent Perry
19 essentially said, and we'll point this out during the
20 testimony, "If it was just on the marijuana, we wouldn't be
21 here." So I don't know, based on that statement that Agent
22 Perry gave, whether that rose to his mind at that time when he
23 saw those empty, or near empty vials, whether that created a
24 reasonable suspicion or probable cause to go further. We do
25 know that Rodolfo Rodriguez says a series of nos, either

1 verbally or shaking his head to various requests that were made
2 by Agent Perry throughout this proceeding.

3 So then we go from Agent Perry looking at these
4 vials -- and the testimony will show Rodolfo Rodriguez did, in
5 fact, consume what appeared to be a gummy bear. Don't know. I
6 guess we'll never know for sure what he took or what its
7 composition was. But we do know then it escalated to the most
8 intrusive type of search that could occur, and that was a full
9 pat-down search, having Mr. Rodriguez stand up. Mr. Chavez,
10 Field Officer Chavez, came and assisted. Mr. Rodriguez is
11 expected to testify that his egress and ingress were blocked
12 where he was located in the car. He felt that he had no choice
13 but to comply with directives. And he was still asking, and
14 you can tell from the transcript of the tape that he was not
15 wanting to be patted down, he was not wanting to be arrested,
16 he was not wanting to be handcuffed. And you can see in the
17 tape and hear in the tenor of the voice Agent Perry was getting
18 a little bit upset, and it was clear that bad things could and
19 would happen to Mr. Rodriguez if he didn't stand up and submit
20 to the handcuffing and the pat-down.

21 Now, we do know historically, based on the pat-down
22 and subsequent search at DEA headquarters, that Mr. Rodriguez
23 did, in fact, have concealed on his person in the crotch area a
24 certain amount of heroin. That's not debatable, and we're not
25 here to condone that kind of conduct or trivialize it. That

1 conduct is serious. But we're here, rather, to defend and
2 uphold Constitutional rights that go way back historically from
3 the Homestead Exemption Privacy Act to the Transportation Act.
4 Even though none of them are directly on point, all those are
5 centered around creating a certain bubble of protection for a
6 member of the traveling public even on common lines like
7 Amtrak, Greyhound, etc.

8 Now, I'm not here to disparage Agent Perry or his
9 reputation. I've known him for a good number of years, as well
10 as his predecessor, Kevin Small, that I had cases against and
11 with. But why I am here, and I have to point this out, Agent
12 Perry does have a history of sorts relating to these type of
13 encounters that even led to the publication -- and again, this
14 is not Jerry Walz, this is the Tenth Circuit -- of a case
15 called Campa Rangel, where the Tenth Circuit sent back to
16 Judge Parker a case because they were so concerned -- not my
17 words, the Tenth Circuit's words, Judge Hartz's words -- that
18 perhaps there had been perjury committed by Agent Perry. And I
19 have never seen in my 40 years a reported case by a Circuit or
20 a United States Supreme Court --

21 MR. WALSH: Your Honor, I'm going to object. I think
22 this is getting close to being a closing argument as opposed to
23 an opening statement.

24 MR. WALZ: Your Honor, where I'm going with it is, I
25 think that this Court's main function today, if I may be so

1 bold, is to assess the credibility of probably Agent Perry and
2 Mr. Rodriguez.

3 THE COURT: I'll allow it.

4 MR. WALZ: I'm almost finished. In any event, I know
5 the Court is familiar with that case. And we also did
6 supplemental authority relating to two recent decisions by
7 United States District Court Judge Martha Vasquez calling into
8 question Agent Perry's credibility.

9 Now, what I want to do whenever I have the
10 opportunity is I want to walk through carefully with the Court
11 the encounters that occurred. Agent Perry's testimony to the
12 Grand Jury -- which when you read the transcribed testimony,
13 they say nothing about him saying no or that he's sleeping. It
14 basically just says that Agent Perry asked and received
15 permission or consent. That's all it says. And we believe
16 that's very misleading to the Grand Jury knowing, in fact, what
17 happened. It continues again with the transcripts, and we
18 believe that the corrected transcript, or the enhanced
19 transcript, as Mr. Walsh says, and I think we might label it
20 that, where it says, "No, I'm asleep," and in the Government's,
21 for lack of a better word, corrected or enhanced transcript it
22 says, "I'm sleeping," when initially asked by Agent Perry if he
23 could interview Mr. Rodriguez, that's very powerful testimony,
24 as well.

25 Based on the totality of the circumstances and

1 analyzing, Your Honor, each encounter -- with, I think, the
2 first encounter being the most important, by the way. But
3 they're all important. Assuming that Agent Perry can somehow
4 get by step one to step two, or whatever, I don't know how he
5 can make the leap from looking at the near empty vials of what
6 he believed to be marijuana -- and I don't know that I've ever
7 seen a chemical report on it from the lab or anything -- to
8 having him stand up, now with Agent Chavez there blocking
9 egress and ingress, and doing a complete pat-down, I don't
10 think that the law supports that kind of jump.

11 And despite my own professional beliefs about Agent
12 Perry and his abilities and whatnot, that's not important.
13 What is important is the evidence before the Court. And we
14 have stipulated into evidence, I believe, just about
15 everything. Mr. Walsh, because we were having some
16 difficulties, or we didn't get a disc of our enhanced version,
17 Mr. Walsh is kind enough that he has it on his computer and
18 he's agreed to play it, and we've agreed to stipulate to its
19 admissibility. And we've already checked with Mr. Garcia, your
20 office administrator, on how we can submit that and get it into
21 evidence appropriately before the Court.

22 So, Your Honor, that's where we're at. I think this
23 is going to be an interesting case. There are some very, I
24 think, semi-complex and complex issues, both legally and
25 factually, and we look forward to it. Thank you, Your Honor.

1 THE COURT: Mr. Walsh.

2 MR. WALSH: Your Honor, just a few remarks in terms
3 of an opening statement.

4 (A discussion was held off the record.)

5 MR. WALSH: Just a couple of opening comments, Your
6 Honor. At the end of the day, after you hear the evidence --
7 Special Agent Perry is going to testify that he never heard the
8 Defendant say anything about sleeping. Initially when it was
9 transcribed, we're going to submit as evidence the transcript
10 from Russian Reporters, and that portion from Russian Reporters
11 is going to say "inaudible."

12 Thereafter, I had Special Agent Perry look for
13 mistakes. Oftentimes those transcripts come back as mistaken.
14 Special Agent Perry put on his Bose headphones and made
15 corrections in the transcript, and that's going to be
16 Government's Exhibit 2. And that's the first time he hears
17 anything about sleeping. And then you heard the part about how
18 the defense got an enhanced audio.

19 Regardless, it's going to be our position that it's
20 not going to matter as to what the defense says in terms of
21 whether he said sleeping or not, that the evidence is still
22 going to show that it was a consensual encounter at the end of
23 the day. As the Court knows, and it's well-established, a
24 defendant can give consent by nonverbal actions, and the
25 evidence will detail the Defendant's nonverbal actions that

1 ultimately, we will argue, constituted consent.

2 There's a couple of case law references in the
3 pleadings. I'll go into them a little bit during some closing
4 remarks, but I'll just touch upon them right now.

5 One, marijuana is still illegal federally, so the
6 actions that Special Agent Perry took after discovering the
7 marijuana, in our view, were completely justified.

8 Two, there's some Tenth Circuit authority that is
9 cited in one of the Government's pleadings that clearly
10 indicates that a defendant can give consent by way of nonverbal
11 actions after an initial denial. So we're going to be relying
12 on that case authority in this case, too.

13 So with that in mind, we'll call Special Agent Perry.

14 (JARRELL WAYNE PERRY, GOVERNMENT WITNESS, SWORN)

15 MR. GARCIA: Please have a seat and state your full
16 name for the record.

17 MR. WALZ: Your Honor, before we start, can they
18 release one hand for Mr. Rodriguez so he can make notes?

19 THE COURT: Sure. Is he right-handed?

20 THE DEFENDANT: Yes, Your Honor.

21 MR. WALZ: Thank you, Your Honor.

22 THE WITNESS: My name is Jarrell Wayne Perry.

23 P-e-r-r-y.

24

25

1 DIRECT EXAMINATION

2 BY MR. WALSH:

3 Q. What is your occupation, Mr. Perry?

4 A. I'm a Special Agent with the Drug Enforcement
5 Administration.

6 Q. How long have you been with the DEA?

7 A. This coming September will be 22 years.

8 Q. And what kind of cases do you generally work?

9 A. For almost 21 years of my career, I've worked interdiction
10 cases, which is basically working at various means of public
11 transportation here in Albuquerque and the surrounding area
12 conducting consensual encounters and subsequently talking to
13 passengers and searching luggage and determining if they're
14 transporting either illegal narcotics or proceeds from illegal
15 narcotics throughout the country.

16 Q. Tell us about consensual encounters. What does that
17 entail?

18 A. Basically, it's a voluntary conversation between myself
19 and a passenger that's either traveling on the bus or the
20 train. I ask permission to speak with them, display my badge,
21 identify myself as a police officer, then ask them various
22 questions about their travel and, subsequently, if they have
23 any luggage with them, eventually ask for consent to search
24 that luggage, and then oftentimes to search their person, their
25 bodies, for contraband.

1 Q. Tell us about the locations where you conduct these
2 investigations.

3 A. The main two places that I work currently are at the
4 Greyhound bus station and at the Amtrak train station, which is
5 basically in the same terminal, but obviously they stop at two
6 different spots. That's basically the two main places that I
7 work now.

8 Q. And the train station and the bus station, those
9 locations, are those here in Albuquerque, New Mexico?

10 A. Yes, sir.

11 Q. Could you approximate, Special Agent Perry, how many cases
12 you've investigated over the years at Amtrak and the Greyhound
13 bus station here in Albuquerque?

14 A. I don't know specifically those two locations. I have
15 worked at other bus stations and sometimes at the Albuquerque
16 International Airport in the packaging service. But during my
17 career, I've been involved in over 1700 cases.

18 Q. Special Agent Perry, let me direct you to the date of
19 February 1, 2018. What were you doing on that date?

20 A. I was working at the Amtrak train station here in
21 Albuquerque on a train that makes a regularly scheduled stop
22 here in Albuquerque.

23 Q. And do you recall what time of day it was?

24 A. I don't know exactly what time the train arrived, but
25 generally it arrives at 11:20 and departs at 11:48. But I was

1 there sometime that morning. I can't remember exactly what
2 time it arrived on that date.

3 Q. And what was your plan in terms of what you were going to
4 do at the train station there?

5 A. To board the train as it stopped, and then speak with the
6 passengers that were on the train, and then the passengers as
7 they reboarded or boarded here in Albuquerque, and conduct
8 consensual encounters and speak with them.

9 Q. Did you have any prior information concerning Rodolfo
10 Rodriguez prior to February 1st, or prior to you going to the
11 Amtrak train station that day?

12 A. No, I did not.

13 Q. Who were you with?

14 A. I was working with Task Force Officer Seth Chavez, who's
15 assigned to our office. He was assigned to work with me on
16 that date.

17 Q. And what's his agency?

18 A. He worked -- well, he no longer works there. He works for
19 a police department on the East Coast now. But at that time,
20 he worked for, I believe it was the Valencia County Sheriff's
21 Department, but was assigned as a Task Force Officer to our
22 office.

23 Q. Now, did you have occasion to go into the coach cars of
24 the Amtrak train?

25 A. Yes. I boarded in the coach section, and Task Force

1 officer Chavez also boarded a coach car.

2 Q. And did you eventually come into contact with an
3 individual that you later identified to be the defendant in
4 this case, Rodolfo Rodriguez?

5 A. Yes, sir, I did.

6 Q. Which coach car did you locate Mr. Rodriguez in?

7 A. He was in, I believe, in the far rear coach car of the
8 train.

9 Q. Tell us how you approached Mr. Rodriguez.

10 A. Well, I boarded the coach car in front of the car he was
11 traveling in. They have a sliding door that slides in between
12 the cars. I walked through that door, and when I walked
13 through that door, Mr. Rodriguez was sitting in the very first
14 seat of that last coach car. If you're looking forward on the
15 left-hand side of the train, he was seated in the window seat,
16 and that's where I approached him to talk to him.

17 Q. Was there anyone sitting right next to him?

18 A. No, there was no one sitting in the immediate area, across
19 from him or in that whole area of the train. That car was
20 pretty empty. There were people in the back, but not near the
21 front part of the car where he was.

22 Q. Were you with Task Force Officer Chavez at this point?

23 A. No. I had boarded the car in front and walked through
24 that door. He boarded the rear car. He was in the back
25 portion of that car. He was nowhere in the area when I first

1 spoke to Mr. Rodriguez.

2 Q. What were you wearing?

3 A. It was in February. I don't know exactly what I was
4 wearing. Probably blue jeans, tennis shoes, a shirt that was
5 untucked, and then a hoodie, hoodie-type jacket. Zip-up hoodie
6 type jacket.

7 Q. Plain clothes?

8 A. Yes, sir.

9 Q. Did you have anything on or about your attire indicating
10 that you were with DEA or law enforcement?

11 A. No.

12 Q. Were you armed?

13 A. Yes, I was.

14 Q. And was your firearm visible?

15 A. No, it wasn't. It was carried on my right-hand side on my
16 belt, underneath my shirt and also underneath my jacket. It
17 was concealed.

18 Q. Did you have any type of badge?

19 A. Yes, I did.

20 Q. Where was that?

21 A. It was in my left rear pocket in my credential holder,
22 where I carry it every day.

23 Q. How did you go about approaching the defendant?

24 A. Well, he was seated in that window seat. I stood across
25 the aisleway. There was two empty seats across from him, and I

1 stood in front of the aisle seat and spoke with him.

2 Q. And where were you standing? Were you blocking his area
3 in any way?

4 A. No. I was across the aisleway. The very first two seats
5 are kind of like an airplane's, they have a larger legroom
6 area. So I stood across the aisleway and spoke with him.

7 Q. Was there room for him to leave?

8 A. Yes, there was. He could have got up and walked either
9 through that sliding door or walked to the rear and went down
10 the aisleway.

11 Q. Is that your normal approach when you do these encounters?

12 A. It depends on how crowded the train is. Sometimes I'll
13 approach people from the rear and stand to the rear of their
14 seat. On this occasion, I just chose to do it that way because
15 of the room and there was nobody around.

16 Q. Do you try not to block passengers?

17 A. Yes, I specifically do that, because I know they have to
18 be able to be free to leave and walk away, and it has to be
19 consensual.

20 Q. Were you wearing any type of, or otherwise in possession
21 of a recording device?

22 A. Yes, I was. I was wearing a digital recorder on a lanyard
23 around my neck underneath my jacket.

24 Q. So was your encounter with the Defendant recorded?

25 A. Yes, sir, it was.

1 Q. Let me hand you Government's Exhibits 1 and 2 at this
2 time. Special Agent Perry, can you identify Government's
3 Exhibit 1 at this time?

4 A. Yes, sir. It's a disc that contains a recording of the
5 encounter between myself and Mr. Rodriguez on that date at the
6 Amtrak train station.

7 Q. And can you tell us about Government's Exhibit 2?

8 A. It's a transcript of that recording from Russin Reporting.
9 It has various pages.

10 Q. Let me show you now Government's Exhibit 3. If you can,
11 identify this for the Court.

12 A. This is another transcript that's made by Russin
13 Reporting.

14 MR. WALSH: I'd like to move for the admission of
15 Government's Exhibits 1, 2 and 3 at this time.

16 MR. WALZ: No objection.

17 THE COURT: They're admitted.

18 (Government Exhibits No. 1, 2 and 3 admitted.)

19 BY MR. WALSH:

20 Q. Let me take back Government's Exhibit 1 and leave that up
21 here with the Court.

22 Special Agent Perry, you looked at my laptop, right, and
23 noticed an audio file that resembled like an orange cone; is
24 that correct?

25 THE COURT: Just a second. Is there another set of

1 exhibits?

2 MR. WALSH: Yes, sir. Let me hand the Court
3 Government's Exhibit 2 at this time.

4 THE COURT: Where is No. 1?

5 MR. WALSH: That's Government's Exhibit 1.

6 THE COURT: Okay, it's the disc.

7 MR. WALSH: And I'll give the Court
8 Government's Exhibit 3. The defense already has copies of
9 Government's Exhibits 1, 2 and 3.

10 BY MR. WALSH:

11 Q. So Special Agent Perry, you saw an audio file on the
12 desktop of my laptop, right?

13 A. Yes, sir.

14 Q. Okay. Now, it's colored orange, like an orange traffic
15 cone, correct?

16 A. Yes, sir.

17 Q. Is that a duplicate and an exact copy of Government's
18 Exhibit 1?

19 A. Yes. I believe it's just downloaded on your computer.

20 Q. Okay. Now, Government's Exhibit 1, tell us where that
21 came from, the disc.

22 A. It was a disc that I made. It has my handwriting on it.
23 It's for discovery, and I gave it to you in this case.

24 Q. And what is it?

25 A. It's the encounter between myself and Mr. Rodriguez on

1 February the 1st, 2018, at the Amtrak train station.

2 Q. Now, turning your attention back to Government's
3 Exhibit 3, let's address Government's Exhibit 3. Tell us about
4 that transcript.

5 A. It's a transcript that basically details the conversation
6 I had with Mr. Rodriguez at the Amtrak train station that came
7 from Exhibit 1.

8 Q. And this was done by Russian Reporters?

9 A. Yes.

10 Q. Were you asked to revise this transcript?

11 A. Yes. You had sent me a copy, and I listened to the
12 recording with my Bose noise reduction earphones, and when I
13 listened to it, I made what I believe were the corrections that
14 I heard and I sent it back to you.

15 Q. And tell us, then, what Government's Exhibit 2 is, that
16 transcript.

17 A. I believe Government's Exhibit 2 is with the corrections
18 that I made that I sent back to you. So it's different, a
19 little different from Exhibit No. 3.

20 Q. Thank you.

21 MR. WALSH: So let me play the recording at this
22 time, which again is Government's Exhibit 1, Your Honor.

23 (Whereupon Government's Ex. 1, an audio recording, played)

24 BY MR. WALSH:

25 Q. Okay, that's the end of the audio. That recording is

1 about three minutes and 44 seconds; is that correct?

2 A. Yes, sir.

3 Q. Let me ask you this, Special Agent Perry. Was the
4 Defendant asleep when you approached him?

5 A. No, he was not. He was lying back in his seat. In my
6 opinion, he was acting as if he was asleep. His eyes were a
7 little bit open. He was looking at me. He wasn't asleep.

8 Q. Now, did you ever hear him say, at that time, that he was
9 sleeping?

10 A. No.

11 Q. When did you first find out that he had mentioned that he
12 was sleeping?

13 A. When I listened -- when you had sent me the transcript and
14 I listened to the recording, then I heard him say something
15 about being asleep, or the word sleep. That's the first time
16 I'd heard that.

17 Q. And that's reflected in Government's Exhibit 2, that
18 transcript, right?

19 A. Yes, sir.

20 Q. What were you doing to listen to the recording?

21 A. I have some -- my office had bought me some Bose brand
22 noise reduction earphones. I put those on and listened to the
23 recording.

24 Q. Okay. Let me ask you this, Special Agent Perry. After
25 you asked him for permission to speak, how did he respond?

1 A. He handed me his ticket. He had a ticket, and he unfolded
2 it and handed it to me.

3 Q. What kind of ticket was it?

4 A. It was an Amtrak train ticket. It was in a folder. It
5 had his ticket inside, and it was stapled to it.

6 Q. Did you examine it closely?

7 A. Yes, I looked at it and I actually read his name off that
8 was on the ticket.

9 Q. Did you hang onto it, or what did you do with the ticket?

10 A. No, I immediately returned it to him, and thanked him.

11 Q. So you never asked for the ticket?

12 A. I never asked for the ticket, no. He just voluntarily
13 handed it to me.

14 Q. Did you ask for identification?

15 A. I did ask for identification after I returned his ticket.

16 Q. And how did he respond?

17 A. He immediately handed me his California identification
18 card and I reviewed that. I read off the name with the city
19 that he lived in, I believe with his date of birth, too. I
20 reviewed that and immediately also returned that to him.

21 Q. So how long did you hold on to his identification?

22 A. A couple of seconds.

23 Q. Now, regarding the bag that we heard on the recording, did
24 you see a bag?

25 A. Yes. He was partially lying back in the window seat, and

1 in the empty aisle seat directly beside him was a backpack that
2 was already unzipped.

3 Q. And you mentioned it was a backpack. Any other
4 descriptions about that bag?

5 A. It was either -- I can't remember if it was dark gray or
6 black. I can't remember.

7 Q. And what did you ask the defendant about the bag?

8 A. I asked him if he had any luggage with him, and he said,
9 no. Or he moved his head in a side-to-side motion, and I
10 confirmed that and he said, no.

11 And then I asked him -- I pointed to that backpack and
12 asked him specifically if that backpack belonged to him. He
13 initially said, no, and then I asked again if that was his
14 backpack, and he said, "That's my bag." He did claim it as
15 belonging to him.

16 Q. So what did you do next?

17 A. I asked him if he would give me consent to search it for
18 contraband, and then he picked up that backpack and turned it
19 upside-down and dumped all the contents out of that backpack
20 onto the empty aisle seat directly beside him.

21 Q. When you asked him the question to search the bag, did he
22 say anything in response?

23 A. I can't remember if he did or not. He may have mumbled
24 something. But I know he picked up the backpack and
25 immediately dumped all the contents out. He was agitated at

1 that time.

2 Q. And what did you do next? What did you see?

3 A. I saw there were some articles that came out, and there
4 was a plastic shopping bag, like you get at the grocery store,
5 that came out of that bag, also, that was lying on the seat.

6 Q. What did you see -- or actually, you see these items, and
7 what do you say next, if anything?

8 A. I asked him -- I wanted to search that plastic bag. I
9 asked him to give me consent to search that, and his response
10 was, "Go for it." So I opened up that plastic bag, and it
11 revealed some plastic -- I refer to them as either vials or
12 canisters. I knew from my experience they were used to hold
13 marijuana.

14 Q. Specifically, what did you see with respect to those
15 vials?

16 A. Well, one or two of them were empty, and then one had a
17 gummy bear in it that has edible THC, and the other one had a
18 green leafy substance. From my experience, I believed it was
19 consistent with, the container and the contents, to be
20 marijuana.

21 Q. Let me just ask you a little bit more about that. That
22 leafy substance, why did you infer that was marijuana?

23 A. Just from my experience of seeing it, seeing those
24 canisters numerous times in my career. And I've seen marijuana
25 and made marijuana seizures hundreds of times. Just from my

1 experience and training.

2 Q. Now, regarding the gummy bear, why did you suspect that
3 that was a THC gummy bear?

4 A. Because it was in one of those marijuana dispensary
5 canisters, and I'd seen those also in the past. They use those
6 to put the THC in.

7 Q. So once you saw these vials, the vial with the leafy
8 substance and then the vial with the gummy bear, what happened
9 next?

10 A. Well, when Mr. Rodriguez saw that I observed those, he
11 immediately grabbed those and placed them behind his back. And
12 you can hear on the recording I tell him to stop and that I'd
13 already seen them. And then he opens up the one that had the
14 gummy bear in it, and he puts it in his mouth and he eats it.

15 Q. What did you think of that at that point?

16 A. Well, I thought it was odd. You hear me chuckle on the
17 recording. I believe he was basically trying to destroy it.
18 You know, it was gone. There was no evidence of him having a
19 THC gummy bear with him.

20 Q. How was his demeanor at this point?

21 A. He was agitated earlier. He still wasn't happy. He was
22 agitated some. When I told him to stop, his demeanor -- he
23 just basically sat there at that time.

24 Q. Were you able to take back the vials, or did you try to
25 use force at this time?

1 A. I didn't try to take the vials back at that time. That's
2 when I told him to stand up.

3 Q. And where were the vials when you asked him to stand up?

4 A. Well, he had taken the one that had the gummy bear from
5 behind his back and opened it up and put that gummy bear in his
6 mouth, but the other ones were lying in the seat behind him.

7 Q. Now, during all of this time, up to this point, where is
8 Task Force Officer Chavez?

9 A. He's in the rear of the car somewhere. He eventually
10 walked up when he heard the conversation with us. He wasn't
11 there until you hear me telling that my partner's here. That's
12 when he walked up.

13 Q. Was this before or after seeing the marijuana?

14 A. It was after I saw the marijuana. When I was telling him
15 to stand up, I believe that's when Task Force officer Chavez
16 walked up, when I was telling Mr. Rodriguez to stand up.

17 Q. What did you do next?

18 A. He didn't listen to what I -- first I asked him to stand
19 up, and then I basically told him to stand up and that I was
20 going to handcuff him, and if he didn't stand up -- I wanted
21 him to stand up so he could put his -- and I even put my hand
22 up on the overhead luggage compartment. I wanted him to place
23 his hands up there so I could basically search him or pat him
24 down. It took him a little while to obey my order, but he
25 eventually did.

1 Q. Why did you want to pat him down at this point? What were
2 you thinking?

3 A. Because basically, in my mind, I had probable cause to
4 arrest him based upon the marijuana that I observed, and I
5 wanted to confirm if he had anything else on his body, any type
6 of contraband or weapon, or other bundles of illegal narcotics.

7 Q. Were you suspecting that he had additional narcotics?

8 A. Well, I didn't specifically suspect him, but from my
9 experience, I've had people that had personal use amounts of
10 marijuana or other drugs, and then they have other larger
11 bundles on their body or in their bags. So it was a
12 possibility. I didn't know specifically that he did, but
13 that's why I wanted to search him.

14 Q. So tell us about the pat-down search. What happened?

15 A. He eventually stood up and put his hands on the overhead
16 luggage compartment area, and then I basically searched him.
17 And I felt a very hard, round-shaped bundle that was pretty
18 large. It was in his crotch area between his legs. And I knew
19 immediately from my experience that that bundle, the location,
20 the concealment method, and then the hardness and the shape,
21 was a bundle of illegal narcotics that I had seen strapped to
22 people's bodies in the past on numerous occasions.

23 Q. In your experience on the train and the bus station, have
24 you seized narcotics from individuals that had them secreted in
25 their pants?

1 A. Yes, on numerous occasions, yes.

2 Q. So what happens next?

3 A. I told Mr. Rodriguez to place his hands behind his back,
4 and he didn't listen. I forcibly placed his arm behind his
5 back, I attempted to handcuff him, and he tried to resist. I
6 had to push him down into the seat and handcuff him. And once
7 I got him in the seat, he basically allowed me to handcuff him.

8 Q. And what's officer Chavez doing at this point?

9 A. He's standing there, basically. You know, if it got to
10 the point where I couldn't handcuff him, he was there to assist
11 me. He was just standing there beside me at the time. And he
12 took custody of Mr. Rodriguez once I brought him up from the
13 seat. He took custody of him and walked him off the train.

14 Q. Did you go with officer Chavez along with Mr. Rodriguez
15 off the train?

16 A. Yes. I gathered up his belongings that he had dumped in
17 the seat, and then walked him off the train to Task Force
18 Officer Chavez's government vehicle.

19 Q. Did you have occasion to look in the pants area of
20 Mr. Rodriguez once you were off the train?

21 A. Yes, sir. In a private area, I did do that.

22 Q. Where at, specifically? What location?

23 A. It was in the parking lot. We parked in an area that was
24 right beside the maintenance shop of Greyhound. We park our
25 vehicles there, and it was in that location.

1 Q. And what did you observe?

2 A. Mr. Rodriguez, he had a -- it was a round-shaped real
3 small bundle of money that had a rubber band, and that was
4 attached to his underwear with that rubber band.

5 Q. And was it later determined as to what kind of currency
6 that was, or how much?

7 A. Yes. It was later counted and it was \$2,300.

8 Q. What was done with the package at this point that was
9 retrieved?

10 A. Well, nothing. It was left on Mr. Rodriguez and he was
11 transported back to the DEA office. At the DEA office,
12 eventually that package was removed from him and it was
13 weighed. It weighed approximately 1.10 gross kilograms. And
14 then we cut into it and field tested the substance inside, and
15 it did field test positive for the presence of heroin.

16 Q. Let me hand you Government's Exhibit 4 at this time. Can
17 you identify that?

18 A. Yes. That's a photograph that was taken by me at the DEA
19 Albuquerque District Office of the bundle that was removed from
20 Mr. Rodriguez's person. It's on a scale with a weight at the
21 bottom of 1.10 kg, which stands for kilograms.

22 Q. And that's the narcotics that you testified about, right?

23 A. Yes. That's the bundle of heroin that was removed from
24 Mr. Rodriguez, in between his legs.

25 MR. WALSH: I'll move for the admission of

1 Government's Exhibit 4.

2 MR. WALZ: No objection.

3 THE COURT: It's admitted.

4 (Government Exhibit No. 4 admitted.)

5 MR. WALSH: I'll provide it to the Court at this
6 time, and I'll pass the witness.

7 CROSS-EXAMINATION

8 BY MR. WALZ:

9 Q. Good morning, Agent Perry.

10 A. Good morning, sir.

11 Q. We just heard your testimony and the fact that you put on
12 your special headphones and made a correction to the
13 tape-recording transcript; is that correct? Am I summarizing
14 that correctly?

15 A. Yes, from what I heard, yes, sir.

16 Q. Okay. And the corrected version from what you heard is
17 Government's Exhibit 2, where you have added, at Page 2, Line 5
18 -- well, let's start with the beginning. It's very short, so
19 if you'll follow along with me. "SA Perry," that's Special
20 Agent Perry --

21 THE COURT: Just a second. Which one are you on?

22 MR. WALZ: It's Government's Exhibit 2, Your Honor.

23 THE COURT: Okay.

24 BY MR. WALZ:

25 Q. You say: "Hello, sir. How are you doing today? How you

1 doing, sir? Sir, I'm a police officer. We check the," and it
2 says "[INAUDIBLE] train here for security. May I speak to you
3 for a moment?"

4 Line 5: "MR. RODRIGUEZ: I'm asleep. Here's my ticket."

5 Do you see that?

6 A. Yes, sir.

7 Q. okay. Now, we heard the Government just play that
8 recording that you made. You heard that, right?

9 A. Yes, sir.

10 Q. Now that the Government has played that with the speakers,
11 before he says, "I'm asleep," can you not also hear plainly
12 where he says, "No, I'm asleep"?

13 A. No, I cannot.

14 MR. WALZ: Okay, may we have that played again?

15 (Whereupon Government's Ex. 1, an audio recording, played)

16 MR. WALZ: Thank you.

17 BY MR. WALZ:

18 Q. You did hear, "No, I'm asleep"?

19 A. No. I hear him mumble something, but I can't hear him
20 say, "No."

21 Q. Okay. So at least you acknowledge now that you hear him,
22 what, mumble something?

23 A. I can hear him mumble something, yes.

24 Q. Okay. Have you seen the transcript that was made by Paul
25 Baca Professional Court Reporters that we had made of the tape?

1 Have you seen that yet? Have you had an opportunity?

2 A. Yes, I looked at that yesterday.

3 Q. Okay. And I'm going to enter it into evidence in just a
4 second for the Court, but let me read that same line from that
5 same tape. Well, the first couple of lines.

6 "SPECIAL AGENT PERRY: How are you doing, sir? Sir, I'm a
7 police officer. I check the train here for security." So
8 there's inserted the word "here" where it was inaudible. "May
9 I speak to you for a moment?" And we just heard this now. We
10 just heard this.

11 "MR. RODRIGUEZ" -- and I understand you say you heard a
12 mumbling, but at least what the transcriptionist heard is:
13 "No, I'm asleep. Here's my ticket." Do you concede that he
14 might have said "No"?

15 A. No. That's your transcript and what they heard. When I
16 listened to it with mine -- I've listened to your recording
17 probably 20 or 30 times. I don't hear the word "No." I hear a
18 mumble.

19 Q. So do you think that Paul Baca Professional Court
20 Reporters, that does transcriptions for the Federal District
21 Court, would include a word that was not present just because I
22 sent them the disc?

23 A. I can't answer that question. I don't know. All I can
24 tell you is that's what they put on there. That's what they
25 apparently think that they heard. I'm telling you what I

1 heard.

2 Q. okay. And I think what's more important is what the Court
3 hears when the Court listens to the tape. But let me ask you
4 this. Assuming he did say "No," as the tape transcription
5 shows, as we believe what we've heard, and he does convey to
6 you -- after you say, "May I speak to you for a moment," and he
7 says, "No," what does that mean to you in terms of being able
8 to proceed in trying to engage in a consensual conversation or
9 search of Mr. Rodriguez?

10 A. No means no. I mean, obviously a no means no.

11 Q. okay.

12 A. But also, you've got to look at the next thing that
13 happened. Even in your -- if we go out and believe what you
14 say, he hands me his ticket. That's implied consent to me.

15 Q. Agent Perry, it's not what I say, it's what's on the tape.
16 I'm just going over the transcript of what was just played.
17 I'm just asking you what your belief would be.

18 Based on your experience and training as brought out by
19 Mr. Walsh, if, in fact, he says -- and this is to you. When
20 you say, "May I speak to you for a moment," and he says, "No,"
21 I just asked you, what does that mean to you, and I believe you
22 said, no means no. Is that correct?

23 A. Yes. One fact by itself would mean no. But you've got to
24 look at what happened next.

25 Q. I'll be glad to do that. We're going to walk through all

1 this, so I'll give you plenty of time to amplify or whatever
2 you want to do. But I just want to cover it as we go along.

3 So when he says, "No," and then we can add the words, "I'm
4 asleep," does that indicate to you, assuming he said that --
5 because, again, the Court has heard it and I presume will
6 review the recording further. Where he says, "No, I'm
7 asleep" -- and we'll get to the ticket part. I know you want
8 to talk about that. But when he says, "No, I'm asleep," does
9 that indicate to you that he is giving consent to go on with an
10 interview or discussion with you at that point?

11 A. I'm going to answer the question this way, which is
12 truthfully and what happened on the train that day. I didn't
13 hear him say no. I didn't hear him say that he was asleep.
14 All I heard him say was, this is my ticket, at the train when I
15 spoke with him that day. So to answer your question, if
16 someone had told me they're asleep and they're talking to me,
17 obviously they're not asleep.

18 Q. Okay, I appreciate that. I really do. And I'm going to
19 take what you say as your testimony, that you did not hear if
20 he did say it. We know he said certain words, because we have
21 heard them, and we might interpret them differently. But in
22 any event, you're saying now that you did not hear him say
23 that?

24 A. At the train, no. When I listened to the recording, as I
25 testified earlier, with the Bose headphones, I heard him

1 mention the word "sleep" or "asleep."

2 Q. Let me ask you this, Agent Perry. And Mr. Walsh covered
3 this with you. You had no preconceived notion that
4 Mr. Rodriguez was on that train at all?

5 A. I didn't know him, no.

6 Q. You didn't look at the PNR, or the manifest of the train
7 coming to the station that day?

8 A. Not on that day, no.

9 Q. Is that a regular thing that you will do in preparation
10 for looking at either the Greyhound bus or Amtrak train,
11 looking at the manifest and seeing who the passengers are?

12 A. That's changed over time in my whole career. We have
13 gotten what I refer to as PNRs for the train, but there have
14 been breaks in that where some days we didn't get them, or some
15 time periods we didn't get them. So all I can tell you is on
16 this date, I didn't have any.

17 Q. Okay. And I'll take what you say at face value. But just
18 so the Court knows, because we're using an abbreviation now,
19 what does PNR stand for?

20 A. Passenger Name Record.

21 Q. And that's something that's originated, I think -- you
22 might have to correct me. We haven't done this exercise in
23 some years. That's something that's originated whenever a
24 passenger buys a ticket at the Amtrak station, and there's some
25 type of a computer located at the DEA office that contains

1 exactly the same information that shows up on the Amtrak record
2 that's being made. Is that a fair way to describe that?

3 A. No. That's actually -- you have what used to happen in
4 the past. But that DEA computer, or whatever you said, no.
5 Those records come specifically from an Amtrak computer. There
6 is no DEA computer that has those records on them.

7 Q. Maybe that was bad terminology on my part. It does come
8 from Amtrak?

9 A. It is an itinerary that you make for a reservation on the
10 train.

11 Q. And how does the information then get transferred to DEA?

12 A. Well, it's changed over the years, but I can tell you how
13 it is currently done.

14 Q. Why don't you tell me how it was occurring in February of
15 2018, since we --

16 A. Well, I didn't have a PNR on that date, so there was no
17 record for me to review. There was nothing that I -- there is
18 no process that I can explain, because I didn't have any.

19 Q. All right. Also, Mr. Walsh talked about searching the
20 Greyhound bus. Do you not have to have written permission to
21 get on Greyhound buses now?

22 A. I don't remember Mr. Walsh talking about Greyhound, but we
23 may have. Do I have to have permission to get on a Greyhound?

24 Q. Yes.

25 A. Yes, I do.

1 Q. And he did ask you about Greyhound and Amtrak. But in any
2 event, you have to have written permission for Greyhound, but
3 not written permission for Amtrak?

4 A. Well, I never stated that. You asked me if I had to have
5 permission. It's not written. I don't have written permission
6 from either one of them, but I have permission from both of
7 them to work there.

8 Q. And to board the vehicle, the bus and the train?

9 A. Yes, sir.

10 Q. Do you know approximately how many passengers were on the
11 Amtrak train the day you conducted this encounter with
12 Mr. Rodriguez?

13 A. No, sir, I do not.

14 Q. Approximately how long had you been on the Amtrak train
15 until you encountered Mr. Rodriguez?

16 A. I'm not exactly sure.

17 Q. Well, were there quite a few passengers there, to your
18 recollection, or were there a few?

19 A. On the car he was on -- I don't know about the other car
20 that I'd just left from. I don't remember, because it was
21 two-and-a-half years ago. On his car, there was not very many
22 passengers in the front portion of that car. In the back,
23 there was, but I couldn't even give you an estimate of how many
24 passengers.

25 Q. Okay. And you indicated during your testimony with

1 Mr. Walsh that Mr. Rodriguez's seat was reclined a bit?

2 A. I don't know if the seat was reclined, but he was kind of
3 lying down a little bit in his seat. I don't think he was
4 reclined any, no. But the seat, just the way he was
5 positioned, he was kind of -- he wasn't sitting up straight.
6 He was kind of slouched down, if that makes sense.

7 Q. Now, you can't say for a fact that he was not asleep, can
8 you?

9 A. Well, when I first started speaking with him, and when I
10 first observed him, when I walked through that car, his eyes
11 weren't closed. They were squinty. So I don't think he was
12 asleep.

13 Q. To be fair, you'd never seen him asleep or groggy or
14 waking up before, had you? This was the first time you ever
15 met Mr. Rodriguez on that train?

16 A. To my knowledge, yes, sir.

17 Q. So you don't know what his sleep patterns were?

18 A. No. But you just asked me if I thought he was asleep.

19 Q. And that's your subjective interpretation?

20 A. Yes, sir.

21 Q. Thank you. In fact, you had to ask him three separate --
22 or two questions and one statement, before he even responded,
23 according to the transcript; isn't that right?

24 A. Can you repeat that again, please?

25 Q. Sure, sure. You actually made three separate statements,

1 two of them being questions, before he answered you, pursuant
2 to any of the transcripts. You said, "How are you doing, sir?"
3 There was no response that I see on any of the transcripts.
4 The next statement is, "Sir, I'm a police officer." No
5 response. I'm sorry, there are actually four. Next statement
6 you make is, "I check the train here for security." No
7 response. And then, "May I speak to you for a moment?" So you
8 said all those things before you finally got a response from
9 Mr. Rodriguez, correct?

10 A. Yes, sir, that's correct.

11 Q. Now going back to the encounter, Mr. Rodriguez mumbled
12 something. You agree you at least can hear mumbling, right?

13 A. I hear him mumble, yes.

14 Q. And we'll leave it to the Court to decide what he actually
15 said, but you did go back with your Bose headphones and hear
16 after the mumble, "I'm asleep"?

17 A. I did hear that, yes.

18 Q. Based on your training and experience, which has been
19 significant, did that cause you concern whether to continue
20 with any investigatory questioning or stop after he told you
21 "I'm asleep"?

22 A. Well, first of all, I never stopped him, and I didn't hear
23 that at the train. You asked me if I heard that with the Bose
24 earphones. At the train, all I heard is, "This is my ticket,"
25 as he handed me his ticket. It didn't cause me any concern at

1 the train, because I didn't hear it at the train.

2 Q. I'm not going to keep kicking that around, because you
3 didn't hear anything at the stop, right?

4 A. Again, it wasn't a stop. It was a consensual encounter.

5 Q. Well, we'll let the Court decide what it was. But in any
6 event, it's your testimony under oath that you did not hear
7 what's on at least one of the transcripts where it says, "No,
8 I'm asleep," so I won't ask you other questions about that.
9 And it makes no difference, because you said you didn't hear
10 it, right?

11 A. Not at the train, I did not.

12 Q. And I asked you hypothetically if, in fact, he did say it,
13 what impact that would have, and we already covered that no
14 means no, but I don't think I really got into the part where if
15 you would have heard him just say -- forget the "no" part.
16 We've already covered that. But if you would have heard him
17 say, "I'm asleep," what impact would that have had on your
18 investigation?

19 A. It wouldn't have had any impact, because he wasn't asleep.
20 He was talking to me. Obviously he can't be talking to me if
21 he's asleep. So it wouldn't have had any impact on me,
22 especially when he hands me his ticket.

23 Q. I understand, and I get the context you're trying to put
24 it in, but sometimes people wake up when people are asking them
25 something and people say they're asleep. Has that ever

1 happened to you?

2 A. People have told me they've been asleep, yes.

3 Q. okay, thank you. And then in the transcript, he allegedly
4 says -- he does say, because we have it on tape, "Here's my
5 ticket." Right?

6 A. Yes, as he hands it to me.

7 Q. And you look at the ticket, correct?

8 A. Yes, sir.

9 Q. Did you see anything wrong or inappropriate with the
10 ticket?

11 A. No. I read off the name.

12 Q. At that point, had you formulated in your mind any
13 reasonable suspicion or probable cause that Mr. Rodriguez was
14 engaged in criminal activity?

15 A. No, sir.

16 Q. why did you continue to talk to him? Just to chat? why
17 did you proceed?

18 A. To perform my duties. Every day, that's what I'm there to
19 do, is to conduct consensual encounters and determine if anyone
20 is transporting illegal narcotics.

21 Q. But you're just picking members out of the general public
22 when at this point even you agree you have not developed
23 probable cause or reasonable suspicion, right?

24 A. Correct. I don't believe I need that to talk to people.

25 Q. Had you displayed your badge yet?

1 A. Yeah, I had already displayed it to him earlier, yes, when
2 I was asking -- before I asked permission to talk to him, when
3 I identified myself as a police officer.

4 Q. I'm trying to find that in the transcript, where you
5 presented your badge. I see where you said in the initial
6 paragraph, "I'm a police officer." At what point did you
7 present your badge, and what did you say when you presented
8 your badge?

9 A. If you look on Line 2 where it says, "Sir, I'm a police
10 officer," that's when I displayed my badge to him.

11 Q. And you didn't say anything like, here's my badge, or
12 anything like that?

13 A. No, I don't say that. I just display it to them.

14 Q. How close were you to him? You said he was by a window,
15 and there are a couple of seats and an aisle, and you're way on
16 the other side. How did you bring that badge to his attention?

17 A. Well, you stated a couple of seats. There was the empty
18 aisle seat directly beside him --

19 Q. Yes.

20 A. -- and then the walkway.

21 Q. Okay.

22 A. I stood in front of the empty aisle seat across from him
23 when I displayed my badge to him. I removed it from my left
24 rear pocket, displayed it to him, and put it back in my pocket.

25 Q. How long did you display the badge?

1 A. Just a few seconds.

2 Q. You make it sound like there's a significant distance
3 between where you and Mr. Rodriguez were. Isn't it true you
4 can take like just one step, almost, or just one step and close
5 the distance of this area, the walkway area, so you're at the
6 outer point of his seat where he could not go by if he wanted?

7 A. That's not correct. Number one, it depends on how big
8 your one step is.

9 Q. How big is your step?

10 A. It was more than one step.

11 Q. How many?

12 A. I can demonstrate how far it was, but I don't know exactly
13 how far it was.

14 Q. I might --

15 A. But it wasn't one step, because you have the aisleway,
16 then you have the empty aisle seat beside him, and then him.
17 It's more than one step.

18 Q. Okay. Now, to close that distance by one step or however
19 many, what would you have to do, to close the distance? That
20 would just be a second or two at maximum, would it not?

21 A. Can you repeat the question?

22 Q. Yes. Timing-wise, how long would it take you to close the
23 distance between where you displayed your badge and where
24 Mr. Rodriguez was sitting?

25 A. Depends on how fast you're moving, so I can't give you an

1 exact time.

2 Q. It doesn't take very long, does it?

3 A. No. I mean, to walk a few feet, it's not going to take
4 you very long.

5 Q. Now, assuming that Mr. Rodriguez had even just wanted to
6 walk out of the conversation at that point, he would still have
7 to leave his seat and walk in front of you either way to exit
8 the car that he was in, correct?

9 A. Yeah. I was facing him, so he would stand up, walk a step
10 or two, get in the aisleway, either turn right or left, and go
11 either way.

12 Q. And so he would have had to have walked right past you,
13 true?

14 A. No, he wouldn't have walked past me. He would have
15 walked -- I was standing across, so he wouldn't have had to
16 walk past me. He would have walked in the hallway either right
17 or left.

18 Q. I'm sorry; right in front of you, and then turn left or
19 right?

20 A. Correct.

21 Q. And then take a -- maybe that was a bad sentence on my
22 part.

23 So, according to the transcript, you thanked him for
24 showing you the ticket, right?

25 A. Yes, sir.

1 Q. And then you asked: "Do you have ID with you,
2 Mr. Rodriguez?" Now, why did you ask him that? He just showed
3 you his ticket. You said you had no probable cause or
4 reasonable suspicion. Why did you want to look at his ID?

5 A. To see if his name on his ID matched the name on his
6 ticket.

7 Q. Did you have any reason to believe that he was jumping the
8 train and not a paying passenger, or traveling under an alias
9 at that point?

10 A. No, not him specifically, but I know from my experience
11 that people sometimes purchase their tickets under different
12 names, and I wanted to see if he did.

13 Q. And then you said, "May I see that, please?" Had he
14 produced his license or something then?

15 A. I'm sorry, I couldn't hear you, sir.

16 Q. You say at that point, "May I see that, please?" Had he
17 produced his license to you?

18 A. His ID. I asked him for it, and he showed it to me.

19 Q. Did Mr. Rodriguez hand you his ticket to be on the train?

20 A. His ticket?

21 Q. Yes.

22 A. He handed it to me. He leaned forward and handed it to
23 me. I don't remember which hand, but he handed it to me.

24 Q. So you were close enough to him from where he was sitting
25 that he could hand you the ticket and you could take the ticket

1 from him?

2 A. I moved forward, stuck my hand out, as did he, and took
3 the ticket.

4 Q. So we have closed the distance, then, have we not, Agent
5 Perry?

6 A. To look at the ticket, yes. And then I walked back to
7 where I was standing, looked at the ticket, and then returned
8 it to him and asked for his ID, yes, sir.

9 Q. Okay. So now it's your testimony that you closed the
10 distance, got the ticket, looked at the ticket, and then at
11 that point did you look at the ID, or had you returned to where
12 you were and then asked for the ID? I'm trying to picture this
13 mentally.

14 A. He reached forward and handed me the ticket. I reached my
15 arm out, took the ticket, stepped back, looked at the ticket,
16 stepped forward, returned it to him, and then asked him for his
17 ID.

18 Q. Now, at this point, he knows you're a police officer? You
19 said you showed him a badge identifying yourself as a police
20 officer; is that right?

21 A. Yes, sir.

22 Q. Now, you're going on with a line of questioning with an
23 individual who is in an inner seat on the train and you're
24 standing in -- what would you call it? The passageway or the
25 corridor? What's the best language to use for that?

1 A. You're talking about the -- I call it the aisleway.

2 Q. Aisleway?

3 A. In between the seats, that's what I call it. walkway or
4 aisleway.

5 Q. So now you've looked at the ticket and you've asked for
6 his ID. And he gave it to you, right?

7 A. Yes, sir, he did.

8 Q. Anything suspicious about his identification that would
9 cause you to have reasonable suspicion or probable cause that a
10 crime was being committed by Mr. Rodriguez?

11 A. No, sir.

12 Q. And I take it you gave him back his license?

13 A. Yes, sir, I did.

14 Q. Did you use the same methodology of taking a step towards
15 him and both of you handing over the license?

16 A. Yes, sir, I did.

17 Q. And then you asked him another question: "You having a
18 good trip?" And it says, "Thank you, sir." I think maybe that
19 was Mr. Rodriguez saying, "Thank you, sir," but I don't know.
20 Does this seem odd, that he says, "Thank you, sir"?

21 A. I believe that was me, because I say, "Thank you, sir,
22 appreciate that." I was thanking him for handing me his ID.

23 Q. Thank you for that clarification. And then you say,
24 "Appreciate that." Now, are you reading this because it's
25 being tape-recorded, where your voice says, "Rodolfo Rodriguez,

1 Jr., Janesville, 10/17/62, thank you, sir"?

2 A. Am I saying that because I'm being recorded? Is that
3 your --

4 Q. Well, you know you're doing a recording, right?

5 A. Yes, sir, I know I'm recording.

6 Q. So why did you say that? I mean, I'm just trying to
7 understand you. You looked at the ID. Why did you say that?
8 Why did you make an audible of that?

9 A. Of the whole thing, or saying "Thank you"?

10 Q. No, where you say, "Rodolfo Rodriguez, Janesville,
11 10/17/62."

12 A. Yes, I'm reading that specifically so it will be on my
13 recorder.

14 Q. And at the beginning of this recording, we hear a weird
15 sound. It sounds like a zipper or a tape. I don't know. What
16 was that sound at the very beginning?

17 A. It's the sound of a zipper. It's my jacket being zipped
18 up. I had turned on my recorder and zipped my jacket up to
19 cover it up.

20 Q. Did you make any recordings with any other passenger that
21 day?

22 A. I'm not exactly sure whether I did or not.

23 Q. Do you keep a log?

24 A. No, I do not.

25 Q. All right. Now, as we continue, you ask him this next

1 question: "Do you have luggage on the train with you today,
2 sir? I see you're shaking your head side to side. Does that
3 mean no?" And by side to side, are we talking about somebody
4 who is shaking their head no?

5 A. Exactly, yes, sir.

6 Q. And Mr. Rodriguez, in fact, says, "No, sir," right?

7 A. Yes, sir.

8 Q. At this point, do you think you've developed any
9 reasonable suspicion or probable cause that there is a crime in
10 progress?

11 A. No, sir.

12 Q. But yet you continue. You go with the next question.

13 "How about this bag here; is this your bag here?" And he says,
14 "No." Right?

15 A. Correct.

16 Q. Again, assuming that he did say no for the initial
17 encounter, now he has said no, he has no luggage, and he has
18 said no about this one bag being his. So if you count that
19 first no, now he's given three nos to you, correct?

20 A. I'm not going to agree with you on the first no.

21 Q. It doesn't make any difference, it speaks for itself. You
22 heard it.

23 A. Exactly. You're asking me a question, and my answer is,
24 no, I don't hear three nos.

25 Q. Do you hear at least the two nos on the transcript?

1 A. He does answer, "No, sir," about luggage, and then there
2 is another no. When I point to the backpack, he does say no.
3 So that's two nos.

4 Q. Okay. Then we continue on where you ask him -- after he
5 says that no, you follow-up, though. "This is not your bag
6 here?" That's -- let me be sure I get you to where we are. On
7 the Government's transcript, it's Line 21. You ask, "This is
8 not your bag here?"

9 Well, actually, Line 18. After he says, "No, sir,"
10 Line 18 says: "SPECIAL AGENT PERRY: Okay. How about this bag
11 here; is this your bag here?"

12 And he says: "No."

13 Then Line 21: "SPECIAL AGENT PERRY: This is not your bag
14 here?"

15 And he answers at Line 22: "This is my bag right here.
16 This is all my bag right here."

17 So let me ask you, cutting off there with that statement,
18 have you developed in your mind, based on your extensive
19 experience, any reasonable suspicion or probable cause that
20 Mr. Rodriguez is engaging in criminal activity?

21 A. No. I would say, no. There might have been a little bit
22 of suspicion about him claiming that bag, but I don't think it
23 is enough to go to the point about criminal activity.

24 Q. Okay. And then you ask -- I'm at Page 2 of
25 Government's Exhibit 2: "SPECIAL AGENT PERRY: You have

1 nothing else, though? Okay. Would you consent for a search of
2 your bag for contraband, sir?"

3 And then it says: "MR. RODRIGUEZ: [INAUDIBLE]."

4 And this version, Government's Exhibit 2, is the one that
5 was prepared after you had listened to the tape-recording with
6 your specialized headphones, right?

7 A. Yes, sir.

8 Q. So we don't know what he said, do we?

9 A. I can't make it out, no.

10 Q. And you say: "All right. Do you give me permission to
11 search this bag here?"

12 And Mr. Rodriguez says: "Go for it."

13 And you say: "Thank you, sir. Leave everything in -- you
14 have no luggage downstairs?"

15 And he says: "No, sir."

16 You say: "What's that?"

17 And he says: "It's nothing. It's medication."

18 So something is going on here where there's a discussion
19 all of a sudden about medication, and there's only just a very
20 short period of time that this is happening between the time he
21 says, "No, sir. [INAUDIBLE]," and then you say, "What's that?"
22 And he says, "It's nothing. It's medication." Is this when he
23 poured out the contents onto the seat? Is that what you
24 testified to, to Mr. Walsh?

25 A. Well, there is a little bit more that happened than that.

1 He poured out the contents onto the seat. He had the plastic
2 bag, and I asked him permission to search that. You hear me
3 say, do I have permission to search this here. That's the
4 plastic bag, and he opened that up. And that's when I saw the
5 plastic container vials, or whatever you want to call them, and
6 he takes them and places them behind his back.

7 Q. These vials, did you bring them to court?

8 A. I'm sorry, I couldn't hear you.

9 Q. The vials, the vials that you talked about, did you bring
10 them to court?

11 A. No, they're not in court today.

12 Q. Now, let me ask you this. I might be jumping a bit ahead.
13 You stated that -- how many vials were there? I'm sorry, let's
14 start with, how many vials were there?

15 A. I can't remember if it was three or four. I'm not sure.

16 Q. Were they see-through vials or colored vials that you
17 could not see through?

18 A. They were colored, but you could see through them.

19 Q. And did you actually retrieve any of the leafy substance
20 from any vial to weigh it?

21 A. I believe we sent them to our lab, yes. Probably not just
22 the substance, but including the vial.

23 Q. Sure. Because we don't know how much leafy substance was
24 there, it could have just been residue, could it not?

25 A. If I remember, it was not -- there were photographs of it.

1 Q. Let me show you at least the photographs of the vials and
2 the bag.

3 MR. WALZ: Would you label these, please?

4 BY MR. WALZ:

5 Q. While Mr. Creasy is labeling that, the truth of the matter
6 is, we don't know what the actual weight of the green leafy
7 substance is, do we?

8 A. I believe it is still at our lab. Our procedure now is
9 they test the heroin and we have a report on that, and the
10 green leafy substance, they don't test that unless we
11 specifically need it for a trial. So it is still at our lab.

12 MR. WALZ: Your Honor, may I approach the witness?

13 THE COURT: You may.

14 BY MR. WALZ:

15 Q. I'm going to hand you what's been labeled as Defendant's
16 Exhibit 1. Do you recognize that photo?

17 A. Yes, sir.

18 Q. And are those the vials you're talking about?

19 A. Yes, sir.

20 Q. And were the tops closed?

21 A. Were they closed?

22 Q. Yes, when the contents were put on the seat.

23 A. Yes, sir.

24 Q. And did you open them up to smell to see if they smelled
25 like marijuana or not?

1 A. No. But to finish answering that first question, they
2 were closed until Mr. Rodriguez opened up one of them.

3 Q. I'm sorry, I don't see that anywhere in the transcript or
4 I don't hear that on the tape. But you say Mr. Rodriguez
5 opened up one of the vials?

6 A. Yes, and took out the gummy bear and ate it.

7 Q. Okay. What about the leafy substance?

8 A. No, sir, it wasn't opened.

9 Q. At least on the transcript, you say at Line 12: "I see
10 that. I see what it was, sir."

11 And Mr. Rodriguez says: "Medication. All that's
12 medication."

13 Do you see where he says that?

14 A. Yes, sir.

15 Q. Now, I know Mr. Walsh asked you about legalization by some
16 of the states for cannabis and does that impact the federal
17 government's perception of cannabis. Do you remember that
18 question that he asked you?

19 A. I remember him talking about it, yes, sir.

20 Q. Okay. And let me just ask what the DEA practice is. Have
21 you, in your interdiction, arrested anybody for less than five
22 ounces of marijuana on their person at an Amtrak train, ever?

23 A. Not specifically and charged them just with that
24 marijuana. But I've observed marijuana, just as in this case,
25 and found something else, that they had other drugs with them.

1 But the probable cause was basically based upon the marijuana
2 that was observed, and then they had bundles strapped to their
3 legs. So, yes. But they're not charged, as in this case, he
4 wasn't charged with the marijuana, he was charged with the
5 heroin.

6 Q. Right, and I appreciate your answer, but my specific
7 question was, have you arrested anybody in your interdiction
8 program during the last five years for having less than five
9 ounces of marijuana on their person?

10 A. I don't know about in the last five years, but I have
11 arrested people, yes. That's the same answer I gave you last
12 time.

13 Q. Well, you also talked about people having drugs strapped
14 to their leg and all that, so you actually expanded more than
15 what I asked. But we'll get to there.

16 MR. WALZ: May we approach with Exhibit No. 1?
17 What's the other page you have there, Alfred?

18 MR. CREASY: Exhibits 2 and 3.

19 THE COURT: Is there any objection?

20 MR. WALSH: I have no objection. Let me just take a
21 quick look at 2 and 3.

22 MR. WALZ: Here's 2 and 3.

23 MR. CREASY: They're the same.

24 THE COURT: Why don't you just move them all in at
25 once.

1 MR. WALZ: Thank you, Your Honor. And in terms of
2 housekeeping, Your Honor, we'd also move for the admission of
3 the transcription performed by Paul Baca Court Reporters that
4 has been provided to Mr. Walsh, as well.

5 THE COURT: Any objection?

6 MR. WALSH: No objection, with the caveat that we
7 disagree with some portions of the transcript, but we can talk
8 about that in closing. No objection.

9 THE COURT: Sure. That's an issue to the weight to
10 be given to the exhibit --

11 MR. WALSH: Yes, sir.

12 THE COURT: -- but you don't object?

13 MR. WALSH: Correct.

14 THE COURT: So Exhibits 1, 2, 3 and 4 are coming into
15 evidence. I should say, Defendant's 1, 2, 3 and 4 are coming
16 into evidence.

17 (Defendant Exhibits No. 1, 2, 3 and 4 admitted.)

18 MR. WALZ: May I approach?

19 THE COURT: Yes.

20 BY MR. WALZ:

21 Q. Agent Perry, you do carry your badge with you, even to
22 court, right?

23 A. Yes, sir.

24 Q. Would you show us the badge that you displayed to
25 Mr. Rodriguez?

1 A. Yes, sir.

2 THE WITNESS: May I stand up, Your Honor?

3 THE COURT: Sure.

4 BY MR. WALZ:

5 Q. You can just show us from where you're at.

6 A. It's just easier for me to get it out when I stand.

7 Q. I understand. Thank you, sir.

8 okay, so let me ask you this. Do you acknowledge that
9 cannabis has been legalized for medicinal purposes in certain
10 states?

11 A. Yes. State-wide, yes, sir.

12 Q. Including California, for medicinal purposes?

13 A. I believe it has, yes.

14 Q. Did you ever do any follow-up to determine based on the
15 prescriptions and the labeling on the bottles as to whether
16 Mr. Rodriguez had a valid prescription for medical marijuana?

17 A. No, sir.

18 Q. Would you acknowledge that there's a significant number of
19 individuals who travel Amtrak and Greyhound that come through
20 New Mexico from California, Colorado, Washington, and other
21 states that have state-wide legalized medical marijuana?

22 A. California, I would say yes. I haven't encountered
23 anybody from Washington or Colorado, I don't believe.

24 Q. Have you ever arrested before anyone on charges alone from
25 the states of California, Washington, or Colorado for having in

1 their possession medical marijuana?

2 A. Arresting, yes. Charging and prosecuting just for the
3 marijuana, no.

4 Q. And the arresting would be part of the procedure you
5 discussed earlier, because you subsequently found other types
6 of contraband, right?

7 A. That's the one that came to my mind, yes.

8 Q. What I'm trying to do, though, is isolate it, if I could.
9 And I appreciate your answer, the picture you're painting, but
10 just standing alone, have you arrested anybody for having in
11 their possession medical marijuana from California, Washington,
12 or Colorado?

13 A. Arrested, yes. But charged and prosecuted just for that,
14 no.

15 Q. Okay, I don't hear you answering my question. It sounds
16 like you're arresting them and there's other contraband
17 involved.

18 A. Or they could have been arrested and not charged.

19 Q. Right. But my question -- I'm not talking about other
20 contraband that you might find. Are you with me?

21 A. Yes, but I've arrested people specifically just for
22 marijuana. They haven't been charged where other contraband
23 wasn't found. I've arrested them, but charging them and
24 prosecuting them is a different story.

25 Q. Okay. Even if they had medical authorization for the

1 marijuana?

2 A. Well, having a card doesn't give you permission to
3 transport pounds of marijuana on the Amtrak train.

4 Q. I understand that: I understand that, and --

5 THE COURT: Is the question, has he ever arrested
6 anyone solely for medical marijuana? Is that --

7 MR. WALZ: That's all I'm asking.

8 BY MR. WALZ:

9 Q. Obviously if they're carrying pounds of marijuana, that's
10 not for medical purposes. I think you understand my question.
11 Maybe you don't, but that's what I'm asking.

12 A. Just for having the medical marijuana --

13 Q. Yes.

14 A. -- have I arrested anyone? Not just for the medical
15 marijuana, no.

16 Q. Okay, thank you.

17 All right, so as we're moving along now with
18 Mr. Rodriguez, where is Field Officer Chavez? Because I think
19 as you said, or maybe Mr. Walsh, this whole encounter only
20 lasted three minutes and, I think it was 17 seconds. I might
21 be mistaken. Did you time it?

22 A. Well, I looked at the time on the bottom, and I believe it
23 was three minutes and 44 seconds.

24 Q. Okay, three minutes and 44 second. So things are moving
25 pretty fast, would you agree with that?

1 A. It was, in my opinion, a pretty quick encounter, yes, sir.

2 Q. okay. So was Field Officer Chavez coming to where you
3 were at as this discussion was ongoing, or whatever you want to
4 call it? During this discussion with Mr. Rodriguez, was
5 officer Chavez coming your way.

6 A. He came up right after I told him to stand up. I wasn't
7 concentrating on where he was. I know he was in the back part
8 of the car. That's where he came from.

9 Q. All right. Now, going again to Government's Exhibit
10 No. 2, you take issue with Mr. Rodriguez at Line 18.

11 You say: "All right. Here you go. All right. That's
12 not medication. All right. You have no luggage downstairs?"

13 "MR. RODRIGUEZ: [NO AUDIBLE RESPONSE]."

14 So, do you agree there was a response, it's just not
15 audible?

16 A. I would have to listen to it probably numerous times, but
17 I'm not exactly sure. If it says it's not an audible response,
18 then I have no reason to disbelieve it.

19 Q. okay. Now, the next one, Line 22: "SPECIAL AGENT PERRY:
20 okay. Can you stand up for me, please, sir?"

21 But isn't the truth of the matter that you're now
22 arresting this man? You were telling him to stand up with the
23 full intent to search him, to pat him down, weren't you?

24 A. I was, yes. My intention at that time was to search him,
25 yes.

1 Q. Thank you. And that wasn't just a get-up-if-you-want,

2 you're telling him he needs to stand up, were you not?

3 A. Well, at that time, specifically on that one, I'm asking
4 him, I think I'm asking him right there. But later on, I tell
5 him to stand up.

6 Q. But you would acknowledge, though, that when you said,
7 "Can you stand up for me, please, sir," it was your expectation
8 that he would stand up or you would arrest him, right?

9 A. Well, I was going to search him. Either way, whether he
10 was going to stand up or not, he was going to get searched,
11 yes.

12 Q. Okay. So that was determined, at least at Line 22, that
13 he was going to get searched. And by searched, we mean body
14 search where you pat them down?

15 A. Yes, sir.

16 Q. And where you say, "Okay, can you stand up for me, please,
17 sir," and he says, "Yes, sir," and you say, "I'm sorry," why
18 did you say "I'm sorry"? What was that about?

19 A. I probably -- on the transcript, it says, "Yes, sir," but
20 I probably couldn't hear what he said.

21 Q. Okay.

22 A. That's what I believe from me saying, "I'm sorry," I
23 didn't understand what he said.

24 Q. Okay. And then we turn to Page 4.

25 "MR. RODRIGUEZ: Please, sir. I'm trying to go to sleep."

1 And you say: "SPECIAL AGENT PERRY: Okay. Sir, I need
2 you to stand up for me. You don't have anything on your body,
3 do you?"

4 So when you say at Line 3 at Page 4, "I need you to stand
5 up for me, you don't have anything on your body, do you," when
6 you told him to stand up for you, it was your expectation that
7 he was going to stand up for you, or you were going to make him
8 stand up by placing him into some kind of custody?

9 A. He was going to be searched whether he stood up or not,
10 yes.

11 Q. okay. And to do a search against somebody's consent, they
12 have to be put into some type of custodial hold of some sort,
13 right?

14 A. Yes. He wasn't handcuffed at that time, but he was going
15 to be.

16 Q. So Mr. Rodriguez says, "No."

17 A. Correct.

18 Q. So here's another time he says no to your question. Well,
19 this is to your -- I guess this wasn't a request. It has two
20 statements. "Sir, I need you to stand up for me" is one, and
21 then, "You don't have anything on your body, do you" and he
22 says, "No."

23 Do you know what he was saying no to? No, that he doesn't
24 have anything on his body, or no, that he wasn't going to stand
25 up, or both?

1 A. I can't recall, but I can guess. Probably to he doesn't
2 have anything on his body, but I can't tell you for 100 percent
3 sure what he was answering to.

4 Q. Well, maybe the next line gives us a little clarification,
5 because you say at Line 7: "Okay. I need you to stand up.
6 I'm going to pat you down."

7 So we can somewhat reference back in the communication.

8 Now you're saying, okay, I need you to stand up, I'm going to
9 pat you down. Do you see that?

10 A. Yes, sir.

11 Q. As far as you're concerned, he cannot refuse your
12 directive to stand up for the pat down?

13 A. No, because I had probable cause. So that's why I ordered
14 him to do that.

15 Q. Okay. And he says: "You can't pat me down. I ain't done
16 nothing." You saw that, right?

17 A. Well, I think it says, "I ain't not nothing."

18 Q. Oh, I'm sorry; "I ain't not nothing." I'm sorry, I
19 misread. And then, "I got --".

20 And then you're more assertive at Line 11: "Sir, you have
21 things of marijuana right there. Go ahead and stand up for me
22 now. I'm not asking you. Put your jacket down right there."

23 So in terms of your directives, now you're very clear that
24 you're not asking him. You're saying, "I'm not asking you,"
25 right?

1 A. Yes, sir.

2 Q. okay. And now we have Seth Chavez apparently appearing.

3 A. Yes, he walks up.

4 Q. Before we get to that paragraph, is Mr. Rodriguez still
5 sitting or is he standing?

6 A. He doesn't stand up until, I believe, later on.

7 Q. okay. So would you admit that Mr. Rodriguez has no egress
8 or exit available to him at this point?

9 A. Not at that point, no.

10 Q. okay.

11 A. Because I had moved in, and Officer Chavez has moved in,
12 too.

13 Q. All right. And you say: "This is my partner right here.
14 I need you to put your hands up here right now. Put your hands
15 up here, sir. Here."

16 "MR. RODRIGUEZ: Sir, you can't expect me to [INAUDIBLE]."

17 "SPECIAL AGENT PERRY: Yes, I can."

18 And by the way, we're almost finished with this.

19 "SPECIAL AGENT PERRY: Yes, I can. You know what? I'm
20 going to go ahead and handcuff you, then. Go ahead and turn
21 around."

22 He says: "No, no. Please don't."

23 "SPECIAL AGENT PERRY: Put your hands up here. I got
24 enough to handcuff you because of what you got. Put your hands
25 up on the thing up there."

1 Next page. "MR. RODRIGUEZ: Please don't."

2 "SPECIAL AGENT PERRY: Put your hands -- step out here and
3 put your hands up there. Sir, step out here and put your hands
4 up there." So it appears that he's still sitting, or in that
5 place where he was on his chair.

6 "I'm not going to ask you again. Put your feet out here
7 and spread them. Spread your feet."

8 "MR. RODRIGUEZ: Sir, I don't have no drugs."

9 "SPECIAL AGENT PERRY: I'm going to -- put your hands up
10 here."

11 "MR. RODRIGUEZ: I don't have nothing."

12 "SPECIAL AGENT PERRY: Put your hands up here. Put your
13 hands behind your back. Put your hands behind your back."

14 "MR. RODRIGUEZ: Okay. Okay. I'm fine."

15 SPECIAL AGENT PERRY: Put your hands back here. It's in
16 his crotch."

17 So, were you feeling his legs and crotch at that time?

18 A. I already had. I was letting Officer Chavez know that I
19 had found something in his crotch.

20 Q. When did the crotch search occur? Because I'd seen no
21 reference to crotch or search or even pat down before the first
22 time you mentioned something being found in his crotch at
23 Line 16, Page 5, shortly before the --

24 A. That wasn't something that I stated I was doing, I was
25 doing it. I was searching him. I wasn't stating, I'm

1 searching your crotch now, or I'm searching your leg now.

2 I just did it.

3 Q. Was he standing or sitting when you were searching his
4 crotch?

5 A. He was standing. He had stood up and put his hands up
6 where I had asked him on numerous occasions, on the overhead
7 luggage compartment.

8 Q. And then he says: "I don't have nothing." And Special
9 Agent Perry says: "Seth, I'll let you hold him." End of
10 recording.

11 Is that the time that you quit interacting with
12 Mr. Rodriguez on the train until you took him off to further
13 search him?

14 A. Yes, sir.

15 Q. Okay. Now, this is the Government's transcript. This is
16 from your recording. We've all listened to it. I don't hear
17 anything about resisting arrest, or having to push him down in
18 his seat, as you testified to Mr. Walsh, and putting his arm
19 behind his back. When was all that occurring?

20 A. Well, when you hear at the end of the recording the
21 rustling part, when he says, "Okay, okay, okay," basically
22 that's when I'm attempting to put his arms behind his back and
23 he goes down in the seat. That's when it was happening.

24 Q. Okay. Now, he wasn't charged with resisting at all, was
25 he?

1 A. No, sir.

2 Q. All right. Now, when you submitted your written Report of
3 Investigation -- and you've been around for many, many years,
4 per your testimony. You know for a consensual encounter you
5 have to have consent, reasonable suspicion, and then probable
6 cause. You know that, right?

7 A. Sometimes it doesn't go to reasonable suspicion, it goes
8 straight to probable cause.

9 Q. Sure. I'm just walking through the park with you here.
10 It can go -- maybe you walk in and somebody is sitting with
11 five pounds of marijuana wrapped on their lap. Obviously you
12 have probable cause and you don't have to do any of those other
13 steps. But here, from your testimony, it started out as just
14 an encounter with no reasonable suspicion or probable cause,
15 true?

16 A. Yes, sir.

17 Q. Okay. So it's important, in case the search is ever
18 challenged, such as here, that somehow -- it's somewhat
19 important to try to establish a consent and the voluntary
20 nature of the defendant or the individual that is subsequently
21 being arrested, correct?

22 A. Can you repeat that again, please?

23 Q. Sure. It's important to establish the voluntary nature or
24 consent of the interactions between you and in this case
25 Mr. Rodriguez in order to take the steps that you took and

1 other more progressive actions leading to his arrest. Is that
2 a correct statement?

3 A. Yes. I believe the consent and voluntariness of it is
4 always important in consensual encounters.

5 Q. So when you wrote your Report of Investigation, you had
6 not, at that point, reviewed the tape-recording that even
7 through your own use of the earphones stated, "I'm sleeping,"
8 whenever you first approached Mr. Rodriguez, right?

9 A. I could have reviewed it. I'm not exactly sure.

10 Q. Have you looked at your Report of Investigation?

11 A. I looked at it very quickly preparing for this, but not in
12 detail, no.

13 Q. Okay. And I'm going to introduce it into evidence. I'll
14 be glad to show it to you. But I see nothing in here even
15 alluding to the fact that he was asleep, or represented that he
16 was asleep, or said, no, I don't want to talk to you. Just off
17 -- before I give it to you, do you think that that's incorrect,
18 that you might have mentioned those things?

19 A. I don't remember him saying, no, I can't talk to you, or
20 I'm asleep, so I would assume that's not in my report.

21 Q. Well, I'll let you look at it. I want to be fair. I
22 agree with you, I don't believe it is in the report, but let's
23 just mark it into evidence and just make it a part of the
24 record.

25 MR. WALZ: While Mr. Creasy is doing that, here's the

1 other photographs. I'll tender them to Mr. Walsh.

2 May I approach the witness to retrieve that exhibit?

3 THE COURT: Sure.

4 MR. WALZ: Thank you. Your Honor, I'm going to
5 tender to the Court -- and these exhibits have been stipulated
6 to -- Defendant's Exhibit 1. I think you already have several
7 of the others, but Nos. 1, 5, 6, 7, 8, 9, 10. I believe the
8 Court already has Exhibit No. 2.

9 And Your Honor, I'll huddle with Mr. Walsh during a
10 break and make sure we have all the exhibits before the Court.

11 THE COURT: Speaking of that, from a timing
12 standpoint, what's --

13 MR. WALZ: Your Honor, I believe I have about 35, 40
14 more minutes with Agent Perry. I don't know if Mr. Walsh
15 anticipates any other witnesses for the Government. I will
16 call Mr. Rodriguez. I anticipate that will be about an hour in
17 direct, and I suspect Mr. Walsh will do a cross-examination of
18 maybe 30, 45 minutes, perhaps an hour. I have no other
19 witnesses other than finishing up Agent Perry and then
20 Mr. Rodriguez.

21 THE COURT: Then should we just break for lunch
22 around noon?

23 MR. WALZ: I think that would be a very good idea. I
24 think I can finish Agent Perry in the next 30 minutes. I think
25 it'll proceed pretty fast now.

1 Your Honor, may I approach the witness so I can just
2 have him take a look at -- oh, I'm sorry.

3 MR. CREASY: Your Honor, Mr. Rodriguez just needs to
4 take a quick break.

5 THE COURT: That's fine.

6 MR. WALZ: Your Honor, can we take ten minutes?

7 THE COURT: Yes, let's do that.

8 MR. WALZ: Thank you.

9 (Recess was held at 11:33 A.M.)

10 (In Open Court at 11:59 A.M.)

11 THE COURT: I think what I would like to do is finish
12 up Agent Perry's testimony, and then we'll break for lunch.

13 MR. WALZ: Yes, sir.

14 THE COURT: Go ahead. And then do I understand
15 Defendant's Exhibits 5 through 10 are coming in without
16 objection?

17 MR. WALSH: That's correct, no objection.

18 THE COURT: All right. They're admitted.

19 (Defendant Exhibits No. 5 - 10 admitted.)

20 MR. WALZ: And Your Honor, for housekeeping,
21 Mr. Garcia, did you find Exhibit 4? We have a copy.

22 THE COURT: Yes. I had taken it out.

23 MR. WALZ: Okay, thank you, Your Honor.

24 BY MR. WALZ:

25 Q. Agent Perry, I just wanted to clarify one thing during the

1 break about the consent to be on Amtrak. You say that Amtrak
2 consented to you being there. Is there like a written policy
3 or document? Did the station manager give you consent to be on
4 that train?

5 A. No, we don't have written permission. We've had standing
6 permission for over 20 years to work at the Amtrak train
7 station.

8 Q. Right, but to actually get on the train.

9 A. We have permission to get on the train, yes. But there's
10 no written permission to do that. It's a standing permission,
11 also.

12 Q. Okay. And I'm sorry, I might have been a little confused,
13 because Mr. Walsh had asked about Greyhound and Amtrak, and I
14 recalled reading an article, and maybe it's not correct, but
15 Greyhound, doesn't it require if an agent goes on a train, they
16 have to have permission? Not a train; on a bus. On a bus, you
17 have to have permission to board that bus to conduct a
18 warrantless search?

19 A. Yes, we have to have permission on Greyhound, which I have
20 standing permission on Greyhound, too.

21 Q. Okay, so let's get -- and thank you for clarifying that.
22 Let me move on.

23 I'm going to hand you Defendant's Exhibit 11. We talked
24 about that a little bit before the break. Again, I just want
25 to see if you see something there that I missed. I don't see

1 under the Narrative section any reference to either you or
2 Field officer Chavez indicating that Rodriguez was asleep, or
3 saying no, that he did not want to talk to you. So I just want
4 to see if you see something different in here.

5 MR. WALZ: May I approach the witness, Your Honor?

6 THE COURT: You may.

7 BY MR. WALZ:

8 Q. Here is --

9 A. Can you tell me what I'm looking for, again?

10 Q. Yes. You're looking for anything in the Narrative from
11 you or Field officer Chavez stating that Mr. Rodriguez either
12 said he was asleep or no, that he didn't want to talk.

13 A. Well, I can look at it, but I think I can answer that
14 question --

15 Q. I'm sure you can.

16 A. -- before I even review it.

17 Q. You don't have to review it if you feel comfortable
18 answering the question.

19 A. That's not in my report, that he stated he was asleep or
20 he didn't want to talk to me.

21 Q. Thank you.

22 MR. WALZ: May I approach, Your Honor?

23 THE COURT: You may.

24 MR. WALZ: Here is Exhibit 11.

25 BY MR. WALZ:

1 Q. Now, consistent with your testimony today and your report,
2 you also testified at a grand jury proceeding on May 8, 2018,
3 did you not? I'm looking at the date.

4 A. I don't remember the date, but if you have it on there,
5 I'm sure you're right.

6 Q. Well, that's what it says on here, so I'll just go with
7 the date they have there. And I'm going to read to you -- and
8 I'm going to show this to you, because I don't want anybody
9 saying I'm taking anything out of context.

10 Mr. Cairns is apparently the AUSA, Assistant United States
11 Attorney, conducting the grand jury, and he made the
12 appropriate introductions and so on and so forth, and at
13 Page 3, Mr. Cairns says: "Okay, and what happened that day?"
14 It's only going to be one paragraph and two sentences, so it'll
15 be short.

16 "Answer: I was checking the eastbound train that
17 makes a regularly scheduled stop here in Albuquerque,
18 boarded the train, began speaking with the
19 passengers. I subsequently approached the Defendant
20 in this case, Rodolfo Rodriguez, Jr., displayed my
21 DEA badge to him, identified myself as a police
22 officer, asked for and received permission to speak
23 with him."

24 MR. WALZ: May I approach the witness?

25 THE COURT: Sure.

1 BY MR. WALZ:

2 Q. This is a copy of the grand jury transcript. It's
3 Defendant's Exhibit 12, and I was reading at Page 3, Lines 2
4 through 8.

5 THE COURT: Did you move Exhibit 11?

6 MR. WALZ: If we haven't, I'd move that. I don't
7 believe there's been any objection.

8 MR. WALSH: No objection.

9 THE COURT: All right, it's admitted.

10 MR. WALZ: Thank you.

11 (Defendant Exhibit No. 11 admitted.)

12 BY MR. WALZ:

13 Q. So in your grand jury testimony, there's, again, nothing
14 about him saying no, or saying he was asleep, or anything like
15 that?

16 A. No, sir.

17 Q. Okay. So based on your testimony -- excuse me, everybody.
18 Let me get back to the microphone.

19 Based on your testimony to the grand jury, you conveyed to
20 the grand jury -- and it's a very short amount of testimony,
21 only six pages. You told the grand jury that you had
22 received -- specifically, you testified that you had received
23 permission to speak with him.

24 A. Yes, sir.

25 Q. Okay. And then there was a discussion with a grand juror

1 who apparently asked you about the marijuana. At Page 4, you
2 are asked -- it says at Line 17:

3 "Okay, and -- but, I mean, if this is all he had,
4 would you have charged him with, in federal court,
5 with possessing marijuana?"

6 Line 20, your answer: "Not for that small
7 amount, no. But it is enough to, basically, place
8 him into custody."

9 Line 22: "All right. And then as -- it's enough
10 to arrest him?"

11 Line 24, your answer is: "Well, we probably
12 wouldn't be here today if it was just the marijuana,
13 no."

14 Do you recall that testimony?

15 A. I don't. But if it's in the transcript, I'm sure it's
16 what I said.

17 Q. Okay, thank you.

18 MR. WALZ: I would like to introduce Defendant's
19 Exhibit No. 12, the grand jury transcript.

20 THE COURT: Any objection?

21 MR. WALSH: No objection.

22 THE COURT: It's admitted.

23 MR. WALZ: Thank you.

24 (Defendant Exhibit No. 12 admitted.)

25

1 BY MR. WALZ:

2 Q. Now, Agent Perry, you have been the subject of other
3 suppression cases where the courts -- and you heard me cite
4 these in the opening statement -- have cited issues with your
5 testimony on the stand versus what's on the tape, and making
6 certain credibility findings not in your favor. Are you
7 familiar with those cases?

8 A. I'm familiar with a couple of cases, yes, sir.

9 Q. Do you know if that's happened to any other DEA agent in
10 this jurisdiction, ever?

11 A. I can't speak for everybody else. I have no idea.

12 Q. Okay. Well, that's fair enough.

13 MR. WALZ: May I confer with co-counsel, Your Honor?
14 I think I'm just about done.

15 THE COURT: Sure.

16 MR. WALZ: Your Honor, at this time the defense rests
17 its cross-examination.

18 THE COURT: All right. Is there redirect?

19 MR. WALSH: Just a few questions.

20 DIRECT EXAMINATION

21 BY MR. WALSH:

22 Q. Special Agent Perry, did you -- let's go back to when you
23 handcuffed the defendant. When does that take place, exactly?

24 A. After I felt the bundle that I believed to be illegal
25 narcotics in his crotch area.

1 Q. Now, when you listened with your Bose headphones and heard
2 the Defendant mention sleeping, or something to that effect,
3 when did that occur in relation to when you testified at the
4 grand jury?

5 A. I'm not exactly sure. Can you repeat that again?

6 Q. Yes. So, you testified at the grand jury, right?

7 A. Yeah. I believe he said May 8th, but I'm not -- if
8 that's what it says on the transcript, I'm sure that's probably
9 correct.

10 Q. And then earlier you testified about revising or looking
11 for mistakes in the transcript?

12 A. Yes, sir.

13 Q. And you used some headphones?

14 A. Yes, sir.

15 Q. Just for the record, when did that occur?

16 A. It was -- I don't know. Whenever you sent me the
17 transcript to review. And we were scheduled on numerous
18 occasions for this hearing. But it was after the grand jury,
19 if that's the question you were asking.

20 Q. Yes, sir. And you have testified in a lot of cases,
21 right, in United States District Court?

22 A. Yes, sir.

23 Q. And you have investigated a lot of cases that eventually
24 were federally prosecuted, correct?

25 A. Yes, sir.

1 Q. Could you approximate?

2 A. Federal cases?

3 Q. Yes.

4 A. I don't know. We don't do any state prosecution now.

5 I used to do some state prosecution cases. But I'd say way
6 more than half of the cases that I've been involved in have
7 been federal cases. It's hard to say an amount.

8 Q. Hundreds?

9 A. Yes, hundreds.

10 Q. Now, let me go back to just that one point about where the
11 defendant was seated. Could he have walked away, or were you
12 blocking him?

13 A. He could have walked away until the point where I saw
14 those vials and I decided that that was probable cause to
15 arrest him. He was free to leave and could have gotten up out
16 of his seat and walked either direction at any time during
17 that.

18 Q. Would he have bumped into you? Was there enough room for
19 him to get by?

20 A. No, he wouldn't have bumped into me. He could have got
21 up, turned right or turned left, went through the sliding door,
22 turned right and went off the train.

23 Q. So he had space?

24 A. He had plenty of space.

25 MR. WALSH: No further questions.

1 THE COURT: Anything else of this witness?

2 MR. WALZ: Just a couple of follow-ups. Just a
3 couple real quick follow-up questions.

4 THE COURT: Then I'm going to give Mr. Walsh the last
5 word, and that's it.

6 MR. WALZ: Sure.

7 RECROSS-EXAMINATION

8 BY MR. WALZ:

9 Q. Agent Perry, did you tell Mr. Rodriguez that he could
10 refuse -- or he could walk away if he so wanted?

11 A. I did not.

12 Q. Did you tell him that he could refuse to talk to you?

13 A. I did not.

14 Q. And in response to really whether he could really walk
15 away or not, you had worked under Agent Small for many years,
16 or worked with him, right?

17 A. Yeah, I wouldn't say I worked under him, but we worked
18 together for years.

19 Q. Okay. And Mr. Walsh alluded to hundreds and hundreds of
20 cases in court, but isn't it a basic premise of your
21 investigative technique, don't take no for an answer?

22 A. No, that's not correct.

23 Q. It's not? So if they say, no, I don't want to talk to
24 you, you don't say something like, well, is it okay, then, if
25 we bring in the drug sniffing dogs?

1 A. No. If somebody tells me no they don't want to talk to
2 me, then I don't talk to them. I go to the next person.

3 Q. Okay. And if we look at former testimony from other
4 hearings, can you quote any where you let somebody just walk
5 away?

6 A. Can you repeat the question?

7 Q. Yes. Can you point to a case where you've actually done
8 that, just let them walk away when they say, no, I don't want
9 to talk to you?

10 A. Well, if I didn't talk to them, there wouldn't be no case.

11 Q. Okay, there would be no case.

12 A. So I can't -- I can tell you that it happens. It happened
13 this week while I was on the bus. It happens not every day,
14 but it happens. People don't wish to talk to me.

15 Q. And so you don't continue on and say, well, then, is that
16 your bag above your head there?

17 A. When someone tells me initially, when I identify myself,
18 that they don't want to talk to me, then I don't talk to them.

19 Q. Okay, very good.

20 MR. WALZ: Thank you.

21 THE COURT: Let me ask counsel this. Do I understand
22 that -- obviously Exhibit 1 is the actual audio,
23 Government's Exhibit 1. Government's Exhibit 3 was the
24 transcript of Russian Court Reporters?

25 MR. WALSH: That's correct.

1 THE COURT: And Government's Exhibit 2, then, was
2 Agent Perry using his Bose headphones and then Agent Perry
3 making some corrections to what the Russian Reporters said was
4 Exhibit 3; is that right?

5 || MR. WALSH: That's correct.

6 THE COURT: All right. And then Defendant's Exhibit
7 No. 4 is the transcript prepared by Paul Baca Court Reporting?

8 MR. WALZ: Correct.

11 || MR. WALSH: Yes, sir.

12 THE COURT: Now, in Exhibit 2 that Agent Perry then
13 listened to -- maybe I just need to pull it out again.

14 In other words, what's essentially the difference
15 between 3 and 2, without having to go line by line?

16 MR. WALSH: Sure. There are a few changes, and
17 that's not something that's unusual, that initially the
18 transcript will come back and it will have mistakes. And Agent
19 Perry did make corrections.

20 THE COURT: I guess I'm not being clear. If he makes
21 corrections, does he then send those corrections to the court
22 reporter and they revise the transcript?

23 MR. WALSH: Through us. He sends it back to me.

24 THE COURT: okay.

25 MR. WALSH: And then for closing, in terms of closing

1 remarks, I was going to make a point about Government's
2 Exhibits 2 and 3.

3 THE COURT: That's fine.

4 MR. WALSH: I won't get into it now.

5 THE COURT: Yes, if you would just point out the
6 differences.

7 MR. WALSH: Yes.

8 THE COURT: I just wanted to make sure I was clear on
9 this.

10 MR. WALZ: Your Honor, just for the record, our No. 4
11 is the same tape, and it virtually says the same thing, except
12 for the additional language.

13 THE COURT: Right, at the very beginning. The
14 significance that the defense is emphasizing with its Exhibit 4
15 is right in the very beginning, right?

16 MR. WALZ: That's right. That's exactly right.

17 THE COURT: That's the way I understand it.

18 MR. WALZ: And the Government's revised, for lack of
19 a better word, transcript has part of it down correct, where it
20 says, "I'm asleep," that Agent Perry heard, but he says that
21 the other part was mumbled. I don't think it was, but the
22 Court has the recording in front of it.

23 THE COURT: Okay.

24 MR. WALSH: One last comment about that. I'm not
25 sure what the defense exhibit is regarding the transcript, but

1 Defense Exhibit 4, that is derived from the cleaned up or
2 "enhanced" audio that the defense performed. So that is
3 actually coming from the same audio, but it's a different
4 audio. I'm not sure if that's clear to the Court.

5 THE COURT: Well, when you say enhanced -- in other
6 words, I forget what an audio expert is. What's the
7 terminology?

8 MR. WALZ: It escapes me what his exact title is.
9 Alfred, do you know?

10 MR. CREASY: No, I'm not sure. He basically informed
11 us that he had listened to the tape to ensure it was not
12 tampered with, the recording, and he said that it was not, and
13 then he said that he took some of the background sounds out of
14 it and that's what he provided back to us.

15 THE COURT: And then Paul Baca transcribed it?

16 MR. CREASY: And then Paul Baca transcribed that
17 recording.

18 THE COURT: Okay, good. I wanted to make sure we got
19 all this on the record.

20 Now, it's 12:20. What time do you want to resume? I
21 want to give everybody enough time. 1:30? 1:45?

22 MR. WALSH: I don't need much of a break.

23 MR. WALZ: Your Honor, I respectfully request 1:45.

24 THE COURT: Sure. Is that enough, an hour and a
25 half, approximately?

1 MR. WALZ: I believe so.

2 THE COURT: Okay, that's fine. Let's resume at 1:45.

3 (Recess was held at 12:18 P.M.)

4 (In Open Court at 1:48 P.M.)

5 THE COURT: Mr. Walsh, Agent Perry's testimony is
6 concluded. Is there any further testimony from the United
7 States?

8 MR. WALSH: No, Your Honor.

9 THE COURT: Did I admit all the exhibits the
10 Government wanted admitted?

11 MR. WALSH: Yes, sir.

12 THE COURT: All right. Mr. Walsh.

13 MR. WALZ: Thank you, Your Honor. It's my
14 understanding that we're going to have Mr. Rodriguez testify
15 from the seated position here.

16 THE COURT: Sure.

17 MR. WALZ: So with the Court's permission, I'd like
18 to call him as a witness.

19 THE COURT: Sure. And then you can stay seated
20 there, or you can go to the end of the table. And then when
21 Mr. Walsh questions, he can just do it from there.

22 MR. WALZ: Thank you, Your Honor.

23 (RODOLFO RODRIGUEZ, DEFENSE WITNESS, SWORN)

24

25

1 MR. GARCIA: Please have a seat and state your full
2 name for the record.

3 THE DEFENDANT: Rodolfo Rodriguez.

4 DIRECT EXAMINATION

5 BY MR. WALZ:

6 Q. Mr. Rodriguez, you're the Defendant in this case
7 proceeding before the Court, correct?

8 A. Yes.

9 Q. Just a little bit about your background, just so the Court
10 knows just a little bit about you. Where were you born and the
11 year of your birth?

12 A. I was born October 17, 1962, in San Antonio, Texas.

13 Q. And can you just describe a little bit about your
14 education?

15 A. I got my GED after I dropped out of high school, and
16 basically, that's the extent.

17 Q. Okay. And what type of employment have you held in your
18 life?

19 A. I was a subcontractor at Hum Aluminum Siding, Steel,
20 Fiberglass. I leveled houses. I roofed. I remodeled. I was
21 a truck driver. I drove coast-to-coast, LA to Miami. I also
22 drove a cement mixer in and around town.

23 Q. Okay. And were you on Social Security disability?

24 A. Yes. I have been since I turned 50, which is almost eight
25 years ago.

1 Q. And what was the nature of your being able to get on
2 Social Security disability?

3 A. I had an accident when I was 49, almost 50 years old. I
4 had an accident in a car and I got a herniated disc, carpal
5 tunnel syndrome, arthritis.

6 Q. And have you remained on Social Security since, up to the
7 time of your arrest?

8 A. Yes.

9 Q. All right. Now, let's advance this forward to focus on
10 the events of February 1, 2018. okay?

11 A. Yes.

12 Q. Before I ask you questions about that, do you recognize
13 Special Agent Jarrell Perry?

14 A. Yes, I do.

15 Q. Is he in the courtroom?

16 A. Yes. He's sitting across the room.

17 Q. Now, prior to February 1, 2018, had you ever had any type
18 of encounter or meeting with Special Agent Perry?

19 A. Yes, I had.

20 Q. Would you describe those to the Court and include when
21 those occurred?

22 A. Well, the first time I saw him, I got off the train coming
23 from LA. I got off the train to go down to see the trinkets
24 that the natives are selling on the side there. And as I was
25 walking down the tarmac, I saw him and he tried to talk to me,

1 and I wouldn't say, yes. So I just -- "Can I talk to you," he
2 said. I said, "I don't know you, stay away from me," and I
3 kept walking. I bought my little old trinkets, and then I got
4 back on the train.

5 When I got back on the train, I noticed he was bent over
6 looking through luggage, and I had never met the guy, so I
7 don't know who he is. At first I thought he was stealing
8 stuff. And then I said, well, maybe he's on the train and
9 maybe that's his bag. But I made noise, he got startled, he
10 turned back, he looked at me, and he starts asking me
11 questions, like what do I want, you know. And I'm like, well,
12 I want to go back upstairs, you know, you're blocking the
13 hallway here. And he says, oh, okay, excuse me. And I went up
14 stairs.

15 Q. And what year was that?

16 A. I'm going to say '16, 2016.

17 Q. And you're sure it was Agent Perry?

18 A. Yes.

19 Q. Did you have any other encounter with him prior to
20 February 1, 2018?

21 A. Yes. Again, I had another encounter when I was on
22 Greyhound. He got on the bus, on Greyhound, and he came to me,
23 and he starts asking me questions, and I said -- I said, I
24 ain't got no time, leave me alone, stay away from me, something
25 to that effect. And he went over and he tried to talk to

1 somebody else, and tried to get them off the bus and the guy
2 says, no, if you want to talk to me, you got to talk to me
3 right here on the bus, in broken English. You know, the guy
4 was telling him that, you know, that if you got questions, ask
5 me now, but I ain't getting off the bus. And then I yelled at
6 him, leave him alone, or something to that effect, and he
7 walked away and got off the bus, and we went on our way.

8 Q. okay. Now, we introduced a picture of you following your
9 arrest on February 1, 2018, showing that you were clean shaven.

10 A. Yes.

11 Q. Back in these prior encounters that you had with Agent
12 Perry, were you clean shaven or did you have the beard and
13 mustache that you have now?

14 A. I've always been clean shaven.

15 Q. So that growth on your face has occurred since you've been
16 incarcerated?

17 A. Correct.

18 Q. okay. Now, had you ever been the subject of an actual
19 investigation or search on a train or bus prior to February 1,
20 2018?

21 A. Yes. Once again, I was on a train, and he approached me
22 again, and he asked me for my ticket, and I gave it to him, and
23 then he tried to get me off the train and I said, no. I said,
24 I'm not getting off the train, I'm asleep, or something to that
25 effect, and he walked away. He had to walk away, 'cause there

1 was too many witnesses. People were watching. People were
2 hearing the conversation that I was carrying on, and the fact
3 that he was trying to get me to get off the chair and go
4 downstairs, or get off the train. And I said, no, I'm asleep,
5 stay away, you know. That's the third time. I had three
6 different encounters with him.

7 Q. okay. And what year was that last encounter that you just
8 discussed?

9 A. I'm going to say it was in the middle of '17, sometime.
10 2017.

11 Q. All right. And then did anything happen between mid 2017
12 and February 1, 2018?

13 A. Somewhere along the line there, I was over in Janesville,
14 California, and I thought I met him over there. I thought he
15 was actually at the house where I would stay over there with
16 this gentleman that I met in Mexico, a surfer by the name of
17 Ron Edwards. I went over there, and I thought I saw him coming
18 out of the house, or walking down the walkway or something. It
19 looked like him. I can't swear that it is him, but it sure
20 feels like it is him.

21 Q. Okay. So let me ask you this question. On February 1,
22 2018, when you first saw Agent Perry, did you recognize him as
23 being the same individual you had encountered before as you
24 have just testified?

25 A. On that particular day that I got arrested, I was asleep,

1 and since there's two chairs, I was asleep across both chairs.

2 Q. I'm going to ask you specifically about that in a minute,
3 but my question was, if you listen carefully, when you first
4 saw him -- and we'll talk about what you want to testify to,
5 about being asleep. But when you first saw him, did you
6 recognize him as being the same individual that you had
7 encountered previously?

8 A. No. My eyes were closed. I only heard him.

9 Q. Okay. All right, now where did you -- where were you
10 coming from that brought you to the Albuquerque Amtrak stop on
11 February 1, 2018? When did you buy your ticket, and where did
12 you buy your ticket?

13 A. I bought my ticket in LA, to Oklahoma.

14 Q. Was it a one-way ticket or not?

15 A. One-way ticket, yes.

16 Q. Do you recall how you paid for the ticket?

17 A. I can't remember. Cash, credit card, it's hard to say.

18 Q. Okay. Where did you board the train?

19 A. LA.

20 Q. In LA. And it went from LA -- did it stop anywhere in
21 between, or did it just come to Albuquerque?

22 A. No, it stops. It stops once or twice in LA, and then it
23 stops in Flagstaff, and then it stops in Albuquerque, and then
24 again it stops further down the road.

25 Q. Did you encounter, to your knowledge, any agents or local

1 police on that stage of the trip between LA and Albuquerque?

2 A. Nobody approached me.

3 Q. Okay. Now, set the stage. Now we'll let you talk about
4 February 1, 2018. Where were you and what were you doing, to
5 the best of your knowledge, before you and Agent Perry started
6 encountering one another?

7 A. I was -- I got on in LA probably 6:00 o'clock at night,
8 7:00, stayed up all night until about 1:00 or 2:00, finally
9 fell asleep, and I had been asleep since, I guess, 2:00,
10 3:00 in the morning, 4:00 in the morning, whatever. It's hard
11 to sleep on that train.

12 And when I decided that I was going to lay down for the
13 night, I got my stuff and I laid my bag there, and I put my
14 stuff -- I dumped the bag, I laid my stuff down, and then I put
15 the laundry bag, that plastic bag that says "Laundry Bag," I
16 put it over all that, and then I put the backpack on top of
17 that and I laid down. I laid on that from one seat to the
18 other, 'cause there's two seats, and then there's the armrest.
19 I used the armrest as a pillow, and I laid on that, both sides.
20 The chairs have this thing between your legs that you pull up,
21 so if you pull them both up, you got a nice little comfy area
22 there where you can lay down and sleep in the fetal position.
23 You can't spread out, but you can sleep in the fetal position.
24 That's why I like that train.

25 And as I'm sitting there -- I like to sit in the front,

1 because you can see, you can hear when people come in with the
2 door opening. And just for an instant, you wake up and, you
3 know, you can hear people, you can see people and make sure,
4 you know, you're safe. Of course, if they come through the
5 back, you can never hear them.

6 That particular morning, I heard the door open and I
7 looked down and I see four feet coming my way. They come by
8 and he starts to say something, and I recognize the voice. I
9 hadn't opened up my eyes, or maybe I just opened them for a
10 second and I saw his feet. But I'm laying there and I say, "I
11 know who you are and, no, you can't search me." And he comes
12 again with, "Excuse me, sir. Excuse me, sir, I'm a police.
13 Excuse me, sir, I'm with the security." And I finally got
14 upset and said, maybe he didn't hear me the first time, so I
15 repeated it again; "No, I'm asleep, but here's my ticket."

16 of course, there's a ticket on the overhead luggage rack
17 that says that I'm a paying customer, and if you work that
18 train long enough, you should be able to walk down that hallway
19 and see, if there's a laying person asleep, look up at the
20 overhead luggage rack and see that there's a ticket there and
21 that that person is a paying customer, you don't need to wake
22 them up. That's why the conductor and the porters all know
23 when to wake you up, because the ticket that's on the overhead
24 luggage rack says your stop and when they got to wake you up.

25 Q. okay, so let's break that down. we covered a lot of

1 ground there. You indicated that -- where were you sitting,
2 towards the front of the -- do you want to call it the car, or
3 what?

4 A. It's the coach car. So yes, in the very front of the
5 coach car, I like to sleep there because there's a little more
6 room, and like I said, you open up the recliner and you can
7 sleep in the fetal position and be semi-comfortable.

8 Q. Okay. And then if I heard your testimony right, you could
9 hear the door, even if you're sleeping, and you might wake up a
10 bit whenever that door opens and shuts?

11 A. Yes. It's like the security alarm.

12 Q. Is it an automatic door, or does someone have to do it
13 manually?

14 A. No, you can either kick the door, it's got a little thing
15 at the bottom where you can kick it, you know, if your hands
16 are full, or you can just push the button and it'll open. It's
17 got two different things on it.

18 Q. About what time of the morning or evening was it?

19 A. When the agent got on the train, I guess it was, what,
20 10:00 o'clock or something in the morning.

21 Q. Okay. And how many people, if you recall, to your
22 knowledge, were in the car with you at that time?

23 A. Well, after that, you know, "I'm asleep," he kept asking
24 me questions and kept harassing me and kept stalking me, and I
25 finally got up and looked around, and I looked to the right and

1 I couldn't see nobody, and that's when he said, that's my
2 partner right there. So I stand up and the first thing I see
3 is his partner. He acknowledges that's his partner. So then I
4 look past his partner and I don't see nobody down there. I
5 look to the left, 'cause they got a big old glass and you can
6 see to the other car, and I noticed I don't have people around.
7 So it's not like I can say, hey, can you guys turn on your
8 phone, I want you to record this.

9 And when I looked to the right and to the left, I noticed
10 that not only was there no people there, but that the walkway
11 or the egress was blocked to the left by Chavez -- the egress
12 was blocked to the right by Chavez, the egress was blocked to
13 the left by Perry. So I knew I didn't have a chance and I
14 didn't have no witnesses, and the first thing that went to my
15 mind is, these guys are going to end up shooting me and saying
16 that I did whatever and that I had a gun, and all kinds of
17 other good stuff. So that's when I pretty much knew that I
18 wasn't going nowhere any time soon.

19 Throughout the encounter, he kept asking me, "Is that your
20 bag? Is that your bag?" And if you'll notice on the
21 transcripts, I say, "No, this is my bag right here, this is all
22 my bag right here." Because he kept pointing to another bag.
23 As I'm laid down, he kept saying, "Sir, is that your bag? Is
24 that your bag?" And he's pointing to another bag. Because the
25 way the luggage rack is on top -- you know, I don't put my bags

1 up there, I put my bags right there so I can see them at all
2 times. And he kept pointing to another bag; "Is that your bag?
3 Is that your bag?" And I finally get up and I say, "No, this
4 is my bag right here."

5 "Can I see the bag?" So I put the bag upside-down and I
6 shake it, so he'll see it's empty, and I give it to him. And
7 that's when he's, don't empty it, don't empty it. The bag's
8 already empty, so you can't put nothing in it and say that it's
9 mine, you know. So he looks, and then that's when he reached
10 down there and he pulled that plastic laundry bag, he pulled it
11 back just a little bit. I don't know what he's looking for,
12 but he pulls it back just a little bit, and that's when he sees
13 the pill bottles of medical -- the medical pill bottles.

14 Q. okay, let's break that down just a bit if we could. when
15 you hear the door, as you testified before, you said you saw
16 four feet walking towards you?

17 A. Yes.

18 Q. Did you finally determine -- because we have to make a
19 record of who everybody is, okay? Did you figure out whose
20 feet they belonged to?

21 A. Well, by the voice, I know that two of them belong to this
22 man, Mr. Perry, but since Mr. Chavez never said anything -- I'd
23 never seen him before, I'd never heard him talk before, so I
24 don't know his voice, and I'd never had no interactions with
25 him, so I don't know who he is.

1 Q. Okay. So what is the very first thing that you recall
2 that either you said to Agent Perry or he said to you? Who
3 initiated the actual conversation, from your memory?

4 A. He initiated the conversation.

5 Q. What did he say?

6 A. He started to say something, and I interrupted him. He
7 started to say something like, excuse me, sir, I'm with
8 security, or whatever, right, but I interrupted him and I say,
9 "Yeah, I know who you are and, no, you can't search me."

10 Q. And then what happened next?

11 A. He kept trying to search me. He kept asking me, over and
12 over. That's why he had to ask me three different times,
13 because I had already answered him. That's why I can't fathom
14 why the recording sounds like a zipper. To me, it sounds like
15 one of those old recordings that you hit reverse, and if you
16 play it back, it'll play what you just said backwards. So
17 that's what I'm thinking, is that when I said, "I know who you
18 are and, no, you can't search me," I'm under the pretense that
19 he put it in reverse and he started all over again. Excuse me,
20 sir, excuse me, sir, excuse me, sir. And I finally said, "No,
21 I'm asleep."

22 Q. So it's your belief that there was some conversation that
23 occurred that is not picked up by the tape recording?

24 A. Correct.

25 Q. And what you just said is to the best of your knowledge

1 what occurred prior to the tape being turned on, or whatever it
2 was?

3 A. Correct.

4 Q. Because we heard that noise that I asked --

5 A. The zipper sound.

6 Q. Yes. Agent Perry, I think, said that might have been a
7 zipper to his jacket. How was he dressed?

8 A. I really didn't notice. I had my eyes closed. I'm
9 asleep. The only thing I heard was his voice, and after the
10 first, second, third time, I figured, well, if I give this guy
11 my ticket -- 'cause I already him, no, I'm asleep. But if I
12 give him my ticket, maybe he'll leave me alone and keep walking
13 away, and he didn't. He kept asking me more and more.

14 And if you notice, I said more than once, no. I didn't
15 say, no, I didn't have no luggage, I said, no, stay away from
16 me. No, you can't search me. No, I can't believe you're
17 waking me up in the middle of this dead sleep and asking me all
18 these questions. That's what was puzzling.

19 Q. Okay. So did you, in fact, empty the contents of your
20 backpack onto your seat that had those vials that supposedly
21 contained medicinal prescribed cannabis?

22 A. The backpack was empty when I gave it to him. There was
23 nothing in it. I just turned it upside-down so he could see
24 there was nothing in it. It's like, he grabbed it, and I go,
25 look, there's nothing in it. Here, go for it.

1 Q. So the vials were under a laundry bag?

2 A. Correct. The laundry bag is about the size of the seat
3 where you sit on it, on the seating part. It's about that size
4 square. So I put it on top of that, and then I put the black
5 backpack on top of that. When he said, "Can I search that," I
6 said, "Yeah, here, go for it," and I gave him the empty
7 backpack.

8 Q. And were the vials covered?

9 A. Yes.

10 Q. Why did you take the vials out earlier?

11 A. I kind of knew that somebody was going to come harass me,
12 because it seems like it only happens in Albuquerque. I've
13 never -- I been on the train from Reno to Springfield, from LA
14 to Oklahoma, and so on, you know, and I've never had anybody
15 come to me like here in Albuquerque. It seems like every time
16 this train hits Albuquerque, somebody is trying to get me off
17 that train. It might not be him, it might be somebody else,
18 but I can almost swear that he sends people up there to try to
19 wake me up and get me off that train.

20 Q. All right. So when had you taken the vials and put them
21 on the seat and then put the laundry bag over them?

22 A. It could have been 2:00, 3:00 in the morning, after I got
23 done drinking and walking around and wore myself out.

24 Q. I'm going to show you what's been admitted as Defendant's
25 Exhibit 3. Is that the laundry bag you're talking about?

1 A. Yes.

2 Q. And were the vials under that laundry bag?

3 A. Yes.

4 Q. And so they were not where you could see them in plain
5 view, were they?

6 A. No. I made sure of that.

7 Q. Did you think it was illegal for you to have medically
8 prescribed cannabis with you?

9 A. No.

10 Q. Did you have anything in those vials other than -- well,
11 let me ask you this. What did you have in those vials?

12 A. Rolling paper. One of the vials had a vape pen, you know,
13 a little bit of -- an empty vape pen. There was no marijuana
14 in there. If there was marijuana in there, I'm sure there'd be
15 a picture of it. At least you would guess he would take a
16 picture of it to prove that there was marijuana in there.

17 Q. Well, you reviewed the pictures that the Government gave
18 us, correct?

19 A. Yes.

20 Q. Did you ever see a picture of any marijuana at all?

21 A. No. I seen an empty container weighing 50 grams.

22 Q. Now I'm going to show you what is Defendant's Exhibit 1,
23 and ask you what you're looking at there.

24 A. That one looks like it's got rolling paper, and the other
25 one, I don't know, I think that's the one that had that vape

1 pen, the contents of the vape pen.

2 Q. okay. Do you see any marijuana --

3 THE COURT: Just a second. Mr. Rodriguez, your wrist
4 is hitting the microphone. If you can move the microphone a
5 little further away, that way we can hear you.

6 MR. WALZ: Thank you, Your Honor.

7 THE COURT: Thank you.

8 BY MR. WALZ:

9 Q. Do you see any marijuana or cannabis in that picture,
10 Defendant's Exhibit 1?

11 A. No. That one looks like it has a container of something
12 or another.

13 Q. You do see the rolling paper, though, in the one vial?

14 A. Yes.

15 Q. And let me show you Exhibit No. 2 and ask you if you
16 recognize that.

17 A. Yeah, that's the rolling paper I had. There's the Zig-zag
18 man, it's color orange, and it says, "Medical Cannabis."

19 Q. And is this a vape pen in the background? I can't tell.

20 A. Yes, that's one of the vape pens.

21 Q. Did you have any cannabis in the vape pen at all?

22 A. I think they were empty.

23 Q. To your knowledge, did you, in fact, have any cannabis --

24 A. I believe I had smoked it all. I don't think I had any
25 left. I'm almost sure I had gotten rid of all of it.

1 Q. Okay. So in order to make a clean record here, to your
2 knowledge, did you have any cannabis, medically prescribed or
3 otherwise, in any of these vials at the time that these vials
4 were encountered by Agent Perry?

5 A. If there was any residue in there, it was prescribed. I
6 had a permit. And if he would have looked in my phone, I had a
7 picture of my permit. And if he would have asked, I would have
8 showed it to him, but he never asked.

9 Q. I understand that, but my question is, to your knowledge,
10 did you have any --

11 A. No.

12 Q. Okay. I guess I better finish the question. Did you have
13 any cannabis in the vials?

14 A. To my knowledge, I had finished it all.

15 Q. Okay. You smoke marijuana or cannabis pursuant to your
16 prescription, right?

17 A. Yeah, 'cause I got a herniated disc, I got carpal tunnel
18 syndrome, I got pins and plates and screws in my right ankle, I
19 got arthritis in my knee.

20 Q. So that was prescribed for you by a doctor, right?

21 A. Yes.

22 Q. And we already looked at Exhibit 3, that's --

23 A. That's the bag that covered all the contents. That's the
24 bag he pulled away.

25 Q. We'll get to that. We'll break it down step-by-step.

1 Now, these photographs, do you know where they were taken,
2 or not?

3 A. I guess at the DEA office.

4 Q. Okay. So these are not taken on the train?

5 A. Oh, no.

6 MR. WALZ: Alfred, do you have the other photographs
7 that we had admitted, please? Thank you.

8 BY MR. WALZ:

9 Q. I'm going to show you Defendant's Exhibit 5, a picture
10 identification card from California. Do you recognize that?

11 A. Yeah. That's my Janesville ID.

12 Q. And did you provide that to Agent Perry upon --

13 A. Yes, I did.

14 Q. Be sure and let me finish my question before you answer.
15 Okay?

16 A. Yes, sir.

17 Q. Now, Exhibit No. 6, that's a picture of you, obviously,
18 right?

19 A. Yes.

20 Q. Is that how you looked on or about February 1, 2018?
21 Because that was taken after your arrest, correct?

22 A. That was taken the same day I was arrested.

23 Q. Okay. Clean shaven in there, right?

24 A. Correct.

25 Q. Okay. Exhibit No. 7?

1 A. Same thing.

2 Q. And this has a few more articles in it, Exhibit No. 8.

3 Can you tell the Court what those articles are?

4 A. One of them looks like a shampoo, a lighter, a phone, a
5 pen, some cologne, and a medical cannabis bottle.

6 Q. And again, do you see any cannabis in that photo?

7 A. No.

8 Q. Number 9, Exhibit No. 9, what is that?

9 A. Looks like my ticket. Yeah, that's my ticket right there.

10 Q. Okay. And the picture of that bottle, did you have that,
11 or is that something else?

12 A. That's a coupon that I clipped for oral rinse.

13 Q. Okay. And Defendant's Exhibit 10?

14 A. It's my ticket.

15 Q. And is that the one that you gave to Agent Perry to look
16 at?

17 A. Yes. This is a ticket I purchased in LA. This is a
18 ticket stub because, of course, the porter takes the ticket.

19 Q. All right. Now, let's pick up where we left off with
20 Agent Perry when you first had knowledge of him entering the
21 car. So we don't have to repeat your testimony, I'm just
22 trying to bring you up to speed, but correct me if I'm wrong,
23 there was an interchange, and at some point the two of you are
24 interacting, right?

25 A. Yes.

1 Q. Okay. Now, you sat here and you heard the tape being
2 played earlier? You have to say "yes" or "no."

3 A. Yes, sir.

4 Q. You don't have to say "sir." And you talked about that
5 you thought there was a conversation that was not recorded or
6 perhaps even deleted.

7 A. Yes.

8 Q. And is that right?

9 A. That's correct.

10 Q. Okay. Now, from what you did hear on the recording, do
11 you believe that that was an accurate recording?

12 A. Yes, it was.

13 Q. So now the interaction is occurring. This has been
14 discussed in the questioning already, but I want to hear what
15 you have to say about it, or more importantly I want the Court
16 to hear what you have to say about it.

17 Agent Perry says: "How you doing, sir? Sir, I'm a police
18 officer. We check the trains here for security. May I speak
19 to you for a moment?" Do you recall him saying that or not?

20 A. Yes, he said that.

21 Q. And then you say -- and this is on Page 2, Mr. Walsh --
22 "MR. RODRIGUEZ: No, I'm asleep, here's my ticket."

23 A. That's what I said.

24 Q. Okay. When you said, "No, I'm asleep," is that no to,
25 what? Because there's several -- you heard me say, there are

1 several statements that he makes before --

2 A. Yeah.

3 Q. Excuse me -- before the response. So when you say, "No,
4 I'm asleep," what are you referencing?

5 A. Well, he asked me, "Can I speak to you?"

6 Q. okay.

7 A. And I said, "No, I'm asleep."

8 Q. So it's your testimony that the "No, I'm asleep" goes
9 specifically to his question of, "May I speak to you for a
10 moment"?

11 A. Yes, correct.

12 Q. Could you hear him?

13 A. Yes, I could.

14 Q. Was there a lot of noise so that you think he could not
15 hear your response?

16 A. No. He asked me three times, and I assumed that he's
17 going to keep asking until I give him an answer.

18 Q. Well, you heard Agent Perry testify he never heard that --

19 A. Yeah.

20 Q. -- the "No, I'm asleep." Did you see or hear anything
21 that would have been interfering with his ability to hear what
22 you were saying?

23 A. If I can hear him, he can hear me.

24 Q. And you did say, "Here's my ticket," right?

25 A. Yes, I did.

1 Q. Apparently he heard that, because he took your ticket?

2 A. Correct.

3 Q. Okay. And that came in the same sentence, right?

4 A. Yeah.

5 Q. At about the same time?

6 A. The same line, I assume.

7 Q. All right. So, do you think you communicated in a manner
8 that was understandable and audible, volume-wise, to Agent
9 Perry where he could hear you say, to his question, "May I
10 speak to you for a moment," where you said, "No, I'm asleep"?

11 A. I know he heard me.

12 Q. And do you think you communicated that in a manner that
13 was understandable?

14 A. Well, I was asleep and I was groggy, and maybe I was
15 mumbling, but I was upset that they were waking me up in the
16 middle of a deep sleep. But I'm sure he heard me. I'm sure he
17 heard me the first time when I said, "I know who you are and,
18 no, you can't search me," even though it didn't come out in the
19 tape, in the transcripts, and I know he heard me when I said,
20 "No." And I said no again, and I said no half a dozen times in
21 those transcripts.

22 Q. But it's not on any transcripts?

23 A. Excuse me?

24 Q. It's not on any -- well, "No" later, but I'm talking about
25 earlier.

1 A. Yes.

2 Q. okay. All right, so anyway, you say, "No, I'm asleep,
3 here's my ticket." Did he take the ticket?

4 A. Yes.

5 Q. How close was he in proximity to you, physical proximity?

6 A. Well, here's a chair, and we'll assume that this is the
7 egress. This is about how wide the egress is.

8 Q. Let me be sure the Judge can see this.

9 THE COURT: I can see it.

10 A. That's about how wide the egress is.

11 Q. okay.

12 A. You can literally reach over and talk to the person and
13 say, how you doing, you going to Kansas or Oklahoma, whatever.
14 You know, you can have a conversation.

15 Q. So if I'm sitting in another seat across from you, it's
16 about this distance, right?

17 A. Basically, yeah.

18 Q. okay. Now, if I'm Agent Perry and I'm standing in the
19 aisle -- it seems like he's portraying this as a considerable
20 distance away. Now, if I'm in the aisle closest to where I'd
21 be sitting --

22 A. Yes.

23 Q. -- how far away would you be?

24 A. I would be right there, he'd be right there. If my head
25 was on this, using this as a pillow, I could hear him and he

1 could hear me.

2 Q. When Agent Perry said you could just get up and walk by
3 him, could you do that?

4 A. No. Two people can't walk down that egress. One has got
5 to move to the side, go in between the chairs to let the other
6 person through.

7 Q. Well, why didn't you just try to get up and walk away?

8 A. That's been suggested.

9 A. Yeah. I didn't feel like -- I didn't feel like I was in
10 the wrong, like I needed to leave, you know. I didn't do
11 nothing wrong. He knows I'm a paying customer because my
12 ticket is on the overhead rack. So why did he wake me up to
13 see my ticket when you know that my ticket is on the overhead
14 luggage rack? Maybe he just wants to wake me up and bother
15 people, you know.

16 I'm not sure how he justifies saying, well, I want to see
17 his ticket. Well, you know he's got a ticket because he's got
18 a ticket on the overhead luggage rack. And you know to buy a
19 ticket you have to have ID, you know. But when I got up and I
20 looked and I saw I didn't have nobody, I just knew I wasn't
21 going to walk away.

22 Q. And you didn't, did you?

23 A. No.

24 Q. Okay. And so then in the transcript, we have Agent Perry
25 thanking you for, I guess, showing him your ticket, and then he

1 follows up with a question. Again, this is on Page 2,

2 Mr. Walsh.

3 "Do you have ID with you, Mr. Rodriguez? May I see that,
4 please? Are you having a good trip?" These are all questions
5 that he's asking you, and thus far no responses are shown.

6 "Thank you, sir, appreciate that." And then it says: "Rodolfo
7 Rodriguez, Jr., Janesville, 10/17/62. Thank you, sir."

8 what was going on during that conversation? Had you given
9 him your photo ID that we looked at earlier?

10 A. Yes, I did.

11 Q. Did you feel that that was the end of the inquiry?

12 A. Yes.

13 Q. Okay. But then he asked you: "Do you have luggage on the
14 train with you today, sir? I see you're shaking your head side
15 to side. Does that mean" -- and we'll get to your answer, but
16 could you show the Judge how you were shaking your head?

17 A. It was kind of like, oh, God, you know. You're upset.

18 You got waken up, and you're asked a dozen questions in less
19 than a minute, and you already told the guy, no. You already
20 know who he is, and you already told him, "I know who you are
21 and, no, you can't search me." But yet, you know, he doesn't
22 hear me. It's inaudible. It's not in the transcripts.

23 Whenever I say, "No, you can't search me," it comes up
24 inaudible.

25 Q. Well, actually, in this transcript, after he asked you

1 that, at Line 17, you say, "No, sir."

2 A. okay.

3 Q. And then Agent Perry asks: "How about this bag here; is
4 this your bag here?" what is your belief as to what Agent
5 Perry is referencing? what bag is he talking about?

6 A. He's pointing to another bag. There's a luggage rack over
7 me and there's a luggage rack on the other side. Up in the
8 front, in the corner, there was another bag, and I'm looking at
9 that bag and he asks me, is this your bag right here? And he
10 asks me once, twice, maybe, and on the third time, I said, "No,
11 this is my bag right here," pointing at the bag next to me. By
12 now, I had already stood up. Now I'm sitting up, I'm no longer
13 in the fetal position falling asleep. Now I'm standing up, and
14 now the black bag is right here next to me, and I say, "No,
15 this is my bag," pointing at the bag next to me.

16 MR. WALZ: Mr. Creasy, can you find me the photograph
17 of that bag? I'll continue and we can come back to that.

18 BY MR. WALZ:

19 Q. okay. So you say -- he said: "How about this bag here;
20 is this your bag here?"

21 You say: "No."

22 "SPECIAL AGENT PERRY: This is not your bag here?"

23 "MR. RODRIGUEZ: This is my bag right here. This is all
24 my bag right here." So that's just what you described, right?

25 A. Yes, sir. That's my bag, right here.

1 Q. Then he says: "There's nothing else, though? Okay.

2 Would you consent for a search of your bag for contraband,
3 sir?" Did he say that?

4 A. Yes.

5 Q. Now, this bag you're referencing, you already knew it was
6 empty?

7 A. Yeah.

8 Q. Because you had emptied it --

9 A. When I fell asleep at 2:00, 3:00 in the morning.

10 Q. -- at 2:00, 3:00 in the morning, and so you were not
11 worried about him searching that bag because there's nothing in
12 there?

13 A. Correct.

14 Q. And, in fact, you said, "There's nothing in there. Okay.
15 All righty. All right."

16 So then he asks again: "Do you give me permission to
17 search this bag here?" Now, is this now a different bag or the
18 same bag?

19 A. It's the black bag.

20 Q. And you say, "Go for it."

21 A. I grabbed it and I said, "Go for it."

22 Q. And again, just for the record, and I know it's a little
23 tedious, but we've got to go through every encounter, why did
24 you say, "Go for it"?

25 A. Because I knew there was nothing in there.

1 Q. And by nothing in there, you're talking about these vials
2 that we've already reviewed?

3 A. Yes. There was really two reasons for that. Hopefully
4 he'd go on his merry way and leave me alone if I let him search
5 an empty bag.

6 Q. okay. And Special Agent Perry says: "Thank you, sir.
7 Leave everything in -- you have no luggage downstairs?"

8 "MR. RODRIGUEZ: No, sir."

9 "SPECIAL AGENT PERRY: what's that?"

10 And then you respond: "It's nothing. It's medication."

11 So, what are you all talking about right there?

12 A. Right there is when he reaches for the laundry bag and he
13 pulls it back just a little bit. Maybe he's looking for
14 something under there. Whatever he's looking for, he reaches
15 down there and he pulls the laundry bag back, and that's when
16 he sees the cannabis.

17 Q. The bottles?

18 A. The bottles.

19 Q. okay. Because if I recall your testimony, you did not
20 believe there was any cannabis in those bottles?

21 A. Correct.

22 MR. WALZ: Your Honor, we've marked Exhibit 13, which
23 we got from the Government. It's his backpack or bag that's
24 being referenced.

25 THE COURT: Any objection?

1 MR. WALSH: No objection.

2 MR. WALZ: Thank you. We would move for admission.

3 THE COURT: Defendant's Exhibit 13 is admitted.

4 MR. WALZ: Thank you, Your Honor.

5 (Defendant Exhibit No. 13 admitted.)

6 BY MR. WALZ:

7 Q. And, in fact, did Agent Perry look through the bag?

8 A. Once he saw that it was empty, he got -- he got a little
9 bit frustrated, maybe a little upset. That's probably why he
10 reached for the laundry bag.

11 Q. I don't want you to speculate as to what Agent Perry is
12 thinking, I just want to track what happened.

13 A. Yes.

14 Q. Okay. Did he look through Exhibit 13, the bag?

15 A. Yes, he looked in it.

16 Q. And did he find anything?

17 A. No.

18 Q. Did he pull anything out?

19 A. No.

20 Q. Okay. Because we know this whole incident that was
21 recorded was only three minutes and -- Agent Perry told me what
22 the second count was earlier today, and I'll double-check that,
23 I'm sure he was correct. But it was three minutes and some
24 seconds, and we can calculate the seconds exactly. Was this
25 happenings pretty fast?

1 A. Yes.

2 Q. okay. So you let him look through the bag. He asked you
3 a question: "And you have no luggage downstairs?"

4 "MR. RODRIGUEZ: No, sir."

5 "SPECIAL AGENT PERRY: what's that?" That's where we are
6 in this discussion.

7 You say: "It's nothing, it's medication."

8 Now, tell us exactly what happened to get onto this
9 discussion where Agent Perry asked you, "what's that," and you
10 said, "It's nothing, it's medication."

11 A. Yeah. He reached down there and he tried to grab it.

12 Q. Grab what?

13 A. Grab the pill bottle.

14 Q. okay. You had said that he moved the laundry bag, right?

15 A. Yes.

16 Q. Was the pill bottle under the laundry bag?

17 A. Yes, it was.

18 Q. Was it visible in plain view to somebody just looking at
19 the laundry bag?

20 A. No.

21 Q. Okay, go ahead.

22 A. So I reached down there and I grabbed one of them, I
23 opened it, and I ate the gummy bear.

24 Q. Why did you do that?

25 A. Because I just felt like, it's mine, you know. It's not

1 his, it's not nobody else's, it belongs to me. It's prescribed
2 to me.

3 Q. Well, did you think you would get in trouble for being in
4 possession of a gummy bear that was prescribed to you?

5 A. Not at all.

6 Q. Was the gummy bear prescribed to you?

7 A. Yes, it was.

8 Q. All right. So when you say, "It's nothing, it's
9 medication," are the two of you, in your mind -- I don't want
10 you to speculate to what Agent Perry's thinking -- in your
11 mind, was this discussion relating to the gummy bear?

12 A. Yes.

13 Q. And Agent Perry says: "I see that. I see what it was,
14 sir." He's talking about the gummy bear?

15 A. Yes. He says that's what it was.

16 Q. And, "MR. RODRIGUEZ: Medication. All that's medication."

17 A. Correct.

18 Q. Was it medication?

19 A. Yes.

20 Q. Prescribed medication?

21 A. Yes.

22 Q. Then Agent Perry says: "Sir, you need to stop. Okay?"
23 What were you doing when he said you need to stop?

24 A. I was covering the stuff back up. He pulled the laundry
25 bag away, and I took it away and I tried to cover my stuff back

1 up.

2 Q. why?

3 A. well, because it's none of his business what I got.

4 Q. Were you under arrest at that point?

5 A. No.

6 Q. Did you feel that you could walk away?

7 A. I felt like I could, but I wasn't. There was no need to
8 walk away.

9 Q. why?

10 A. Because I hadn't done nothing wrong. I'm a paying
11 customer traveling on an overnight train.

12 Q. All right. And so you're saying that you were trying to
13 use the laundry bag to cover back up the vials?

14 A. Yes.

15 Q. But you did say -- he said: "Sir, you need to stop.

16 okay?" And it says: "MR. RODRIGUEZ: Yes, sir." Did you
17 agree then to stop?

18 A. Yes.

19 Q. Now we get to a different phase of the interaction between
20 you and Agent Perry. I think I asked you, do you recall how he
21 was dressed?

22 A. I can't recall.

23 Q. Had he displayed any firearm or badge to you, to your
24 recollection?

25 A. No.

1 Q. At this point.

2 A. No, at this point, I hadn't seen a badge.

3 Q. What about a firearm?

4 A. I hadn't seen no firearm.

5 Q. Okay. Now Special Agent Perry says: "All right. Here
6 you go." When he says, "Here you go," in your mind what was he
7 referencing?

8 A. He was giving me my ID, probably. Or maybe -- I'm not
9 sure what he was doing. You have to remember, I had just woke
10 up. I had woke up. I had been awake all of three minutes, and
11 this happened so fast, and I'm still groggily, I'm still --
12 maybe I'm not speaking clearly enough or maybe -- I don't know
13 what his problem was, but he just kept on me. He drilled on me
14 from the beginning and he wouldn't stop.

15 Q. Well, he says: "All right. Here you go. All right.

16 It's not medication. All right. You have no luggage
17 downstairs? Okay. Can you stand up for me, please, sir?"

18 What was your understanding when he asked you, "Can you
19 stand up for me, please, sir"?

20 A. I was probably nodding my head, no. I was probably -- if
21 I could break out the original transcripts, I was probably
22 telling him, no. No, you can't search me; no, stay away from
23 me, something to that effect.

24 Q. Well, what the response was, according to the transcripts,
25 it says: "MR. RODRIGUEZ: [INAUDIBLE]."

1 A. Once again, inaudible. When I say, no, get away from me,
2 no, I'm asleep, no, stay away from me, it shows up inaudible.

3 Q. Okay. Did you understand, though -- you did hear him ask
4 you, "Can you stand up for me"?

5 A. Yes.

6 Q. Did you think that you could decline that?

7 A. And I did. I said, "No, I'm asleep."

8 Q. And then Special Agent Perry on the next page, Page 4,
9 says, "I'm sorry." Because we don't know what you said that's
10 inaudible, when his comment on the next page says, "I'm sorry,"
11 what in your mind was Agent Perry saying he was sorry for?

12 A. I don't know. I would assume he said sorry for waking you
13 up, sorry I can't hear you, sorry whatever, you know. I'm not
14 sure why he's saying sorry.

15 Q. I'm not asking you to speculate what's in his mind, but
16 what is your belief as to why?

17 A. Why he said sorry?

18 Q. In your mind.

19 A. In my mind, I think he said sorry because he is sorry.

20 Q. For the encounter?

21 A. No, I think he's just in general sorry, because an
22 authentic person would say, I apologize for waking you up, sir,
23 can you please get up. My apologies for doing this, my
24 apologies for doing that.

25 Q. Now, next on the tape is you saying: "Please, sir. I'm

1 trying to go to sleep."

2 A. That's what I said.

3 Q. Were you trying to go back to sleep?

4 A. Of course.

5 Q. Then his response was: "Okay. Sir, I need you to stand
6 up for me."

7 A. Yes.

8 Q. What was going through your mind at that point?

9 A. I'm going to have to get up. I'm going to have to make a
10 recording of this. I'm going to have to see if I have
11 witnesses. I'm, you know, I'm thinking ahead.

12 Q. Did you believe that you were under some type of custodial
13 investigation at that point?

14 A. He never said, you're under arrest. He never said, I'm
15 going to place you under arrest, or anything to that fashion.
16 He just told me to get up.

17 Q. And your response was, "I'm not going to," and then
18 there's two hyphens. So we don't know what --

19 A. Once again, I probably said, I'm not going to because I
20 don't have to, or because I told you no, and I know who you
21 are, or whatever, you know. Something. I must have mumbled
22 something, because I was still asleep. I wasn't clearly awake.
23 I wasn't thinking at 100 percent capacity like I am now.

24 Q. Well, then Agent Perry says: "You don't have anything on
25 your body, do you?" And you respond: "No."

1 A. Correct.

2 Q. And then Agent Perry says: Okay. I need you to stand up.
3 I want to pat you down." Do you remember that?

4 A. Yes.

5 Q. And you said, according to the transcript and the tape you
6 heard: "You can't pat me down. I ain't got nothing." So
7 you're refusing to give consent to stand up and be patted down?

8 A. Correct.

9 Q. "I got," and then unfortunately, it's inaudible again.
10 I'm just saying.

11 A. I'm listening. I'm just smirking.

12 Q. okay. And then Special Agent Perry says: "Sir, you got,
13 well, things of marijuana right there. Go ahead and stand up
14 for me now. I'm not asking you. Put your jacket down right
15 there. There's my partner, right here. I need you to put your
16 hands up here right now. Put your hands up here, sir. Up
17 here."

18 okay. Do you doubt that that language is correct? You
19 heard the tape this morning.

20 A. Yes.

21 Q. Okay. Did you think you were under arrest at that point?

22 A. No.

23 Q. Do you think you could have still said no and walked away?

24 A. I would hope I could still say no and walk away, but once
25 again, when he said, "That's my partner, right here," I didn't

1 know he was standing back there, because the chairs are so high
2 you can't see behind you. The chairs are up to here, so you
3 can't just turn around and see.

4 But when I stood up and I looked and I saw Chavez right
5 there, that's when he said, "That's my partner, right there."
6 So I'm going to assume that he was standing there all along
7 watching, hearing, seeing what's going on.

8 Q. So did you feel you had any egress or ability to walk away
9 at that point?

10 A. No. When I saw Chavez to my right and Perry blocking to
11 the left, I just knew I wasn't going to walk anywhere any time
12 soon, at least not being -- at least being escorted.

13 Q. Okay. So again, though, in the next line, you again
14 refuse consent. I'm going to read this verbatim. Your
15 response was: "Sir, you can't just pat me down."

16 A. That's correct.

17 Q. Did you ever consent, to your knowledge, to any search,
18 ever, during all of this time --

19 A. No.

20 Q. -- from beginning to end?

21 A. Never. Never did I say, yes, go ahead, pat me down,
22 search me.

23 Q. Or give information, even?

24 A. No.

25 Q. And again, the tape has been introduced, but you say that

1 there was a discussion that occurred off tape, which we don't
2 have, right?

3 A. Yes.

4 Q. But on the tape we do have, and it'll speak for itself, he
5 asked you for consent. I don't want to go back and read the
6 whole thing, I won't, but when he says, "May I speak to you for
7 a moment," you said, "No, I'm asleep."

8 A. Yes.

9 Q. Do you remember that?

10 A. Yes.

11 Q. And in all these times that he continues to ask you to do
12 things, you either shake your head no, or tell him no?

13 A. Correct.

14 Q. So from the very beginning of the encounter until the time
15 you're actually arrested and patted down, every time Agent
16 Perry has asked for consent to do something, you have told him
17 no?

18 A. Correct.

19 Q. okay. And then Special Agent Perry says: "Yes, I can.
20 And I can. You know that" -- I'm sorry. "You know what? I'm
21 going to go ahead and handcuff you. Go ahead and turn around."
22 Where were you at that time when that happened?

23 A. Well, that's after I stood up and I looked both ways. And
24 by that time, he had already moved to the egress, and then the
25 other guy moved -- he never moved, he just stayed there, you

1 know. And he's trying to get me to put my hands up, and I'm
2 looking and I'm wondering, you know, am I going to get shot
3 here? What's going to happen? I have no witnesses. A million
4 things go through your mind in three minutes.

5 Q. All right. And then you say in the transcript and on the
6 tape we heard, "No, no. Please don't."

7 "Please don't," why did you say that?

8 A. Because he starts grabbing me and starts manhandling me.

9 Q. Were you the aggressor by failing to cooperate, or were
10 you trying to resist in any manner?

11 A. No. There was no way I could resist at that point. At
12 that point, I felt like I didn't stand a chance. It was two
13 against one, you know. I don't know who this guy is, but one
14 guy is standing to the right -- I can't see the gun, but he's
15 got his hand like he's holding something.

16 Q. Who's he?

17 A. Chavez.

18 Q. Okay.

19 A. When I looked to the left, this guy, he's got his hand on
20 his side. Of course, I can't see it, because I only see his
21 left side. I look to the right and I can only see this guy's
22 left side. So I know on their right side, they got guns. They
23 haven't pulled the guns out, but I just know they got their
24 hands on their weapons.

25 Q. So did you resist or not?

1 A. I did briefly.

2 Q. What do you mean by that?

3 A. Briefly, when he grabbed me, I tried to pull away, and
4 that's where the struggle -- that's when the struggle happened.

5 Q. What kind of struggle?

6 A. It was a minor struggle. It was nothing major. It was
7 just -- I didn't swing on the guy, he didn't swing on me. He
8 grabbed my wrist and threw me down on the chair and cuffed me
9 up.

10 Q. What do you mean he threw you down on the chair?

11 A. Yeah, he grabbed my arm and he pushed me down. Like he
12 said: "I threw him on the chair and cuffed him up."

13 Q. Okay. And again -- then the next transcribed information
14 is Special Agent Perry says: "Put your hands up here. I got
15 enough to handcuff you because of what you got there. Put your
16 hands up on the thing up there."

17 What's your understanding of what he's talking about as to
18 where he wanted you to put your hands?

19 A. He wanted me to put my hands on the luggage rack.

20 Q. And you said: "Please don't, please don't, please don't."

21 A. Yes.

22 Q. Why did you say that?

23 A. Because he kept -- he kept trying to search me, he kept
24 trying to pat me down, and I didn't want to get patted down.

25 I didn't want him to pat me down, but he forced himself on me.

1 I feel like I got violated when he stuck his hand in my crotch.

2 Q. Well, in all fairness, now, the Government introduced the
3 picture of a block of heroin that was taped in your crotch
4 area.

5 A. He didn't know. It could have been a block of cheese for
6 all he knew.

7 Q. I understand all that, but I'm just saying, you know, that
8 is, in fact, what was found. But in any event, though, you
9 said you believe you felt violated?

10 A. Yes.

11 Q. Okay. So when was this patting down occurring of your
12 crotch area?

13 A. When I turned around, I put one hand up -- I put both my
14 hands up, but one of them, I was touching the top. And he
15 starts patting me down, and when he gets to the crotch area,
16 that's when I made a sudden move and that's when he grabbed me
17 by the wrist and threw me down on the chair.

18 Q. And then according to this here, again, Special Agent
19 Perry responds: "Put your hands -- step out here and put your
20 hands up there. Sir, step out here and put your hands up
21 there. I'm not going to tell you again." And then again:

22 "MR. RODRIGUEZ: [INAUDIBLE]."

23 A. That's -- once again, I said, look, dude, I already told
24 you, you can't search me, stay away from me. And what else
25 does it say after? I'm sorry, I didn't mean to interrupt you.

1 Q. No, it just says: "MR. RODRIGUEZ: [INAUDIBLE]."

2 Special Agent Perry is next. He says: "Put your feet out
3 there and spread them. Spread your feet." Do you remember him
4 telling you that?

5 A. Yes.

6 Q. And then: "MR. RODRIGUEZ: Sir, I don't -- I don't know,"
7 and then inaudible.

8 A. Yeah. Once again, I don't know why you're doing this.
9 I already told you no.

10 Q. "SPECIAL AGENT PERRY: I'm not," and then there's two
11 hyphens. "Put your hands up here."

12 "MR. RODRIGUEZ: I don't have nothing, you know. What?"

13 "SPECIAL AGENT PERRY: Put your hands up there. Behind
14 your back. Put your hands behind your back."

15 "MR. RODRIGUEZ: Okay. Okay. Okay. Okay, that's fine."

16 "SPECIAL AGENT PERRY: Put your hands back there." And
17 then he says: "It's in his crotch."

18 And then: "MR. RODRIGUEZ: [INAUDIBLE]."

19 "SPECIAL AGENT PERRY: I'll let you hold him." And then
20 the recording concludes. Okay?

21 A. Yes.

22 Q. So --

23 A. Can I read through that?

24 Q. We'll do it during a break so we can --

25 A. Okay, that's fine.

1 Q. I'll ask the Court for a short break, and you can
2 certainly do that.

3 Now, in the sworn testimony that Agent Perry gave in this
4 affidavit for the detention probable cause hearing, that would
5 imply that he obtained consent from you. Do you believe that
6 would be a correct statement?

7 A. No, that's not a correct statement. He lied to the
8 magistrate.

9 Q. You have looked at the affidavit that was filed in this
10 case, Document 1, that is signed by Jarrell W. Perry, Special
11 Agent? You've seen that before?

12 A. Yes, I've read it.

13 Q. And you believe that that is not true?

14 A. No, that's totally false.

15 Q. And why do you say that?

16 A. Because the transcripts reflect totally different.

17 MR. WALZ: Your Honor, may we have a ten-minute
18 break? I think I'm just about finished with my examination.

19 THE COURT: Sure, that would be fine.

20 MR. WALZ: Thank you.

21 (Recess was held at 2:51 P.M.)

22 (In Open Court at 3:01 P.M.)

23 THE COURT: You may be seated.

24 MR. WALZ: Thank you.

25 THE COURT: Go ahead, Mr. Walz.

1 MR. WALZ: Thank you.

2 Now, if I could impose on you to just play the tape
3 one more time, because I'm going to ask a couple of follow-up
4 questions.

5 BY MR. WALZ:

6 Q. okay, I want you to listen.

7 A. Are we playing the first tape or the second tape?

8 Q. The tapes are all the same. One is a cleaned up version.

9 A. okay. Well, I want to hear the cleaned up version.

10 MR. WALZ: Could you play the Paul Baca version?

11 MR. CREASY: It's labeled as "Enhanced."

12 THE COURT: what exhibit is the transcript?

13 MR. WALZ: The transcript is Exhibit 4.

14 THE COURT: Right. Is there a corresponding exhibit
15 to that?

16 MR. WALZ: Yes. We're going to do that by agreement.
17 We did not bring a disc, so we've agreed, myself and the
18 Government, that we will get a disc either directly to the
19 Court or work with your staff to send the transmission
20 electronically.

21 THE COURT: That's fine. But for purposes of today's
22 hearing, what exhibit is that?

23 MR. WALZ: Why don't we call it --

24 MR. CREASY: The enhanced version.

25 MR. WALZ: Well, we've got that, but we've got to

1 give it a number. Alfred, what number are we on?

2 MR. CREASY: I think we're on 14.

3 MR. WALZ: why don't we call it Defendant's 15 just
4 to be safe. Thank you, Your Honor.

5 THE COURT: Okay.

6 (Defendant Exhibit No. 15 admitted.)

7 MR. WALZ: Now, listen to this carefully.

8 (Whereupon Defendant's Ex. 15, an audio recording, played)

9 MR. WALZ: Thank you.

10 BY MR. WALZ:

11 Q. Mr. Rodriguez, you just heard that recording played again.

12 A. Yes.

13 Q. To your belief, from what was actually recorded, was that,
14 to your knowledge, true and accurate, the words that we could
15 hear?

16 A. Yes.

17 Q. And did you hear yourself say, or not, "No, I'm sleeping,"
18 in that recording?

19 A. Yes, I heard myself.

20 Q. And was it clear? Is that what you said?

21 A. That's what I said. I heard it. I've heard it before.
22 I've heard it probably half a dozen times. I played it when I
23 was in Cibola. I had a law library there, I did my research, I
24 played it over and over, and I could hear myself.

25 Q. And were you mumbling when you said that?

1 A. No, I wasn't.

2 Q. Do you think, again, you equivocated the words, "No, I'm
3 asleep," whenever Agent Perry asked you, "May I speak to you
4 for a moment"?

5 A. I heard it, as well as other inmates that heard the
6 recording --

7 Q. I don't want to talk about other inmates. They're not
8 here.

9 A. All right.

10 Q. It's about you.

11 A. Okay.

12 Q. And you and Agent Perry were the only ones there, right?

13 A. Yes.

14 Q. Okay. So to your knowledge, did you communicate that in a
15 manner, to your belief, that he could hear you?

16 A. Yes, I did.

17 Q. And it's also your contention -- I'm just trying to wrap
18 things up -- that you believe that there were words that were
19 spoken prior to this tape being made?

20 A. Yes.

21 Q. Where you hear that zipping or that kind of weird jiggly
22 sound, my words, at the beginning of the tape, you think there
23 was a conversation that occurred even prior to that?

24 A. Yes.

25 Q. Are you certain about that?

1 A. Yes, sir.

2 Q. You understand you are under oath?

3 A. Yes, sir.

4 Q. And I guess the last question is, do you believe you ever
5 consented at any time --

6 A. No, I didn't.

7 Q. I'm not quite finished -- consented at any time to any
8 request from Agent Perry to conduct a search of your body or
9 person, other than the backpack that you gave to him?

10 A. I never gave him permission to search me. I gave him an
11 empty backpack so he could search it, because I knew that I was
12 going to encounter something. I just had that feeling, that
13 every time I come through New Mexico, something's happening,
14 and I just knew that I would have to be ready for whatever. So
15 that's why I had the backpack empty and lying out in plain
16 view, so nobody could sneak nothing up there. And when they
17 asked for it, I give him the backpack.

18 Q. And then the last question is, I believe the last
19 question, there was no cannabis, to your knowledge, in any of
20 those vials?

21 A. No.

22 Q. Except for the gummy bear?

23 A. Except for the gummy bear.

24 Q. Would you admit that there was cannabis in the gummy bear?

25 A. There was cannabis in the gummy, because I bought it from

1 the pharmacy, medical cannabis pharmacy.

2 MR. WALZ: Okay. Your Honor, I have no further
3 questions.

4 THE COURT: Okay. Mr. Walsh.

5 MR. WALSH: Yes, sir.

6 CROSS-EXAMINATION

7 BY MR. WALSH:

8 Q. Mr. Rodriguez, if you could put Defendant's Exhibit 1 in
9 front of you.

10 A. Yes, I have that.

11 Q. So you see four vials in that, Mr. Rodriguez?

12 A. Yes.

13 Q. There's a blue one; is that correct?

14 A. Yes.

15 Q. And I guess it's kind of a white clear one?

16 A. Yes.

17 Q. And then there's a purple one. What's in the purple one
18 there?

19 A. It looks like rolling papers, Zig-Zags.

20 Q. Okay. The gummy bear, did that come from the clear vial?

21 A. I would say it probably did. It could have.

22 Q. Now, the green vial, there's marijuana in there, this
23 leafy substance inside the green vial, correct?

24 A. It's -- I can't see what it is.

25 Q. You see something in that green vial, correct?

1 A. It could have been one of those cartridges from the vape
2 pens.

3 Q. But you can see the green leafy substance inside the green
4 vial, correct?

5 A. I can't make it out. I see something in there, but I
6 don't know what it is.

7 Q. okay, fair enough. Let me -- on direct testimony, you
8 indicated, Mr. Rodriguez, that you had seen Special Agent Perry
9 previously, right?

10 A. Yes.

11 Q. And you said you saw him in 2016?

12 A. Something to that effect.

13 Q. okay. Was that the Greyhound Bus incident, or do I
14 remember that correctly?

15 A. The first incident was on the Amtrak.

16 Q. okay. And tell us what happened -- that's when you were
17 walking outside of the Amtrak station, right?

18 A. That's when I got off the train, yes.

19 Q. And he tried to talk to you at that time?

20 A. Yes.

21 Q. And you said, no, correct?

22 A. Correct.

23 Q. okay. And then fast-forward, if I have it correctly,
24 you're on the Greyhound bus during what timeframe?

25 A. Could have been that next year, or the same year.

1 Q. And so Special Agent Perry comes up to you on the
2 Greyhound bus, correct?

3 A. Yes.

4 Q. And he tries to talk to you at that time, right?

5 A. Yes.

6 Q. And you said, leave me alone, or something like that?

7 A. I said: "I ain't got no time, leave me alone."

8 Q. And Special Agent Perry walked away then, right?

9 A. Yes, he did.

10 Q. okay. Now, turning to -- well, actually, before turning
11 to February 1, 2018, you indicated on direct that you think you
12 might have saw Special Agent Perry in California?

13 A. Yes.

14 Q. Right around the timeframe of 2017-2018, or do you recall?

15 A. I want to say it was -- could have been in '17, yes.

16 Somewhere in '17 -- no. In the beginning of '17, maybe late
17 '16.

18 Q. And you think you saw him in Janesville? Am I pronouncing
19 that correctly? Is it Janesville, California?

20 A. Correct.

21 Q. Okay. Where is Janesville?

22 A. It's Reno, Nevada, west, west of -- Janesville and
23 Susanville are two cities next to each other. They're sister
24 cities, and they're right up there by Herlong. Herlong,
25 California.

1 Q. And so you saw Special Agent Perry there in Janesville,
2 but you didn't talk to him?

3 A. No.

4 Q. Okay. Do you think he was trying to investigate you?

5 A. I don't know what he was doing there.

6 Q. But no conversation, right? Okay.

7 Now, fast-forward to this incident, February 1, 2018. You
8 said you purchased a one-way ticket?

9 A. Correct.

10 Q. And where did you buy that ticket at? I might have missed
11 that.

12 A. LA Union.

13 Q. And do you remember when you purchased that ticket, when
14 you bought it?

15 A. Probably a couple of hours before the train left.

16 Q. Is that normally your means with which you travel, you
17 travel by way of one-way tickets?

18 A. Yeah, I make last-minute decisions.

19 Q. Those previous times when you had traveled through
20 Albuquerque, did you have one-way tickets?

21 A. Yes.

22 Q. And do you buy them close to the time of departure?

23 A. Yes.

24 Q. So you're in Albuquerque on February 1, 2018, and you're
25 in the coach car, correct?

1 A. Correct.

2 Q. okay. And there's not many people sitting close by you;
3 isn't that correct?

4 A. There was nobody on that train.

5 Q. Weren't there people in the back of your coach car?

6 A. I didn't see nobody on that train at all.

7 Q. But to be clear, there was nobody sitting next to you,
8 right?

9 A. Correct.

10 Q. And there was no one sitting behind you?

11 A. When I stood up and I looked to the left, I could see all
12 the way to the back, and I could see no heads, no feet.

13 Q. So nobody was sitting behind you?

14 A. No.

15 Q. And nobody was sitting across from you?

16 A. No.

17 Q. And you were sitting in the window seat, correct?

18 A. I was sitting in the fetal position on two chairs with the
19 leg rests up in the air.

20 Q. okay. So you had a bag with you, the backpack?

21 A. Yes.

22 Q. And that was located on the passenger seat, right?

23 A. I was sitting in the window seat, it was in the aisle
24 seat.

25 Q. okay. So right next to you?

1 A. Yes.

2 Q. okay, thank you. Now, you indicated that when you saw
3 Special Agent Perry, you said, "I know who you are and you
4 can't search me." Isn't that right?

5 A. I heard the doors open. I woke up. I was startled, you
6 know, like when you hear the doors open, so you know somebody's
7 coming through there. So for a brief second, I opened my eyes,
8 and right when I opened my eyes, I heard him say something.
9 I interrupted him and I said, "I know who you are and, no, you
10 can't search me."

11 Q. So at that time, you're aware and you're not asleep,
12 right?

13 A. I was awakened by the door.

14 Q. okay. You were not awakened by Special Agent Perry asking
15 questions, you were awakened by the door?

16 A. Well, yeah, I was startled by the door, awakened by the
17 door, okay.

18 Q. Okay. And then you say, "I know who you are and you can't
19 search me"?

20 A. As he started to speak, I interrupted him and I said, "I
21 know who you are and, no, you can't search me." He never
22 finished his sentence. Just by the voice.

23 Q. I'm sorry?

24 A. Just by the voice. He never finished his sentence. Just
25 by the voice, I interrupted him and I told him, "I know who you

1 are and, no, you can't search me."

2 Q. And then I think I got this correctly. You said -- you
3 testified on direct that you said that twice, or at least three
4 times altogether, correct?

5 A. Throughout the recording, yes.

6 Q. You said, "I know who you are, you can't search me," at
7 least three times?

8 A. At least.

9 Q. But you concede, obviously, it's not on the recording?

10 A. No.

11 Q. And you had an expert that created the enhanced audio file
12 that we were listening to, correct?

13 A. My team chose that expert, yes.

14 Q. And that expert doesn't say anything about the recording
15 being altered in any way, does he?

16 A. Correct.

17 Q. Okay. In fact, I think it says something to the effect
18 that there's no evidence that it was manipulated or altered in
19 any way; is that correct?

20 A. That's correct.

21 Q. Because you obviously read everything with respect to your
22 case?

23 A. Correct.

24 Q. I mean, you have a pretty good legal mindset yourself, it
25 seems like. Is that fair to conclude?

1 A. I did most of my research, yes.

2 Q. So it sounds like you know your legal rights?

3 A. I pretty much do.

4 Q. okay. And you knew your legal right back on February 1,
5 2018, correct?

6 A. Correct.

7 Q. okay. Now, let me turn your attention, Mr. Rodriguez, to
8 Defense Exhibit 4, which is the transcript that you were
9 referring to during your direct testimony, and let me shift
10 your attention to Page 3, Line 3.

11 In that transcript, it says: "There's nothing in there.

12 Okay. All righty. Right." And that is followed by your name.

13 Do you see that portion?

14 A. Yeah.

15 Q. Okay. Now, I'd like to have you pick up Government's
16 Exhibit 2, which is the Government's transcript.

17 A. Okay.

18 Q. And do you see -- actually, Page 2, Government's
19 Exhibit 2. Mr. Rodriguez, do you see --

20 THE COURT: What line?

21 MR. WALSH: Yes, sir. Line 24.

22 BY MR. WALSH:

23 Q. Okay, Mr. Rodriguez, do you see that question of Agent
24 Perry where it says: "You have nothing else, though? Okay.
25 Would you consent for a search of your bag for contraband,

1 sir?" Do you see that question?

2 A. Yeah.

3 Q. okay. Now, Government's Exhibit 2 has your response as
4 inaudible, correct? Do you see that?

5 A. Yes, that's the original recording.

6 Q. okay. Now, let's play the recording at this time and
7 let's see if we can hear Line 4 with respect to Defendant's
8 Exhibit 4.

9 (Whereupon Government's Ex. 1, an audio recording, played)

10 BY MR. WALSH:

11 Q. So you can't hear it, Mr. Rodriguez. You can't hear
12 that line. That's not on the recording, correct? You can't
13 hear it?

14 A. We're talking about the enhanced version?

15 Q. Yes. That's what we just played.

16 A. okay, that would be this side, not that side.

17 Q. okay. Actually, let's play it again. Apparently we
18 didn't play the enhanced version.

19 (Whereupon Defendant's Ex. 15, an audio recording, played)

20 BY MR. WALSH:

21 Q. Do you agree with me, Mr. Rodriguez, you can't hear that
22 line?

23 A. I can say that -- I can only go by what I see here,
24 because what you're playing there on that recording is not
25 quality tape, you know. I feel as though if you're gonna have

1 a conversation and you're gonna make it clear, the quality has
2 got to be there. It's in the Rules of Evidence, Federal Rules
3 of Evidence.

4 Q. Let me just stop you right there, Mr. Rodriguez. I
5 appreciate your concerns about the quality of the audio.
6 That's always legitimate and a concern. But my question to you
7 is that you cannot hear that line from what we just heard. Do
8 you agree with that?

9 A. The line where I say --

10 Q. This line: "There's nothing in there. Okay. All righty.
11 Right." You can't hear that?

12 A. You can't hear it on the audio, but yet it's in the
13 transcript, is that what you're trying to tell me?

14 Q. Well, you tell me. Could you hear that line?

15 A. Well, I can read it, but I can't hear -- that whole tape
16 is bad quality to start with.

17 Q. So you didn't hear it; is that correct? When we just
18 played it, you didn't hear it? Would you agree with me there?

19 A. That I can't hear it?

20 Q. Yeah. You did not hear that line; is that correct?

21 A. I can't say I hear it, but I can't say it's not there.

22 Q. Okay. You do hear a bag being dumped out and contents
23 hitting the passenger seat, correct?

24 A. No.

25 Q. You don't hear the jingling there?

1 A. No.

2 MR. WALSH: Let's back it up and play it again.

3 (whereupon Defendant's Ex. 15, an audio recording, played)

4 BY MR. WALSH:

5 Q. okay, did you hear it this time?

6 A. I heard the bag. What I do hear is a lot of background
7 noise.

8 Q. okay. You didn't hear the debris being dumped out by you
9 onto the seat?

10 A. No.

11 Q. But that doesn't sound like an empty bag, does it?

12 A. Well, the bag was empty, because I emptied it.

13 Q. But what we just heard, that didn't sound like an empty
14 bag being shaken, does it?

15 A. Oh, yeah, because you see, you have the two straps, and
16 what you hear is the straps probably hitting the plastic bag,
17 because you're shaking the bag and the straps are loose, back
18 and forth, and they're hitting the plastic. That's what you're
19 hearing.

20 Q. So that's your explanation?

21 A. Well, that's the only logical explanation.

22 Q. Let me ask you this, Mr. Rodriguez. You admitted to
23 eating the gummy bear, correct?

24 A. Yes.

25 Q. And that gummy bear had THC in it? You admit to that?

1 A. It's my medication. I have a prescription.

2 Q. So the answer is, yes?

3 A. Yes.

4 Q. And you admit that it was in one of these vials?

5 A. Yes.

6 Q. Do you also admit that you took some of the vials and
7 placed it behind you in your seat, that you grabbed them,
8 correct?

9 A. What happened was, when he pulled the laundry bag, I got
10 the gummy bear, I opened it, and I threw it in my mouth.

11 Q. Okay. Why did you do that?

12 A. Because it's mine. I can eat it. I bought it. I paid
13 for it. I have a prescription for it. That's why all that
14 took place.

15 Q. And why were you compelled to eat a gummy bear at that
16 particular time?

17 A. Because I couldn't find another better time. I don't
18 know.

19 Q. There was no particular reason? And that was the only
20 gummy bear that you had, you didn't have like a bag of gummy
21 bears?

22 A. If there was a bag of gummy bears, it'd be an exhibit.

23 Q. Okay. So were you under the influence of cannabis at this
24 particular time?

25 A. I had been drinking all night.

1 Q. You had been drinking?

2 A. Yeah.

3 Q. Okay. Because I think you had said that you're
4 100 percent clear today, but you weren't during the encounter;
5 is that correct?

6 A. Well, it was a three-minute encounter two-and-a-half years
7 ago.

8 Q. So you admit that your recollection is a little hazy?

9 A. In fact, it's become clearer since I been clean.

10 Q. Oh, okay. But you were under the influence of alcohol at
11 the time?

12 A. I was sleeping drunk, yes, I was.

13 Q. Okay. And you also testified that you had used up all of
14 your cannabis, because you must have been smoking that night,
15 too, right?

16 A. I was eating bears and drinking beer.

17 Q. So you had a pretty good buzz on?

18 A. I was asleep buzzed, yes.

19 Q. Fair enough.

20 A. I don't drink and drive.

21 Q. So, going back to the vials, so you did take them and put
22 them behind your back?

23 A. No.

24 Q. Oh, you didn't do that?

25 A. No.

1 Q. Okay. Now, when Special Agent Perry initially spoke to
2 you, you were awake, right, at that time?

3 A. I was awakened by the door.

4 Q. So you're not sleeping at the time he asks you his first
5 questions, correct?

6 A. I was asleep until the door opened.

7 Q. Then you're awake?

8 A. I'm semi-asleep.

9 Q. Okay. And then he asked to talk to you, and you handed
10 him your train ticket, correct?

11 A. I said, "No, I'm asleep, but here's my ticket." Yes, I
12 said that. It's in the transcripts.

13 Q. And there wasn't much time in between him talking to you
14 and you responding with the train ticket, right?

15 A. I responded -- he asked me a question, "Can I speak to
16 you," and I said, "No, I'm asleep." But I know you want to see
17 my ticket. Even though there's a ticket on the overhead
18 luggage rack, you want to see my ticket. So I felt that maybe
19 if I gave this guy my ticket, maybe he'd leave me alone.

20 Q. So the ticket above you, that's not the same ticket that
21 you had in your possession, that's something different?

22 A. That's --

23 Q. That's something like a seat identifier, or something
24 along those lines, correct?

25 A. If you walk --

1 Q. It's called a seat check. Have you ever heard of that?

2 A. A seat check? Yeah, that's where they sit you down and
3 say, okay, here, you're going to sit right here.

4 Q. And that's different than your ticket, correct?

5 A. Well, in order to get a seat check, you have to have a
6 ticket, and in order to get a ticket, you have to have ID.

7 Q. But it's not the same thing?

8 A. Well, let's just say if you're walking down the train
9 today, if you go get on the train and you go by there and you
10 see a seat check, you know that that person right there is
11 going to Oklahoma City, Oklahoma. That's their seat, and
12 they're going to Oklahoma City, Oklahoma.

13 Q. Fair enough. But the ticket is going to have more
14 information than the seat check, right?

15 A. The ticket stub will.

16 Q. Right. So your ticket is different than the seat check,
17 correct?

18 A. Yes, it is.

19 Q. Okay. So let's go back to this. Special Agent Perry asks
20 you some questions, and you immediately gave him your train
21 ticket, right?

22 A. That's not true. He asked me three times. "Excuse me,
23 sir, can I talk to you, sir? Excuse me, sir, I'm with
24 security. I'm a police officer." And I finally got fed up. I
25 said, maybe this guy didn't hear me the first time when I said,

1 "I know who you are and, no, you can't search me." Maybe he
2 didn't hear me, so I'm going to say it again. "No, I'm
3 asleep." And hopefully if I give you this ticket, you'll leave
4 me alone. Those are the thoughts that go through your mind, or
5 that go through my mind.

6 Q. Yeah, but the problem is, Mr. Rodriguez, he asked those
7 questions within a span of like three seconds.

8 A. Three questions in three seconds?

9 Q. Thereabouts. Five seconds. It was very quick, correct?

10 A. So he didn't even give me a chance to answer, is that what
11 you're trying to say?

12 Q. My point is, it was very quick. You're acting like it was
13 this long, protracted episode of harassment. That was not the
14 case.

15 A. He asked a question, and he gave me time to answer it.

16 Q. And then you --

17 A. He asked me another question --

18 Q. All right, let me interrupt --

19 A. First question.

20 Q. -- you there, Mr. Rodriguez. He asked you the questions,
21 and then --

22 A. He waited for an answer.

23 Q. -- and then very quickly you give him a train ticket,
24 right?

25 A. No.

1 Q. So after he asks the questions, within ten seconds, you
2 give him the train ticket? It's on the tape. It was very
3 quick. It was rapid fire. You don't have a response?

4 A. No, if you're saying it's on the tape, then why are you
5 asking me?

6 Q. Well, I want you to confirm what's on the tape.

7 A. Well, I don't need to confirm what's on the tape. We all
8 know what's on the tape. We've heard it six times. I've heard
9 it 20. He's heard it 30.

10 Q. Well, you seem to have a different version of events, but
11 let me just get you to --

12 A. There's only one version --

13 MR. WALZ: Let him finish.

14 THE COURT: One at a time.

15 BY MR. WALSH:

16 Q. Mr. Rodriguez, let me just have you admit to this. You
17 gave him -- you voluntarily gave Special Agent Perry your train
18 ticket, correct? You gave it to him?

19 A. After he harassed me for about 20 seconds.

20 Q. But you handed it to him, right?

21 A. In hopes that he would go away.

22 Q. Okay. And he's not touching you at this point, right?

23 A. Not yet.

24 Q. Okay. So you give him the train ticket, right?

25 A. Yes.

1 Q. And then he asks for identification, right?

2 A. Correct.

3 Q. And then you gave him your identification, right?

4 A. Correct.

5 Q. okay. And backing up, with regards to the train ticket,
6 he immediately gave it back to you, right?

7 A. Correct.

8 Q. okay. So then you gave him your identification, right?

9 A. Correct.

10 Q. okay. And then Special Agent Perry looks at it, right?

11 A. Ding ding ding, you're right again.

12 Q. And then he immediately gives it back to you, correct?

13 A. Yes, sir, he did.

14 Q. okay. So then at this point, Special Agent Perry turns
15 your attention to the bag, right, and that backpack that we saw
16 in one of those photographs, that's your backpack, right?

17 A. It is.

18 Q. okay. And he asks you permission to search the bag,
19 right? Do you recall that?

20 A. Yes. I said, yes.

21 Q. Okay. Then you take the bag and you dump it. You dump
22 the stuff onto the passenger seat, and that's what we just
23 heard?

24 A. I dumped the bag at 3:00 in the morning when I went to
25 bed.

1 Q. So then there was a plastic bag within the backpack,
2 correct?

3 A. After I dumped the bag, I put the plastic laundry bag on
4 top of the contents. Then I threw the black bag-bag on top of
5 that.

6 Q. So you do admit when Special Agent Perry -- he asked you a
7 second time, "Do you give me permission to search this bag
8 here." You see that in the transcript, correct?

9 A. I see it on the transcripts. But I guess what you don't
10 see is when he steps up to me, he's not pointing at that black
11 bag I'm laying on, he's pointing at another bag across the
12 aisle on top of the luggage rack on that corner, because he
13 can't see the black bag. I'm laying on the black bag. I'm
14 using the armchair as my pillow. And when he wakes me up, he
15 says, "Is that your bag right there, sir? Is that your bag
16 right there, sir?" And I notice he's pointing across the
17 hallway, or across the aisle, and he's pointing to another bag.
18 I finally wake up and said, "No, this is my bag right here.
19 This is all my bag right here." Don't get me mixed up with
20 that bag and try to put that bag on me, because I don't know
21 whose it is.

22 Q. But none of that's captured on the recording or in the
23 transcript, this other bag?

24 A. No, it ain't captured on a body cam, 'cause he don't wear
25 none.

1 Q. But you do admit, Mr. Rodriguez, that Special Agent Perry
2 asks you permission, and I'm referring to Line 3, Page 3 --
3 Let's look at Government's Exhibit 2 for the purposes of this
4 question. I believe it's probably captured in Defense
5 Exhibit 4, as well. I'm not sure. Do you have that in front
6 of you?

7 A. okay, we're working on the first transcript, or the
8 enhanced version transcript?

9 Q. Let's look at Government's Exhibit 2.

10 A. okay.

11 Q. I'm sorry; I thought you were searching. Do you have the
12 exhibit in front of you?

13 A. Uh-huh.

14 Q. okay, thank you. So let me direct your attention,
15 Mr. Rodriguez, to Line 3, Page 3.

16 "SPECIAL AGENT PERRY: All righty. All right. Do you
17 give me permission to search this bag here?"

18 A. Now he's pointing at the bag next to me.

19 Q. okay.

20 A. Before he was pointing at the other bag. Now, right here
21 now, he's pointing at the bag next to me.

22 Q. But you see that question here in the transcript?

23 A. Yes, I do.

24 Q. And you've heard it on the audio, correct?

25 A. Yes, I did.

1 Q. Okay. And your response is, "Go for it," right?

2 A. I picked the bag up and I said, "Go for it." And when I
3 shook it, that's what you hear is the straps hitting the
4 plastic.

5 Q. So let me rephrase my question. Your response here is,
6 "Go for it," right?

7 A. After I said, "No, I'm asleep."

8 Q. Let me have you look at Line 5. what does it say?

9 A. "Go for it."

10 Q. Thank you.

11 MR. WALSH: I have no further questions.

12 THE COURT: Is there redirect?

13 MR. WALZ: Yes, Your Honor. Thank you.

14 REDIRECT EXAMINATION

15 BY MR. WALZ:

16 Q. Mr. Rodriguez, Mr. Walsh asked you about tampering of the
17 tape that we heard. okay?

18 A. Yes.

19 Q. Mr. Walsh did not ask you about whether or not there may
20 have been another recording made that we have never even
21 received, true?

22 A. Correct.

23 Q. So in the tape that was played, he asked you about the
24 defense expert and was there any alteration of that tape, and
25 you said, not to your knowledge, correct?

1 A. Yes.

2 Q. But what was never asked was, did you ever receive another
3 tape that had the initial conversation that you've testified
4 where you said, "I know who you are and, no, you can't search
5 me." You've never heard that tape, have you?

6 A. No.

7 Q. Or seen that tape?

8 A. No.

9 Q. So what your expert reviewed was only the tape recording
10 provided by the Government?

11 A. Correct.

12 Q. Are you certain in your mind that you had that previous
13 conversation with Agent Perry?

14 A. Yes, I'm certain.

15 Q. Okay. Now, there seems to be some confusion over what
16 bags Agent Perry is referring to and what bag that you're
17 referencing. In the transcripts, he asked you about -- at
18 Page 2, using Government's Exhibit 2: "Okay. How about this
19 bag here; is this your bag here?" What bag is he talking
20 about?

21 A. The bag that's across the aisle on top of the luggage
22 rack.

23 Q. And you say, "No"?

24 A. That's not my bag up there.

25 Q. And Agent Perry says: "This is not your bag here," right?

1 A. Right. And he's still pointing across the aisle.

2 Q. All right. Why did you have this laundry bag with you, as
3 shown in Defendant's Exhibit No. 3?

4 A. Because that's where I put my dirty clothes.

5 Q. Okay. And Mr. Walsh spent a considerable amount of time
6 playing the tape several times, alluding to maybe on the
7 Government's Exhibit 2 at Line 2 that you're shaking out your
8 backpack before you give it to Perry. Did you do that?

9 A. I turned the bag upside-down and I shook it, so he could
10 see there was nothing in it.

11 Q. So there weren't things falling out and making noise --

12 A. No.

13 Q. -- when that happened?

14 A. There was nothing in it, and I made sure of that.

15 Q. And he actually had to move the laundry bag before he saw
16 even one of these empty vials?

17 A. Correct.

18 Q. Did he have your permission to move the laundry bag?

19 A. No.

20 Q. And this was kind of new in the testimony with Mr. Walsh,
21 but I guess there was some indication that you had been
22 drinking and smoking cannabis previous to the encounter.

23 A. Yes. He alleged, and I told him I was drinking beer and
24 eating gummy bears all night.

25 Q. Do you believe you were impaired?

1 A. No.

2 Q. And are you certain that, to the best of your knowledge,
3 you did not have -- and we've all looked at this exhibit. Have
4 you ever seen any of the green leafy substance produced
5 visually, or taken on a photograph that allegedly came out of
6 any of these vials?

7 A. No photographs of the green leafy stuff. There's no
8 photographs of the green leafy substance, like you said. No
9 lab reports, no weight, no nothing. The Government alleges
10 it's 56 grams, but that's what the empty vial weighs, is
11 56 grams, because you cannot fit 56 grams inside that little
12 vial.

13 Q. So whenever they talked about weight of the alleged
14 cannabis, what they were weighing was the vial itself, right?

15 A. Correct, that's what the vial weighed.

16 Q. And they took photographs of, well, it appears just about
17 everything they could, right?

18 A. Yeah.

19 Q. Including the seized amount of the contraband, right?

20 A. Yes.

21 Q. And they took photographs of all the vials, right?

22 A. Yes.

23 Q. But there are no photographs of any loose leafy substance
24 of cannabis, is there?

25 A. That's correct.

1 MR. WALZ: I have no further questions.

2 THE COURT: Anything else?

3 MR. WALSH: Nothing further, Your Honor.

4 THE COURT: Okay. Mr. Walsh, any further evidence?

5 well, I should say first, Mr. Walz, any further
6 evidence from the defense?

7 MR. WALZ: No, Your Honor. And just to preserve an
8 issue that Mr. Rodriguez has raised and the Court already
9 looked at, it was the grand jury, to get a certification for a
10 true bill, or an electronic signature of the foreman, to be
11 sure that the grand jury was properly constituted with the
12 appropriate number of grand jury members. I believe the Court
13 has already ruled on that, but Mr. Rodriguez wanted me to make
14 sure that that issue --

15 THE COURT: I'll note that he's raised the issue and
16 I'll note his objection to my ruling for the record.

17 MR. WALZ: Thank you. But in terms of evidence, I
18 would like to proffer to the Court, and Mr. Walsh can certainly
19 correct me if I'm wrong, we have never been provided with any
20 photograph of any green leafy substance that was allegedly
21 taken from any of these vials. The only measurement that
22 occurred that you will see in the officer's report is they
23 weighed the vial, itself, and I think that's extremely
24 misleading. If they're trying to build an exception to perform
25 a warrantless search by saying that they relied on a vial that

1 had loose cannabis in it, we're certainly entitled to see that
2 cannabis, and even have an independent test performed on this
3 leafy substance that they claim was in one of these vials.

4 So, we have never been provided any kind of a
5 photograph depicting the substance, or any opportunity -- I
6 don't want to say that, because we never requested it because
7 we didn't believe there was any in there. But to have any kind
8 of independent test of any residue to show it was cannabis. So
9 I just want to note that for the record.

10 But we have no other evidence, other than we will
11 provide the enhanced -- and I say that, but it's the same tape.
12 I can hear the same stuff on the Government's tape, it's just
13 clearer is all. There's nothing new. We only worked from the
14 recording that was provided by the Government. So it's the
15 same recording, it's just that some of the background noise
16 might be toned down a bit, but that's about it. But Your
17 Honor, we have nothing further to submit.

18 THE COURT: All right. Mr. Walsh, any rebuttal
19 evidence?

20 MR. WALSH: If I can have one second.

21 No rebuttal evidence, just a few remarks for closing
22 when the Court is ready.

23 THE COURT: Sure.

24 MR. WALSH: Should I take the podium now?

25 THE COURT: Go ahead.

1 MR. WALSH: Your Honor, I'll let the Court size up
2 Mr. Rodriguez's testimony. Obviously there's a lot of dispute
3 between what Mr. Rodriguez testified to and what Special Agent
4 Perry testified to. Obviously a lot of what Mr. Rodriguez
5 testified to is not in any way, shape or form captured on audio
6 or on the transcript. There's no evidence of any doctoring of
7 the audio, and there flat-out wasn't any manipulation of the
8 audio. We wouldn't do that.

9 One point that was not made was that Mr. Rodriguez
10 was referring to some other bag, like up high in the luggage
11 compartment, but that doesn't coincide with the rest of his
12 testimony or the aspect of his testimony where he said there
13 was no one else in that coach car. So that doesn't hold water.

14 This encounter had all of the hallmarks of the
15 consensual encounters that the Court has dealt with in the past
16 with respect to Special Agent Perry, and perhaps Special Agent
17 Small, in terms of encounters that take place on the train, in
18 the bus, and all these factors that the case law talks about.
19 You know, militate and weigh in favor. I think without dispute
20 that this was a consensual encounter here.

21 Obviously as is the case with Special Agent Perry and
22 the way he does business, he's very polite, very professional,
23 he's not being verbally abusive or heavy-handed. So that's one
24 factor. He's wearing plain clothes. There's no firearm
25 brandished, it's concealed. There's no commands given until

1 after the marijuana was observed, and then we heard from the
2 evidence that Task Force Officer Chavez didn't join Special
3 Agent Perry at his location until after the marijuana had been
4 observed, until after Special Agent Perry asked the Defendant
5 to stand up for the pat down.

6 Regarding this sleeping business, the evidence shows
7 that Special Agent Perry didn't hear anything about sleeping.
8 Given the fact that the defense needed to take the audio and
9 either have it cleaned or enhanced to hear the word "no" -- and
10 let me rephrase. we heard from Special Agent Perry when he put
11 on the Bose headphones, that's when he heard "sleeping," and
12 Government's Exhibit 2 does have a reference to -- I'm going
13 from memory here -- asleep or sleeping. But Government's
14 Exhibit 2 does not have the word "no." And it makes sense that
15 Special Agent Perry didn't hear it because it wasn't audible,
16 and the only way it became audible is when the defense took
17 that audio and had it cleaned or enhanced.

18 Furthermore, we know that Special Agent Perry didn't
19 hear it because Government's Exhibit 3, which was the initial
20 transcript made by Russin Reporters, has that portion
21 inaudible. So Special Agent Perry didn't hear it. As a matter
22 of fact, a defense pleading, I believe it's their initial
23 Motion to Suppress, mentions that this part was inaudible, or
24 rather unintelligible. So even at that point, prior to the
25 audio being enhanced, the defense conceded that you couldn't

1 hear it. And we don't hear, "No." We hear the "sleeping," but
2 I hear kind of a groan. Obviously it's going to be up to the
3 Court.

4 But our point is, even if he did say it, so what? It
5 doesn't make a bit of difference. I think it's a bit of a red
6 herring argument. It's a consensual encounter, and if an
7 officer or an agent approaches somebody consensually and
8 someone initially says, no, I don't want to talk, I don't think
9 that the case law says that at that point an officer cannot ask
10 another innocuous question thereafter.

11 THE COURT: Let's see. Go to either Exhibit 2 or 3,
12 and say on Page 2 -- I guess I'm looking at Government's
13 Exhibit 3. So at the top, this is right after Agent Perry
14 says, "Hello, sir," and Mr. Rodriguez says inaudible, let's
15 assume -- where does the analysis go? Let's assume he says,
16 "No, I'm sleeping."

17 MR. WALSH: And I'm sorry, sir, Government's
18 Exhibit 3, Page 3?

19 THE COURT: No, Page 2.

20 MR. WALSH: Page 2 is the portion that we're talking
21 about?

22 THE COURT: Yes. He says: "Make I speak to you for
23 a moment." Let's assume Mr. Rodriguez, where it says
24 inaudible, let's assume he did say, "No, I'm sleeping."

25 MR. WALSH: It doesn't matter.

1 THE COURT: What is the analysis?

2 MR. WALSH: It doesn't matter, one, because he didn't
3 hear it. It's not like Special Agent Perry would be obligated
4 to back off and not say anything further after someone
5 initially says, no, I'm sleeping. But even if he had heard it,
6 it's still no big deal, and there's a citation in -- I believe
7 it's Document 88. If you can give me a second, let me retrieve
8 it for the Court.

9 So this is Document 88, Page 2, last paragraph.

10 I cite to the cases of the United States vs. Guerrero,
11 472 F.3rd 784, which cites to United States vs. Flores. The
12 citation is there in the pleadings, I won't state it. But I
13 believe that the Tenth Circuit has held that nonverbal consent
14 may validly follow a verbal refusal, and that's why --

15 THE COURT: What's the -- let's say it was, "No, I'm
16 sleeping." Then what's the next step that makes it nonverbal
17 consent?

18 MR. WALSH: Then we have, at the same time he says,
19 hypothetically speaking, "No, I'm sleeping," he gives him
20 identification.

21 THE COURT: And that's based on -- and you say that
22 based on Perry's statement in Line 6 where he says, "Rodolfo
23 Rodriguez, Jr."?

24 MR. WALSH: Line 6? I'm sorry.

25 THE COURT: Yes, on Page 2.

1 MR. WALSH: Yes.

2 THE COURT: Line 6. "SPECIAL AGENT PERRY: "Rodolfo
3 Rodriguez, Jr." There's a question mark right there.

4 MR. WALSH: Yes, sir.

5 THE COURT: Now, is Agent Perry looking at the
6 identification?

7 MR. WALSH: No. I'm sorry, I might have misspoke.
8 The train ticket. So he initially gives him the train ticket.

9 THE COURT: All right.

10 MR. WALSH: So that's unrebutted. Mr. Rodriguez
11 admitted to that.

12 THE COURT: Then the next line, Line 8, Perry says:
13 "Thank you, sir. Do you have ID with you? May I see that,
14 please?" So that would be --

15 MR. WALSH: Additional. So that's additional
16 consent. Consent, as the Court knows, can be shown by way of a
17 person's nonverbal actions. We have that in spades here; the
18 train ticket, the identification. He asks him about the bag,
19 asks to search the bag.

20 THE COURT: Let's go down to Line 21.

21 "MR. RODRIGUEZ: This is my bag right here. This is all my bag
22 right here." Now, what's the Government's version of the bag
23 that he's referring to? The backpack?

24 MR. WALSH: Yes. That's what we contend certainly
25 was the case, it's the backpack. And then his actions of --

1 THE COURT: So go over to the next page.

2 MR. WALSH: Sure. His actions of dumping the bag,
3 that's more consent.

4 THE COURT: Now, where it says -- at Line 1 up at the
5 top of Page 3, is that where the Government contends that there
6 were contents that fell out of the backpack?

7 MR. WALSH: Yes. And I was trying to make that point
8 during cross-examination. I take issue with Defendant's
9 Exhibit 4. I don't hear what they have in their transcript at
10 that portion of our transcript.

11 THE COURT: I'm going to have to go back and look at
12 the testimony.

13 MR. WALSH: Sure.

14 THE COURT: But I do know that it's the Government's
15 position that the evidence establishes that the backpack wasn't
16 empty, that there were contents, and you pointed to the sound
17 on the audio, which the Government contends that's the contents
18 falling out of the backpack.

19 MR. WALSH: Yes, sir.

20 THE COURT: Now, the so-called marijuana bottles, is
21 it the Government's contention that that's part of what fell
22 out?

23 MR. WALSH: Yes. Well, let me correct myself. So
24 the contents -- and the evidence, I believe, shows this -- the
25 contents are dumped out. Obviously we're arguing that action

1 of him doing it, the Defendant doing it, is consent, a further
2 manifestation of consent.

3 And then -- and this coincides with the transcript
4 here. And then Special Agent Perry, as he testified to, sees a
5 plastic bag and he asks a follow-up question; do I have
6 permission to search your bag here?

7 THE COURT: Where is that?

8 MR. WALSH: That's just right there.

9 THE COURT: What line?

10 MR. WALSH: Line 2, Page 3.

11 THE COURT: Okay. And the "Go for it" means that's
12 consent to search the plastic bag, the laundry bag I think it's
13 been referred to as?

14 MR. WALSH: Correct. Just a few more thoughts,
15 unless the Court --

16 THE COURT: Sure. I just wanted to make sure I was
17 clear on the Government's position on all of this.

18 MR. WALSH: I appreciate that. And then as we heard
19 from Special Agent Perry, marijuana being still against the law
20 federally, he had probable cause. Probable cause is an
21 objective standard. It doesn't matter what was going through
22 his mind, but we certainly have probable cause upon him seeing
23 the marijuana. So the evasive and suspicious activity of him
24 grabbing the marijuana gummy bear and eating it, which is
25 suspicious behavior right in Special Agent Perry's presence,

1 that's when Special Agent Perry chuckles on the audio, and then
2 also seeing the vial of marijuana.

3 THE COURT: Approximately what line would that
4 chuckle be?

5 MR. WALSH: Do you know? It's going to be there on
6 Page 3 when he's talking about medication. I don't know for
7 sure.

8 THE COURT: That's fine.

9 MR. WALSH: I think alternatively, even without
10 probable cause -- and again, I think the Court can just decide
11 that there was probable cause which justified the ensuing pat
12 down and the command. But I also think that --

13 THE COURT: Probable cause for the federal offense of
14 what?

15 MR. WALSH: Possession of marijuana. Now, you know,
16 it doesn't matter that he wasn't ultimately charged with it,
17 but I would argue to the Court that based upon the Defendant's
18 shifty behavior up to this point, the eating of the gummy bear,
19 the kind of evasiveness about this bag, that bag, the way he
20 grabs the vials and puts them behind him, that there was
21 reasonable suspicion to conduct further activity and to conduct
22 the ensuing pat down. So I think the Court can go either way,
23 in my view, in terms of assessing that there was reasonable
24 suspicion and/or probable cause.

25 I think his actions were certainly justified to

1 detain him. He asked him to stand, to have him stand up, and
2 then he does a pat down. Handcuffs are not applied until after
3 Special Agent Perry feels the package, which he knows is
4 narcotics from his training and experience. Government's
5 Exhibit 4 certainly shows this huge package that understandably
6 would be weighty, a weighty presence inside the Defendant's
7 groin area. So the pat down was fine. And then once he
8 discovered the narcotics on his person, then he appropriately
9 placed the Defendant in handcuffs.

10 As to the grand jury issue, the Defendant's -- I want
11 to touch upon that. Special Agent Perry didn't lie to the
12 grand jury. One, he didn't hear anything at that time when he
13 testified to the grand jury, anything about sleeping. The
14 first time he hears it is when he put on the Bose headphones.
15 And he never hears, and we never concede that at any time he
16 says, no. But he certainly received permission to talk as
17 demonstrated by the Defendant's actions, for the reasons I've
18 already stated. So there's no problems there.

19 I cite to some -- I make references in my pleadings,
20 I believe, from memory, referring to some kind of Miranda
21 cases. Obviously this is not a Miranda situation, but I think
22 it's kind of analogous in the sense that, at most, I think what
23 Mr. Rodriguez is saying is ambiguous. Some of the Miranda case
24 law talks about, when there's ambiguity, it's not like law
25 enforcement has the duty to back off and cease interrogation.

1 At most, his comment is ambiguous. He didn't hear no, and so
2 even if he does say it -- I don't hear it. I hear kind of a
3 nah. But I don't think it's a big deal. I don't think it
4 effects anything.

5 There's no authority, that I'm aware of, that just
6 because an officer comes up to someone and says, hey, can I
7 talk to you, and someone initially says, no, that the officer
8 has to leave and turn around and walk away. The officer can
9 turn around and ask another innocuous question and say, you
10 know, how's it going, or how's the weather. The real issue is,
11 you have to take the entire encounter into context, in its
12 entirety, looking, of course, at the totality of the
13 circumstances.

14 So all of those actions are consensual that I've
15 already addressed, and then when it comes down to asking for
16 the search of the bag, it's very unequivocal and it's very
17 explicit and it's very clear. Nonverbal, which is fine; he
18 dumps the backpack. Follow-up question as to the plastic bag;
19 "Go for it." So there's just no Fourth Amendment violation in
20 this case.

21 As a matter of fact, regarding Florida vs. Bostick,
22 the whole consensual encounter Supreme Court case, I believe
23 going from memory here that there's no requirement for an
24 officer even to come up and ask permission to talk to somebody.
25 They can just go up and start engaging in conversation. I

1 think Special Agent Perry actually takes extra measures in the
2 way he approaches things and in the way he approached things in
3 this case to ensure that the encounter really reflects that of
4 being consensual. But there's no obligation for an officer.
5 He can go up and say, hey, can I talk to you, you know. And
6 again, I mentioned that case law. I think it nails it, that
7 nonverbal consent can follow a verbal refusal.

8 So all together, based on all of that, we would ask
9 the Court to deny Defendant's Motion to Suppress, and their
10 Motion to Dismiss. Thank you.

11 THE COURT: Mr. Walz.

12 MR. WALZ: Thank you, Your Honor, for sitting through
13 this today. We really appreciate it. And we really appreciate
14 the Court letting us do this live, because I think it's very
15 important --

16 THE COURT: I agree.

17 MR. WALZ: -- for the Court when presenting a case
18 like this, the credibility of the parties and hearing them
19 personally.

20 THE COURT: It would have been done sooner if we
21 hadn't had all this pandemic stuff.

22 MR. WALZ: Mr. Rodriguez understands, and we all do.
23 And we're very grateful for the Court setting this hearing.

24 First of all, let me straighten up the confusion that
25 the Government has created about the tape and the enhanced tape

1 and the transcript. There's only one tape recording that's
2 ever been produced by the Government, and it says the same
3 thing. And I'm glad that Mr. Walsh started the whole process
4 this morning by playing the Government's tape; not the enhanced
5 tape, the Government's tape. I heard it, I hope the Court
6 heard it, we heard it, I know the people at Paul Baca Court
7 Reporters heard it where he says, "No, I'm asleep." And
8 Special Agent Perry absolutely heard it, because he was
9 standing right across from Mr. Rodriguez at the time.

10 There wasn't anything magical about the enhanced tape
11 that all of a sudden the word "no" shows up before "I'm
12 asleep." And, in fact, it took a considerable amount of
13 discussion, and I guess Agent Perry had to put on his special
14 headphones before the Government would finally concede that the
15 words "I'm asleep" were on the tape. For the longest time,
16 they wouldn't even concede that. So it's of no surprise that
17 they will not concede, even to this day, even though
18 Mr. Walsh came dangerously close at the end of his summation by
19 saying that he might have heard the word "nah" before "I'm
20 asleep," that he absolutely said, "No." We know it, they know
21 it, and most importantly, the Court knows it.

22 The case law, I think, as quoted by Mr. Walsh is a
23 bit of a stretch. No means no. Agent Perry even admitted
24 under my examination that if he would have heard the word no,
25 he's done. It's time to walk away. Move on. But he did not

1 do that, and so it's no great mystery, then, that the only way
2 he can continue with that belief and testimony and still
3 justify an ongoing investigatory stop is by not hearing, "No,
4 I'm asleep."

5 Based on the totality of the circumstances -- and I
6 know Agent Perry has been around an awful long time and he's
7 done some very, very fine work in the jurisdiction and so on,
8 and I know that Mr. Rodriguez is just a citizen, like the rest
9 of us, but that does not mean necessarily that you should give
10 Agent Perry's testimony more credibility than Mr. Rodriguez's,
11 who maybe even to his embarrassment was very candid to the
12 Court with his testimony and memory of the events that
13 occurred.

14 If there is a red herring issue on the tape
15 recording, it's the Government that created that, not defense
16 counsel, because they're in control of the tape and we weren't
17 there. Mr. Rodriguez is sure he had a conversation that was
18 never tape-recorded. We don't know when Agent Perry turned on
19 the tape recorder. We do know from the time he turned on the
20 tape recorder to the end there was no alteration of the tape.
21 We all agree on that. But we don't know what might have
22 happened before. We will never know that, because these are
23 the only two people present when that occurred.

24 But having said that, let's go with the best case
25 scenario for the Government. Agent Perry comes into the car

1 and he decides, I guess willy-nilly, just to start a
2 conversation with Mr. Rodriguez, who Agent Perry actually
3 admitted was reclined in his seat. I think Agent Perry says
4 his eyes were half open. I'll give that to the Government,
5 even, that maybe he woke up from his sleep or was drowsy. He
6 asked, "Can I speak to you," and he says, "No, I'm asleep."
7 That should have done it. That's why it was painfully
8 necessary to go over that transcript with Agent Perry. At
9 every turn, no matter how Mr. Walsh and the Government wanted
10 to argue it, it was nonconsensual based on the totality of the
11 circumstances.

12 we know where Agent Perry was standing in the aisle,
13 and I think we've all been on a train. I hope so, at this
14 point in our lives. He described where Mr. Rodriguez was and
15 where he was. Mr. Rodriguez would have to cross his path to
16 get out, one way or another. And by then, Agent Perry has
17 already said he showed him his badge and identified himself as
18 a police officer. Nobody in their right mind is going to walk
19 out during the middle of questioning by somebody who has badged
20 them, identified himself as a police officer, and is standing
21 in the aisle looking at you.

22 I kept asking Agent Perry, well, the fact that he
23 gave you his ticket, did you see anything wrong with that? No.
24 Did that create reasonable suspicion or probable cause? No.

25 Then he took it to the next step and asked him for

1 his identification, which he produced. Did you see anything
2 wrong with that? No. Did it create reasonable suspicion or
3 probable cause? No.

4 Despite all this, he's still continuing, and you can
5 see, no matter when you look at the transcript and listen to
6 the tape, a more aggressive posture going on by Agent Perry as
7 this continues on in discussion.

8 Now, it's a fairly short encounter, and this bag view
9 is very confusing, as to was Agent Perry initially pointing to
10 a different bag that was in the coach. Mr. Walsh says, well,
11 there weren't any other individuals in that car. That doesn't
12 mean there couldn't have been another bag. That doesn't mean
13 that other people might not have been going off to take a break
14 and then coming back to the car. So that's just pure
15 speculation on the Government, and it's an absolute red herring
16 that there weren't other bags in that particular car.

17 In any event, Mr. Rodriguez was very candid with the
18 Court to say that he had dumped out those contents because he
19 didn't want any hassle. He's been around. As Mr. Walsh
20 brought out in his cross-examination, he's fairly learned on
21 some of the fundamentals of law, and he just didn't want any
22 hassle. So he dumped out these few vials that, in my opinion,
23 except for the gummy bear, were empty, and covered them with
24 the laundry bag that you can't see through. So whenever he
25 handed him that bag, it was empty. And I never got from Agent

1 Perry's testimony this morning where he got permission
2 specifically from Mr. Rodriguez to move the laundry bag where
3 the vials were then located.

4 But having said that, there was nothing wrong with
5 the vials. There is no marijuana, I believe, in that green
6 vial. You can look at it and look at it and look at it. I
7 don't see any green leafy substance. He did have some wrapping
8 papers in one, and he did take a gummy bear. But he admitted
9 that. There's no way the Government could ever prove what was
10 in that gummy bear, or anything else. But he was candid. He
11 had a prescription for it, and he took it.

12 And it makes no sense if they're going to use that as
13 their reason to justify reasonable suspicion or probable cause,
14 this loose leafy marijuana, not to produce it. Is it here?
15 No. Did you see a picture of it outside the vial? No. And
16 then when you read the report, what they weighed was the vial.
17 That's what the vial weighed. I don't see how they can make
18 that jump, given everything that has occurred, somehow make
19 that jump to the next very escalated phase of arrest, because
20 then they're telling him to stand up, put his hands behind his
21 back, and during that time they're doing the pat down, as well.

22 And also, Field Officer Chavez has closed in from the
23 other direction. So you have Agent Perry on one side, Chavez
24 on another, and Agent Perry made it clear, you're not going
25 anywhere. Mr. Rodriguez made it clear he knew he wasn't going

1 nowhere. He was under arrest. And the pat down occurred at
2 that juncture.

3 So whenever I started this morning, I said I think
4 this has some complex legal issues and some complex factual
5 issues, and whenever we started this morning I did -- and I
6 also want to say that when you look at the factors for
7 custodial interrogation, we have to look at the position where
8 Agent Perry was and we have to look at the position where Agent
9 Chavez was, or Field Officer Chavez. Were there any other
10 witnesses there? Were they in a threatening stance? I asked
11 Agent Perry, did you ever tell him that he could refuse to talk
12 to you? And, of course, there is no case that says they have
13 to do that, but there are cases that we cited on point that no
14 means no. And even Agent Perry admitted that no means no. And
15 the result, if he would have heard it, which we believe he
16 did -- I'm not saying that he's being untruthful, but I just
17 think the evidence is overwhelming that he must have heard that
18 statement. But he elected to keep on with the search.

19 And whether we like it or not, there is the very,
20 very troubling case of United States vs. Campa Rangel where the
21 Tenth Circuit was so concerned about Agent Perry committing
22 perjury -- and they used the word perjury. I'm not using the
23 word perjury, the Tenth Circuit used that word in its decision.
24 They didn't say he perjured himself, but they did say:

25 "The issue of perjury arises because of

1 contradictions between various sworn statements by
2 Agent Perry, and between those statements and
3 testimony by the bus driver and a passenger, relating
4 to who, if anyone, saw Mr. Rangel remove the bag
5 containing the cocaine from a larger bag that he
6 carried onto the bus in El Paso. The smaller bag and
7 its contents were not dusted for fingerprints."

8 And then they also talk about Agent Perry's affidavit
9 in support of the complaint and Agent Perry's testimony at the
10 preliminary hearing. As a result of that testimony, the Tenth
11 Circuit remanded the case back to the District Court to conduct
12 a 2255 proceeding and address those issues at that particular
13 hearing.

14 We have many of the same issues here. The tape, I
15 believe, contradicts a lot of what Agent Perry said on the
16 stand. The discrepancies are very apparent. In the
17 Campa Rangel case, they talked about the testimony at the
18 preliminary hearing, and I think it's analogous to the
19 testimony he gave at the grand jury, which I think was where he
20 misrepresented whether he had consent. When you read the grand
21 jury transcript, it seems like they're almost holding hands and
22 having a wonderful discussion, and Mr. Rodriguez is agreeing to
23 everything. That didn't happen. It just didn't happen. And
24 we know that because we know how many times he shook his head
25 no and he said no. And the fact that even force was used

1 during the arrest and pat down is just another example of that.
2 And maybe body cams are the answer. I don't know what the
3 answer is. Maybe nobody does. Or a better recording system or
4 something. I don't know.

5 But then we had those two cases -- and again, I know
6 they're not binding on this Court -- that were District Court
7 opinions issued by Judge Vasquez with similar concerns to what
8 we have brought up in this case and that were brought up in
9 Campa Rangel, where the tape recordings and the testimony --
10 and it doesn't have to line up 100 percent. Nothing can. But
11 there's just too many contradictions that made the credibility
12 of Agent Perry be called into play. And we've cited those
13 cases in our pleadings. United States vs. Darius Muse, and
14 United States vs. Garcia-Guzman. Both of them are -- Muse is a
15 2019 opinion, and Garcia-Guzman is a 2020 opinion. And that,
16 in fact, is troubling.

17 And I like the alternative Government arguments,
18 they're always pretty interesting, to say, well, he didn't
19 really hear that, but if he did, it still makes no difference.
20 I think that's somewhat disingenuous for the Government to take
21 that position, particularly in light of Agent Perry's testimony
22 this morning.

23 One thing I have to say, and it's just because I
24 guess I've maybe done a few of these cases, maybe too long, but
25 I was representing a defendant in front of Juan Burciaga in the

1 Court on Gold Street, and the Government had this tape of this
2 interaction with these drug dealers, and there was so much
3 background noise you could hardly hear the discussion. And the
4 Government hired a very high-priced expert who took out all the
5 background noise, enhanced the voices, and was playing the
6 tape. And whenever I listened to the tape initially, I could
7 hardly hear any of the conversation. So I'm a fairly young
8 lawyer then, and I thought, this doesn't sound right to me. I
9 think Larry Gomez and Bobby Baca were on the other side. And I
10 make an objection, and Judge Burciaga says, what's your
11 objection, Mr. Walz? I said, well, that's not the same tape
12 the Government provided. They took out all the background
13 noise. And he said, come up here. So he takes me up to the
14 bench and the other lawyers, and he says, Mr. Walz, that's the
15 most ridiculous objection I think I've ever heard since I've
16 been sitting on the bench. Of course they can take out
17 background noise and enhance the quality of the tape. And I
18 said, yes, sir.

19 So I thought that's kind of interesting that the
20 Government would somehow try to make some type of hay that we
21 tried to clean up the tape and reduce some of the background
22 noise. But I learned a very significant lesson early in my
23 career from Judge Burciaga, who didn't mince words very
24 frequently. But in any event, even on the Government's tape,
25 you can hear him say, no.

1 So Your Honor, I think that the evidence goes back
2 and forth. I don't think the Government has carried its
3 burden, and they have the burden by a preponderance of the
4 evidence based on credible evidence. In a warrantless search
5 where they claim it was consensual -- and it can shift. There
6 are cases that can shift from consensual to investigatory back
7 to consensual back to reasonable suspicion. So we're having
8 all this jumping around and legal standards as this
9 conversation and interaction progresses between Agent Perry and
10 Mr. Rodriguez.

11 Your Honor, we would ask that the Court -- we're not
12 in any rush, to be quite frank with you. We want the Court to
13 really have whatever time the Court may want to hear the tape.

14 THE COURT: I want to get the record, and then I
15 think the parties need a decision on this.

16 MR. WALZ: Thank you, Your Honor. Unless the Court
17 has some specific questions --

18 THE COURT: I do. I want to do one thing. I don't
19 know whether you want to use Government's Exhibit 2, 3, or the
20 Paul Baca exhibit. Whatever transcript, I want to just run
21 through a couple.

22 || MR. WALZ: Sure.

23 || THE COURT: Which one do you want?

24 MR. WALZ: Well, I have the one on top No. 4, which
25 is the Paul Baca one.

1 THE COURT: I don't know if I've got that one.

2 MR. WALZ: I have Government's 2 here. That's fine.

3 I can use any of them.

4 THE COURT: Have you got Government's 3?

5 MR. WALZ: Yes, I do.

6 THE COURT: If there's another Paul Baca exhibit, we
7 can go with that.

8 MR. WALZ: No, I think Paul Baca only has one
9 exhibit. That's No. 4. I have Government's Exhibit 3 here.

10 THE COURT: All right. Let's go down -- let's go to
11 Page 3, and towards the bottom -- I'm sorry, Page 2, at the
12 bottom. So start with Line 17. Perry is saying: "How about
13 this bag here; is this your bag here?" And Mr. Rodriguez says,
14 "No."

15 MR. WALZ: Right.

16 THE COURT: And then Perry says: "This is not your
17 bag here?" And then Mr. Rodriguez says: "This is my bag right
18 here. This is all my bag right here."

19 MR. WALZ: Yes.

20 THE COURT: That's the backpack?

21 MR. WALZ: That's the backpack.

22 THE COURT: It's in one of the defendant's photos.

23 MR. WALZ: That's the backpack.

24 THE COURT: Okay. And then Perry says: "You have
25 nothing else, though? Would you consent for a search of your

1 bag for contraband, sir?"

2 MR. WALZ: Right.

3 THE COURT: And then the transcript says, inaudible.

4 MR. WALZ: Right.

5 THE COURT: But then you have Perry saying: "All
6 right. All right. Do you give me permission to search this
7 bag here?" And then there is the reference, "Go for it."

8 Now, is that Mr. Rodriguez talking about the
9 backpack?

10 MR. WALZ: I believe that's still on the backpack,
11 yes.

12 THE COURT: Now, there's also been testimony about
13 the contents of the backpack being emptied.

14 MR. WALZ: Right.

15 THE COURT: And when I go back and I listen to
16 Mr. Rodriguez's testimony, nothing's in the backpack? The
17 noise on the tape are the straps hitting --

18 MR. WALZ: That's right. I think what Mr. Rodriguez
19 was referencing when Mr. Walsh was cross-examining him is where
20 you have that inaudible at the top of the page, at number 1.
21 Mr. Walsh was inferring that Mr. Rodriguez was dumping the
22 contents out of the backpack, and it's Mr. Rodriguez's
23 testimony that the straps from the empty backpack that he was
24 getting was brushing or hitting the laundry bag.

25 THE COURT: Now, we know it's undisputed that

1 Mr. Rodriguez ate a gummy bear.

2 MR. WALZ: That's undisputed.

3 THE COURT: So where was the container that had the
4 gummy bear, then?

5 MR. WALZ: That vial was under the --

6 THE COURT: The plastic laundry bag?

7 MR. WALZ: The plastic --

8 MR. CREASY: Laundry bag.

9 MR. WALZ: I don't want to call it a laundry bag. It
10 was a plastic --

11 THE COURT: Plastic bag.

12 MR. WALZ: A plastic bag for laundry, yes. It had
13 the name of a dry cleansers or a laundry on the bag.

14 THE COURT: And it was underneath there?

15 MR. WALZ: That's where it was.

16 THE COURT: So it did not drop out of the backpack?

17 MR. WALZ: No. And what happened, according to
18 Mr. Rodriguez's testimony, is after Agent Perry looked through
19 the backpack and didn't find anything, he started to pull the
20 laundry bag away from where Mr. Rodriguez previously in the
21 morning had put the vials, and that's when Mr. Rodriguez, per
22 his testimony, grabbed the vial and ate the gummy bear.

23 THE COURT: Okay.

24 MR. WALZ: That's how it happened.

25 THE COURT: I just wanted to make sure I was clear on

1 everybody's position.

2 MR. WALZ: Right. And Your Honor, I don't think, I
3 don't think that that would provide reasonable suspicion, much
4 less probable cause, a man eating a gummy bear and Agent Perry
5 finding some vials that are clearly marked prescription
6 medicine. Cannabis is a prescribed medicine, whether the
7 Government likes it or not, and I think that would stand up in
8 any court in the United States if it's a prescribed medicine
9 versus recreational purposes. Even if he misuses the medicine,
10 it was still prescribed. It's prescribed. And I don't believe
11 that him eating the gummy bear -- and he was candid with the
12 Court, he said the gummy bear had THC -- constitutes reasonable
13 suspicion, much less probable cause to go from there to
14 essentially ordering him to stand up out of his seat, bend him
15 over backwards, put his arms behind him, handcuff him, or
16 handcuff one hand -- I'm not clear, because then they wanted
17 him to put his hands above the rail where there's other
18 baggage, so they could handcuff him higher, apparently. And
19 then while that's going on, Agent Perry is doing the pat down
20 of his crotch, as well. It's happening in a matter of seconds,
21 but I think that the Constitution protections and the case law
22 protections are being seriously trampled upon during that very
23 brief period of time.

24 THE COURT: Now, the Motion to Dismiss, that's based
25 on -- that rises or falls based on the ruling on the

1 suppression?

2 MR. WALZ: That's right.

3 THE COURT: I wanted to make sure there wasn't
4 anything else we needed to talk about on that.

5 MR. WALZ: No, and you've already ruled on whether
6 there was a true bill and whether the grand jury was
7 appropriately constituted, so that issue is no longer before
8 the Court.

9 THE COURT: Okay. All right, thank you.

10 MR. WALZ: Thank you, Your Honor. Thank you,
11 Mr. Walsh. Thank you, Agent Perry.

12 MR. WALSH: If I can just make a couple of points in
13 rebuttal. I'm not going to give you legal argument. We're all
14 probably ready to call it a day.

15 THE COURT: Sure.

16 MR. WALSH: The Court obviously has to decide if it
17 sees what we see regarding the marijuana in the green vial.
18 That's Defendant's Exhibit 1. And counsel made mention of
19 these cases from Judge Vasquez's court. We wanted to also make
20 mention that subsequent to those cases, that Agent Perry has
21 testified before Judge Vasquez and she has found him credible,
22 subsequent to the cases that Mr. Walz cited. That's United
23 States vs. Manuel Delgado-Salazar, 19-1195, and United States
24 vs. Elena Rivas, 19-417. Just FYI. Just wanted to give that
25 information to the Court there.

1 I just want to make sure I didn't misstate anything.
2 When I was talking about Mr. Rodriguez's testimony about a bag,
3 another bag that allegedly Special Agent Perry was referring
4 to, which we don't agree with. I wasn't saying -- it's not our
5 position that there wasn't other bags, or not other people.
6 There is testimony that there weren't many people around the
7 Defendant. My point of bringing that up was to say that his
8 testimony didn't make sense. I just wanted to make sure that I
9 wasn't misstating our position that there wasn't any other bags
10 in that particular coach car.

11 And then I wasn't trying to be critical regarding the
12 efforts to come up with the enhanced audio. My limited point
13 was the fact that the enhanced audio, you know, that it had to
14 be worked on is further evidence that it made sense that
15 Special Agent Perry didn't hear it, didn't hear the word no.

16 THE COURT: No, I understood you.

17 MR. WALSH: And then just to make sure that I didn't
18 fumble this, what I was trying to say is that, yeah, he didn't
19 hear it, period, but if the Court deems that he did say it on
20 the audio, about "no, I'm sleeping," or what have you, that was
21 my point, that in the alternative, it doesn't matter for the
22 reasons already stated. Thank you. Nothing further.

23 THE COURT: All right. With that, we'll be in
24 recess. Thank you.

25 (Proceedings adjourned at 4:36 P.M.)

1 IN THE UNITED STATES DISTRICT COURT
2
3 _____)
4 UNITED STATES OF AMERICA,)
5 Plaintiff,)
6 vs.) No. 1:18-CR-01568-WJ
7 RODOLFO RODRIGUEZ, JR.,) MOTION HEARING
8 Defendant.)
9 _____)

10 CERTIFICATE OF OFFICIAL COURT REPORTER

11 I, Mary K. Loughran, CRR, RPR, New Mexico CCR #65, Federal
12 Realtime official Court Reporter, in and for the United States
13 District Court for the District of New Mexico, do hereby
14 certify that pursuant to Section 753, Title 28, United States
15 Code, that the foregoing is a true and correct transcript of
16 the stenographically reported proceedings held in the
17 above-entitled matter on Friday, June 26, 2020, and that the
18 transcript page format is in conformance with the regulations
19 of the Judicial Conference of the United States.

20 Dated this 5th day of August, 2020.

21

22 _____
23 MARY K. LOUGHAN, CRR, RPR, NM CCR #65
24 UNITED STATES COURT REPORTER
25 333 Lomas Boulevard, Northwest
Albuquerque, New Mexico 87102
Phone: (505)348-2334
Email: Mary_Loughran@nmd.uscourts.gov

David
Walsh

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA,

Plaintiff,

U.S.ATTORNEY'S OFFICE
Albuquerque, NM

vs.

NO: 18-CR-1568 WJ

RODOLFO RODRIGUEZ, JR.,

Defendant.

BEAN & ASSOC'S, INC.
GRAND JURY MATERIAL

TRANSCRIPT OF PROCEEDINGS

MATTER 3

May 8, 2018

TESTIMONY OF JARRELL W. PERRY

BEFORE: THE FEDERAL GRAND JURY
Albuquerque, New Mexico

A P P E A R A N C E S

For the Government:

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Assistant United States Attorney
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(1969N-PJ)

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1 MR. CAIRNS: Okay, this is another Jay
2 Perry Case. The defendant is charged with possession
3 with intent to distribute 1 kilogram and more of
4 heroin.

5 JARRELL W. PERRY,

6 after having been first duly sworn under oath,
7 was questioned and testified as follows:

8 EXAMINATION

9 BY MR. CAIRNS:

10 Q. And I'm sorry, again, but please state your
11 name for the record.

12 A. It's Jarrell W. Perry.

13 Q. And your employed by the Drug Enforcement
14 Administration?

15 A. Yes, sir, I am.

16 Q. And can you tell me if you're familiar with
17 the events surrounding the pending charges against a
18 target identified as Rodolfo Rodriguez, Jr.?

19 A. Yes, sir, I am.

20 Q. And can you tell me where Mr. Rodriguez was
21 encountered, on what date that occurred, and where he
22 was encountered?

23 A. It was at the Amtrak train station here in
24 Albuquerque, and it was on February the 1st of this
25 year.

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1 Q. Okay, and what happened that day?

2 A. I was checking the eastbound train that
3 makes a regularly-scheduled stop here in Albuquerque.
4 Boarded the train; began speaking with the
5 passengers. Subsequently approached the defendant in
6 this case, Rodolfo Rodriguez, Jr., displayed my DEA
7 badge to him, identified myself as a police officer,
8 asked for and received permission to speak with him.

9 After a short conversation about his
10 travel, I asked him if he had any luggage with him.
11 He identified a backpack that was on the seat beside
12 him. I asked him for consent to search it. He
13 picked it up, unzipped it -- I think it was already
14 unzipped -- and dumped all the contents out of the
15 backpack. When he did that, I saw two small vials.
16 One contained a green, leafy substance that I knew
17 from my experience to be consistent with marijuana;
18 the other one contained an edible type gummy bear,
19 which, from my experience, was also consistent with
20 edible marijuana.

21 At that time I instructed Mr. Rodriguez to
22 stand up, place his hands up on the overhead luggage
23 compartment, which he subsequently did. I conducted
24 a search of his person. In his lower abdomen,
25 basically, between his legs was a very hard,

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1 round-shaped bundle that I knew to be consistent with
2 a bundle of illegal narcotics that were concealed
3 underneath his clothing.

4 He was handcuffed, removed from the Amtrak
5 train, transported back to the DEA office. At the
6 DEA office that bundle was removed from his person.
7 It was round-shaped, large, it was wrapped in clear
8 plastic. We cut into that bundle and it revealed a
9 brown-colored substance that field tested positive
10 for heroin. We weighed that bundle and it weighed
11 approximately 1.10 gross kilograms.

12 Q. Okay, let me back up a little bit to the
13 marijuana, when you noticed that there were vials
14 containing marijuana. Again, is marijuana still a
15 controlled substance under federal law?

16 A. Yes, it is.

17 Q. Okay. And -- but, I mean, if this is all
18 he had, would you have charged him with -- in federal
19 court with possessing marijuana?

20 A. Not for that small amount, no, but it is
21 enough to, basically, place him into custody.

22 Q. All right. And then -- so it's enough to
23 arrest him?

24 A. But we probably wouldn't be here today if
25 it was just the marijuana, no.

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1 Q. Okay. And then -- but then, upon arrest,
2 you're able to conduct a search of the person that
3 you've been -- arrested to make sure that they don't
4 have weapons or other contraband?

5 A. Yes, sir, that's correct.

6 Q. And that's when you found the heroin in
7 this case?

8 A. Yes, sir.

9 Q. And just to draw your attention to the
10 indictment, the defendant is charged with possessing
11 heroin; there's no mention of the marijuana?

12 A. Yes, sir.

13 MR. CAIRNS: Does the grand jury have any
14 questions about this case?

15 GRAND JUROR: Off the record.

16 MR. CAIRNS: Oh, yes, go ahead. You want
17 me to answer a question for you later or --

18 GRAND JUROR: Off the record. Can I do
19 that?

20 MR. CAIRNS: Well, we prefer questions from
21 the grand jury to come on the record.

22 GRAND JUROR: Okay, no problem.

23 MR. CAIRNS: But you're free to ask any
24 questions that you want. I mean, this -- again, this
25 case isn't about marijuana. That's what I was trying

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1 to get out of the witness.

2 GRAND JUROR: Right, and I understand. I
3 just wanted to see, if the person had a medical
4 marijuana, if that were to be the case...?

5 MR. CAIRNS: You can answer the question.
6 I mean, again -- yeah, you can answer the question.

7 THE WITNESS: I'm not exactly sure if he
8 did. He did, he didn't have one on his person. If
9 he had one or access to one, I have no idea, but he
10 didn't have one with him on his personal property or
11 anything.

12 GRAND JUROR: Okay.

13 MR. CAIRNS: Does that answer your
14 question?

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IN THE UNITED STATES DISTRICT COURT

MAY 09 2018

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

)

Plaintiff,

)

vs.

)

RODOLFO RODRIGUEZ, JR.,CRIMINAL NO. 18-1568 WJ
21 U.S.C. §§ 841(a)(1) and (b)(1)(A):
Possession with Intent to Distribute

Defendant.

1 Kilogram and More of Heroin.

INDICTMENT

The Grand Jury charges:

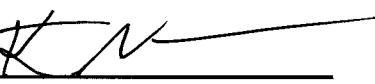
On or about February 1, 2018, in Bernalillo County, in the District of New Mexico, the defendant, **RODOLFO RODRIGUEZ, JR.**, unlawfully, knowingly and intentionally possessed with intent to distribute a controlled substance, 1 kilogram and more of a mixture and substance containing a detectable amount of heroin.

In violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A).

A TRUE BILL:

/s/

FOREPERSON OF THE GRAND JURY


Assistant United States Attorney

04/30/18 11:18AM

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA)
Plaintiff,)
vs.)
RODOLFO RODRIGUEZ, JR.)
Defendant.)
Case No. 18-CR-1568 WJ

MOTION TO SUPPRESS

COMES NOW Defendant, Rodolfo Rodriguez Jr., by and through his attorney, Jerry A. Walz, Walz and Associates, P.C., pursuant to the Fourth Amendment to the Constitution of the United States, and hereby moves the Court to suppress any statements made or evidence seized subsequent to the illegal stop, search and questioning of Defendant on February 1, 2018, and as grounds states the following:

I. Procedural History

1. Defendant was traveling and asleep in his seat on the eastbound AMTRAK train through Albuquerque, NM, when he was approached by Special Agent Jarrell W. Perry and Drug Enforcement Administration Task Force Officer Seth Chavez. *Report of Investigation dated 2/3/2018 page 4, attached hereto as Exhibit A.*
2. Special Agent Perry approached Defendant while he was seated and asleep. *Report of Investigation dated 2/3/2018 page 4. Audio recording of encounter*¹.

¹ Audio recording of the encounter between Special Agent Perry and Defendant was provided through discovery by the United States Attorney's office on March 13, 2018, and will be introduced at hearing.

3. After waking Defendant, Special Agent Perry had to speak to Defendant twice before he identified himself as a law enforcement officer and asked Defendant if he could speak with him for a moment. *Audio recording of encounter.*
4. Defendant did not agree to speak with Special Agent Perry and instead, after saying something unintelligible on the audio recording, without being asked handed Special Agent Perry his train ticket and stated that it was his train ticket. *Audio recording of encounter.*
5. Defendant was still groggy from having just been woken up from a sound sleep and Special Agent Perry continued to interrogate Defendant. *Report of Investigation dated 2/3/2018 page 5.*
6. Defendant presented his identification to Special Agent Perry when asked because he did not feel he could refuse because Special Agent Perry continued to interrogate him and he was still groggy from sleep. *Report of Investigation dated 2/3/2018 page 5.*
7. When asked if he would consent to Agent Perry searching his bag, Defendant emptied the contents onto the empty seat next to his, felling as though at this point he did not have an option. *Report of Investigation dated 2/3/2018 page 5.*
8. Among the other contents of Defendant's bag was a plastic store bag that contained different plastic vials. Within two of the vials was Defendant's medically prescribed marijuana in edible form and in leaf form. *Report of Investigation dated 2/3/2018 page 5.*
9. At this point, Special Agent Perry ordered Defendant to stand up and place his hands on the luggage rack above the seats. When Defendant refused, saying he wanted to sleep, Special Agent Perry Again ordered Defendant to stand up and informed him that "I'm not asking you." *Report of Investigation dated 2/3/2018 page 5.*

10. A pat down search was conducted and Agent Perry felt a large round bundle between Defendant's legs and Defendant was then handcuffed. *Report of Investigation dated 2/3/2018 page 5.*

11. Defendant was taken into custody and was charged in a one count indictment filed May 14, 2018, with 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. *Doc # 17*

II. Argument

“It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is ‘per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.’ It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that [is] conducted pursuant to consent.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043–44, 36 L. Ed. 2d 854 (1973). This case poses the question of what constitutes consent and the shifting of an encounter from one of consent to one of investigation.

The Supreme Court has recognized three types of police encounters. *See United States v. White*, 584 F.3d 935, 944–45 (10th Cir. 2009) (the Supreme Court has recognized “three types of police-citizen encounters[:] ‘(1) consensual encounters which do not implicate the Fourth Amendment; (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause.’”).

The initial contact of Defendant by Special Agent Perry might have been classified as a consensual encounter which would not implicate the fourth amendment, however, the burden is on the government to proof by a preponderance of the evidence that the consent relied upon by the government was freely and voluntarily given. *See United States v. Ray*, 199 F. Supp. 2d 1104, 1108 (D. Kan. 2002) (For this exception to apply, the government must prove by a preponderance of the evidence that consent was freely and voluntarily given.). The determination as to if consent is given freely and voluntarily is a question of fact and based on the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047–48, 36 L. Ed. 2d 854 (1973) (the question whether a consent to a 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 circumstances).

For Defendant the evidence goes against consent being freely and voluntarily given for the encounter with Special Agent Perry. First, Special Agent Perry woke Defendant from a sound sleep to initiate the encounter. Special Agent Perry was required to announce his presence several times before Defendant awoke and responded. Second, without being asked and out of a habitual response when encountered on the train, Defendant presented his ticket to Special Agent Perry. Third, Special Agent Perry, started interrogating Defendant by asking for his identification without a clear and unambiguous response to the question if it was permissible for Special Agent Perry to ask him questions. Defendant felt that he was compelled to respond to Special Agent Perry and provide the identification documents.

By this point in the encounter Defendant felt that he could not leave and he could not refuse to respond to Special Agent Perry. While Defendant never gave consent for the encounter, at this point it is clear that the encounter had changed, even if initially a consensual encounter to a seizure.

See United States v. Williams, 356 F.3d 1268, 1274 (10th Cir. 2004) (Once a reasonable person would not feel free to terminate the encounter, however, the encounter is transformed into a seizure requiring at least reasonable suspicion.) Further, by Special Agent Perry's actions it was clear to Defendant that he had no choices but to do what he was directed to do. This shows that the encounter was not consensual in nature. It is not consensual as Defendant Rodriguez felt as though he was not free to leave, but also that he felt he was not free to decline Special Agent Perry's requests or to terminate the encounter. *See Fla. v. Bostick*, 501 U.S. 429, 436, 111 S. Ct. 2382, 2387, 115 L. Ed. 2d 389 (1991) (In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.)

At this point the analysis must change and the government must show a reasonable suspicion of criminal activity to continue the investigation. "A reviewing court must analyze each stage of the [police-citizen] encounter, ensuring that the requisite level of suspicion or cause is present at each stage." *United States v. Shareef*, 100 F.3d 1491, 1500 (10th Cir. 1996). *See also United States v. White*, 584 F.3d 935, 944-45 (10th Cir. 2009) (These categories are not static and may escalate from one to another.). At this point there is no evidence of criminal activity. It is not until the unconstitutional search based on a lack of reasonable suspicion of Defendant's bag that there is any evidence of potential criminal activity when Special Agent Perry discovered the prescribed medical marijuana that any suspicion can be aroused and a further search of Defendant be undertaken. All of the evidence seized and the statements obtained in the unconstitutional and illegal search and seizure of Defendant must be suppressed.

III. Conclusion

The government is required to show by a preponderance of the evidence that an encounter between police and a citizen is consensual. In this case there is no evidence that Defendant

consented to the encounter with Special Agent Perry. Even if consensual at the start, which Defendant disputes, the nature of the encounter changed to a non-consensual investigation search upon which Defendant should have been given his Miranda warnings. As Agent Perry continued to interrogate Defendant after waking him from a sound sleep.

Based on the totality of the circumstances and the unconstitutional and illegal encounter of Special Agent Perry and Defendant Rodolfo Rodriguez, all of the evidence and statements obtained from Defendant during his encounter with Special Agent Perry must be suppressed.

Respectfully submitted,

WALZ AND ASSOCIATES, P.C.

/s/ Jerry A. Walz

JERRY A. WALZ, ESQ.

Attorney for Defendant Rodolfo Rodriguez, Jr.

133 Eubank Blvd NE

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I HEREBY CERTIFY that on the 21st day of December, 2018, I filed the foregoing electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

/s/ Jerry A. Walz

Jerry A. Walz

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA)
Plaintiff,)
vs.)
RODOLFO RODRIGUEZ, JR.)
Defendant.)
Case No. 18-CR-1568 WJ

MOTION TO DISMISS INDICTMENT

COMES NOW Defendant, Rodolfo Rodriguez Jr., by and through his attorney, Jerry A. Walz, Walz and Associates, P.C., pursuant to the Fourth and Fifth Amendment to the Constitution of the United States, and hereby moves the Court to dismiss the one count indictment filed May 14, 2018, charging Defendant with violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) 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 (*Doc # 17*) brought against Defendant Rodolfo Rodriguez, and as grounds states the following:

I. Procedural History

1. Defendant was asleep and sprawled across multiple seats while traveling on the eastbound AMTRAK train through Albuquerque, NM, when he was approached by Special Agent Jarrell W. Perry and Drug Enforcement Administration Task Force Officer Seth Chavez.

Report of Investigation dated 2/3/2018 page 4, attached hereto as Exhibit A.

2. Special Agent Perry approached Defendant while he was asleep. *Report of Investigation dated 2/3/2018 page 4. Audio recording of encounter*¹.
3. After waking Defendant, Special Agent Perry had to speak to Defendant twice before he identified himself as a law enforcement officer and asked Defendant if he could speak with him for a moment. *Audio recording of encounter*.
4. When asked, Defendant did not agree to speak with Special Agent Perry and instead, after saying “no, I’m asleep, here’s my ticket”, without being asked handed Special Agent Perry his train ticket. *Audio recording of encounter*.
5. Defendant was still groggy from having just been woken up from a sound sleep and Special Agent Perry continued to interrogate Defendant. *Report of Investigation dated 2/3/2018 page 5*.
6. Defendant presented his identification to Special Agent Perry when asked because he did not feel he could refuse while Special Agent Perry continued to interrogate him and Defendant was still groggy from sleep. *Report of Investigation dated 2/3/2018 page 5*.
7. When asked if he would consent to Agent Perry searching his bag, Defendant emptied the contents onto the empty seat next to his, feeling as though at this point he did not have an option. *Report of Investigation dated 2/3/2018 page 5*.
8. Among the other contents of Defendant’s bag was a plastic store bag that contained different plastic vials. Within two of the vials was Defendant’s medically prescribed marijuana in edible form and in leaf form. *Report of Investigation dated 2/3/2018 page 5*.

¹ An enhanced version of the audio recording of the encounter between Special Agent Perry and Defendant was provided to the United States Attorney’s office on August 5, 2019, and will be introduced at hearing.

9. At this point, Special Agent Perry ordered Defendant to stand up and place his hands on the luggage rack above the seats. When Defendant refused, saying he wanted to sleep, Special Agent Perry Again ordered Defendant to stand up and informed him that “I’m not asking you.” *Report of Investigation dated 2/3/2018 page 5.*

10. A pat down search was conducted and Agent Perry felt a large round bundle between Defendant’s legs and Defendant was then handcuffed. *Report of Investigation dated 2/3/2018 page 5.*

11. Defendant was taken into custody and was charged in a one count indictment filed May 14, 2018, with 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. *Doc # 17*

II. Argument

The Fifth Amendment to the Constitution of the United States provides that “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury....” In *Giglio v. United States* the Supreme Court of the United States determined that “deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972), quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935). The Tenth Circuit has quoted *Bank of Nova Scotia* and *Pino* as determining, “[A]s a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendant[].” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988). But we may dismiss an indictment “for prosecutorial misconduct which is flagrant to the

point that there is some significant infringement on the grand jury's ability to exercise independent judgment." *United States v. Pino*, 708 F.2d 523, 530 (10th Cir.1983)" *United States v. Hillman*, 642 F.3d 929, 933–34 (10th Cir. 2011).

Defendant was prejudice in the Grand Jury proceedings. Special Agent Perry testified to the Grand Jury that he "asked for and received permission to speak with" Defendant when in fact, when Special Agent Perry asked if he could speak with Defendant, Defendant replied "no, I'm sleeping." *Transcript of Proceeding, Matter 3, May 8, 2018, Testimony of Jarrell W. Perry, page 3, line 8*, Attached as Exhibit A, and *Audio Recording of Encounter*. By continuing the encounter Special Agent Perry violated Defendant's Fourth Amendment rights and conducted an illegal search of Defendant's bag. By his testimony, Special Agent Perry led the Grand Jury to believe he had conducted a legal, consensual search of Defendant and therefore there was probable cause for his arrest. The recording of the encounter contradicts this important representation to the Grand Jury.

III. Conclusion

The government is required to show by a preponderance of the evidence that an encounter between police and a citizen is consensual. Here, there is no evidence that Defendant consented to the encounter with Special Agent Perry. Based on the totality of the circumstances and the unconstitutional and illegal encounter of Special Agent Perry and Defendant Rodolfo Rodriguez Defendant's arrest was unconstitutional and no charges should have been brought before the Grand Jury. Because Special Agent Perry provided testimony before the Grand Jury that was not correct regarding the consensual encounter, and the testimony was prejudicial to Defendant, the indictment should be dismissed.

Respectfully submitted,

WALZ AND ASSOCIATES, P.C.

/s/ Jerry A. Walz

JERRY A. WALZ, ESQ.

Attorney for Defendant Rodolfo Rodriguez, Jr.

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I HEREBY CERTIFY that on the 9th day of August, 2019, I filed the foregoing electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

/s/ Jerry A. Walz

Jerry A. Walz

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 18-1568 WJ

RODOLFO RODRIGUEZ,

Defendant.

**MEMORANDUM OPINION AND ORDER
DENYING DEFENDANT'S MOTION TO DISCLOSE
SPECIAL AGENT PERRY'S PERSONNEL FILE**

THIS MATTER comes before the Court upon Defendant's Motion to Disclose Special Agent Perry's Personnel File, filed October 21, 2019 (**Doc. 64**). Having reviewed the parties' pleadings and the applicable law, the Court finds that Defendant's motion is not well-taken and, therefore, is DENIED.

BACKGROUND

Defendant was traveling on an eastbound AMTRAK train through Albuquerque New Mexico in February 2018 when he was approached by Special Agent Jarrell Perry ("Agent Perry") and Drug Enforcement Administration ("DEA") task force officer Seth Chavez. Defendant was charged with possession and distribution of heroin as a result of a search conducted by Agent Perry. In this motion, Defendant seeks the following from Agent Perry's personnel file:

- qualifications and any disciplinary actions,
- any training Special Agent Perry has attended, and

- a list of any individuals Special Agent Perry has arrested on an AMTRAK train or a Greyhound Bus during an alleged consensual encounter from February 1, 2017, through February 1, 2018.¹

Defendant has also filed a Motion to Suppress (Doc. 27) and a Motion to Dismiss Indictment (Doc. 56), both of which are set for hearing on January 7, 2020 at 9:30. Doc. 71. In those motions, Defendant disputes the voluntariness of his responses to Agent Perry's questions and the legality of Agent Perry's search of his backpack. The Court rules on this motion first, assuming that the information Defendant seeks would arguably be relevant to the credibility of Agent Perry's testimony at the hearing on the motion to suppress.

DISCUSSION

Defendant seeks Agent Perry's personnel file under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). He claims that he is entitled to any exculpatory materials that may explore Agent Perry's motives (including discriminatory or prejudicial motives) in continuing to question Defendant after Defendant allegedly declined to speak with him. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *see also Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995) (government has a duty to disclose evidence material to guilt or punishment even when the prosecutor personally did not know of that evidence); *U.S. v. Velarde*, 485 F.3d 553, 558–59 (10th Cir. 2007) (accord).

The Government claims that *Brady* allows Defendant to obtain information that is "material" to guilt or punishment but does not entitle him to information that explores an agent's

¹ The Government points out that as a DEA agent, the personnel file at issue here actually consists of several files even though each employee has an Official Personnel File. Doc. 67 at 4, n.3; *see also U.S. v. Jennings*, 960 F.2d 1488, 1491-92 (9th Cir. 1992) (discussing DOJ policy pertaining to the review of personnel files).

motives. For that reason, the Government addresses Defendant's request under Rule 16 but contends that Defendant has not shown that the requested items are "material" to preparing the defense, as required under the rule. Fed.R.Crim.P.16 (a)(1)(E).²

I. Items Regarding Agent Perry's Training, Qualifications and Disciplinary Actions

The Government is correct that *Brady* does not entitle a defendant to information that addresses the "motive" of a law enforcement officer, although potential impeachment evidence would be discoverable under *Giglio v. United States*, 405 U.S. 150, 153 (1972) (prosecution's disclosure obligation extended to evidence that is useful to the defense in impeaching government witnesses, even if the evidence is not inherently exculpatory). However, a defendant has no *Brady* or *Giglio* right to sift through an agent's personnel file to see if he can find any potentially impeaching information; rather, it is the Government "that decides which information must be disclosed." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Government's files).

The Government notes that personnel files are subject to the Privacy Act under 5 U.S.C. §552(a) and cites to other cases in the District of New Mexico denying defense motions to compel disclosure of Agent Perry's personnel files:

- *United States v. Matthew Grobstein*, CR 13-663 MV, Doc. 73
- *United States v. Jesus Francisco Fernandez*, CR 17-3237 JAP, Doc. 103
- *United States v. Kenja Treron Thomas*, CR 18-00458 WJ, Doc. 64

In each of these cases, the Court ruled that neither *Brady* nor *Giglio* required disclosure of Agent Perry's entire personnel file, and that it is up to the Government to decide which information is material and must be disclosed, relying on *Pennsylvania v. Ritchie*. Also, in each

² The "materiality" requirement under Rule 16 is "broader than *Brady*" in that it mandates disclosure of any material information, whether exculpatory or not. *U.S. v. Muniz-Jaquez*, 718 F.3d 1180, 1183 (9th Cir. 2013).

of these cases, the Government was ordered to review Agent Perry's personnel files in connection with the DEA's investigation of alleged perjury by Agent Perry in *U.S. v. de la Campa-Rangel*, 519 F.3d 1258 (10th Cir. 2008) (*Campa-Rangel*); and then disclose any impeachment evidence to defendant if such material was contained in the files.

Under United States Supreme Court precedent, Defendant is not entitled to make its own review of Agent Perry's personnel files to determine whether they contain any *Brady/Giglio* material and so Defendant's request is denied on that issue. However, what is less clear is whether the Government should be ordered to conduct a review of Agent Perry's personnel files prior to a hearing on the pending Motions to Suppress/Dismiss in order to decide whether the requested items contain any *Brady, Giglio* or impeachment evidence.

Defendant's requests for information on Agent Perry's training, qualifications and disciplinary actions are far more generic than the requests for categories of documents related to an investigation into Agent Perry's alleged perjury in the *Campa-Rangel* case. Here, Defendant's request to comb through Agent Perry's personnel file seems more like a request for permission to embark on a fishing expedition than a request for documents which have a plausible link to potential impeachment evidence. The Government acknowledges its ongoing obligation to conduct reviews and disclose potential *Brady/Giglio* material to Defendant. The Court finds that there is no need to impose Defendant's timeline on the Government to carry out this obligation, particularly in light of the nature of the requested items, and so the Government will not be required to conduct specific reviews of material other than as part of its normal review and disclosure obligations.

Accordingly, Defendant's request for information from Agent Perry's personnel files regarding qualifications and any disciplinary actions, and any training he has attended, is DENIED.

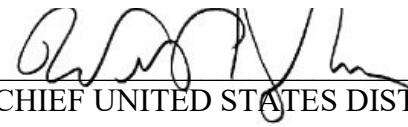
II. List of Other Arrestees

Defendant also claims that he was "selected and singled out" by Agent Perry to be questioned and seeks information to explore his "mindset in singling out Defendant." However, Perry's subjective "mindset in singling out Defendant" is irrelevant to a Fourth Amendment inquiry into the legality of the questioning and the search. *See Williams v. Denver*, 99 F.3d 1009, 1024 n.3 (10th Cir. 1996) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)) (officer's conduct must be viewed objectively, without regard to his state of mind in determining whether a substantive constitutional violation has occurred).

The Government argues that inasmuch as Defendant suggests that he was subjected to selective enforcement, he fails to satisfy the rigorous standard of producing evidence of discriminatory effect and discriminatory intent. *See United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006). To make a credible showing of discriminatory effect, a defendant must show that a similarly situated individual was not arrested or referred for federal prosecution for the offense for which the defendant was arrested and referred. *Id.*

The Court agrees with the Government that Defendant is just speculating that the requested list of arrestees may reveal bias on the part of Agent Perry. Moreover, a list of other individuals who *were* arrested by Agent Perry is really irrelevant under a selective enforcement theory, since the "similarly situated individual" would be an individual who was *not* arrested. Thus, the information sought is not material to a claim of selective enforcement and Defendant's request for that material is also DENIED.

IT IS SO ORDERED.



CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) CRIMINAL NO. 18-1568 WJ
)
RODOLFO RODRIGUEZ, JR.,)
)
Defendant.)

CONDITIONAL PLEA AGREEMENT

Pursuant to Rule 11(a)(2), Fed. R. Crim. P., the parties hereby notify the Court of the following agreement between the United States Attorney for the District of New Mexico, the Defendant, **RODOLFO RODRIGUEZ, JR.**, and the Defendant's counsel, Jerry Walz, Esq.

REPRESENTATION BY COUNSEL

1. The Defendant understands his right to be represented by an attorney and is so represented. The Defendant has thoroughly reviewed all aspects of this case with his attorney and is fully satisfied with that attorney's legal representation.

RIGHTS OF THE DEFENDANT

2. The Defendant further understands the Defendant's rights:

1. to plead not guilty, or having already so pleaded, to persist in that plea;
2. to have a trial by jury; and
3. at a trial:
 - a) to confront and cross-examine adverse witnesses,
 - b) to be protected from compelled self-incrimination,

- c) to testify and present evidence on the Defendant's own behalf, and
- d) to compel the attendance of witnesses for the defense.

WAIVER OF RIGHTS AND PLEA OF GUILTY

3. The Defendant hereby agrees to waive these rights and to plead guilty to a one-count indictment, charging a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), that being Possession with Intent to Distribute 1 Kilogram and More of Heroin. The plea is conditioned upon the reservation of right pursuant to Rule 11(a)(2), Fed. R. Crim. P., to appeal the Court's order denying Defendant's Motion to Suppress and denying Defendant's Motion to Dismiss Indictment (Doc. 100).

SENTENCING

- 4. The Defendant understands that the maximum penalty the Court can impose is:
 - a. imprisonment for a period of not less than ten (10) years to life;
 - b. a fine not greater than \$10,000,000;
 - c. a mandatory term of supervised release of not less than five (5) years to follow any term of imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the Defendant's supervised release could be revoked--even on the last day of the term--and the Defendant could then be returned to another period of incarceration and a new term of supervised release.); and
 - d. a mandatory special penalty assessment of \$100.00.

5. The Defendant may be eligible for the "safety valve" provisions set forth at 18 U.S.C. § 3553(f)(1)-(5) and U.S.S.G. § 5C1.2. If the Defendant establishes eligibility for each of the elements in § 3553(f)(1)-(5) and U.S.S.G. § 5C1.2, the Defendant would be entitled to a reduction of two levels from the base offense level as calculated under the sentencing guidelines,

and the sentence imposed could be less than the statutory minimum sentence that would otherwise apply.

6. The parties recognize that the federal sentencing guidelines are advisory, and that the Court is required to consider them in determining the sentence it imposes.

ELEMENTS OF THE OFFENSE

7. If this matter proceeded to trial, the Defendant understands that the United States would be required to prove, beyond a reasonable doubt, the following elements for violations of the charges listed below:

21 U.S.C. §§ 841(a)(1) and (b)(1)(A), that being, possession with intent to distribute 1 Kilogram and more of Heroin;

First: the defendant knowingly and intentionally possessed a controlled substance;

Second: the substance was in fact heroin;

Third: the defendant possessed the substance with the intent to distribute it; and

Fourth: the weight of the substance was more than 1 kilogram.

DEFENDANT'S ADMISSION OF FACTS

8. By my signature on this plea agreement, I am acknowledging that I am pleading guilty because I am, in fact, guilty of the offense to which I am pleading guilty. I recognize and accept responsibility for my criminal conduct. Moreover, in pleading guilty, I acknowledge that if I chose to go to trial instead of entering this plea, the United States could prove facts sufficient to establish my guilt of the offense to which I am pleading guilty beyond a reasonable doubt. I specifically admit the following facts related to the charges against me, and declare under penalty of perjury that all of these facts are true and correct:

a. On or about February 1, 2018, in Bernalillo County, in the District of New Mexico, I, **RODOLFO RODRIGUEZ, JR.**, unlawfully, knowingly and intentionally possessed over 1 kilogram and more of a mixture and substance containing a detectable amount of heroin. Specifically, I possessed with the intent to distribute heroin when I was on board the Amtrak Train Station in Albuquerque and had a large-shaped, packaged bundle in between my legs prior to it being seized by law enforcement incident to my arrest. I have learned and admit that the narcotics I possessed lab-tested positive for heroin and totaled an amount that exceeded 1 kilogram of heroin.

9. By signing this agreement, the Defendant admits that there is a factual basis for each element of the crime to which the Defendant will plead guilty. The Defendant agrees that the Court may rely on any of these facts, as well as facts in the presentence report, to determine the Defendant's sentence, including, but not limited to, the advisory guideline offense level.

RECOMMENDATIONS

10. Pursuant to rule 11(c)(1)(B), the United States and the Defendant recommend as follows:

- a. The parties recommend pursuant to Fed. R. Crim. P. 11(c)(1)(B) that the Defendant receive a role reduction of 2 levels from the base offense level, as a minor participant in the offense of conviction, under USSG § 3B1.2.
- b. The United States agrees to recommend a sentence within the applicable sentencing guideline range.
- c. As of the date of this agreement, the Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the

Defendant's criminal conduct. Consequently, pursuant to USSG § 3E1.1(a), so long as the Defendant continues to accept responsibility for the Defendant's criminal conduct, the Defendant is entitled to a reduction of two levels from the base offense level as calculated under the sentencing guidelines, and if applicable, a reduction of an additional offense level pursuant to USSG § 3E1.1(b).

- d. The Defendant understands that the above recommendations are not binding on the Court and that whether the Court accepts these recommendations is a matter solely within the discretion of the Court after it has reviewed the presentence report. Further, the Defendant understands that the Court may choose to vary from the advisory guideline sentence. If the Court does not accept any one or more of the above recommendations and reaches an advisory guideline sentence different than expected by the Defendant, or if the Court varies from the advisory guideline range, the Defendant will not seek to withdraw the Defendant's plea of guilty. In other words, regardless of any of the parties' recommendations, the Defendant's final sentence is solely within the discretion of the Court.

11. Apart from the recommendations set forth in this plea agreement, the United States and the Defendant reserve their rights to assert any position or argument with respect to the sentence to be imposed, including but not limited to the applicability of particular sentencing guidelines, adjustments under the guidelines, departures or variances from the guidelines, and the application of factors in 18 U.S.C. § 3553(a).

12. Regardless of any other provision in this agreement, the United States reserves the right to provide to the United States Pretrial Services and Probation Office and to the Court any information the United States believes may be helpful to the Court, including but not limited to information about the recommendations contained in this agreement and any relevant conduct under USSG § 1B1.3.

DEFENDANT'S ADDITIONAL AGREEMENT

13. The Defendant understands the Defendant's obligation to provide the United States Pretrial Service and Probation Office with truthful, accurate, and complete information. The Defendant represents that the Defendant has complied with and will continue to comply with this obligation.

14. The Defendant agrees that, upon the Defendant's signing of this plea agreement, the facts that the Defendant has admitted under this plea agreement as set forth above, as well as any facts to which the Defendant admits in open court at the Defendant's plea hearing, shall be admissible against the Defendant under Federal Rule of Evidence 801(d)(2)(A) in any subsequent proceeding, including a criminal trial, and the Defendant expressly waives the Defendant's rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 with regard to the facts the Defendant admits in conjunction with this plea agreement.

15. By signing this plea agreement, the Defendant waives the right to withdraw the defendant's plea of guilty pursuant to Federal Rule of Criminal Procedure 11(d) unless (1) the court rejects the plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(5) or (2) the Defendant can show a fair and just reason as those terms are used in Rule 11(d)(2)(B) for requesting the withdrawal. Furthermore, Defendant understands that if the court rejects the plea

agreement, whether or not defendant withdraws the guilty plea, the United States is relieved of any obligation it had under the agreement and defendant shall be subject to prosecution for any federal, state, or local crime which this agreement otherwise anticipated would be dismissed or not prosecuted.

WAIVER OF APPEAL RIGHTS

16. The Defendant is aware that 28 U.S.C. § 1291 and 18 U.S.C. § 3742 afford a defendant the right to appeal a conviction and the sentence imposed. Acknowledging that, the Defendant knowingly waives the right to appeal the Defendant's conviction and any sentence, including any fine, at or under the maximum statutory penalty authorized by law, with the exception that the defendant retains the right to appeal the court's denial of his motion to suppress and his motion to dismiss indictment, (Doc. 100), limited to the arguments presented to the district court by the defendant in support of those motions. In addition, the Defendant agrees to waive any collateral attack to the Defendant's conviction and any sentence, including any fine, pursuant to 28 U.S.C. §§ 2241, 2255, or any other extraordinary writ, except on the issue of defense counsel's ineffective assistance.

GOVERNMENT'S AGREEMENT

17. Provided that the Defendant fulfills his obligations as set out above, the United States agrees that:

a. The United States will not bring additional criminal charges against the Defendant arising out of the facts forming the basis of the present indictment.

18. This agreement is limited to the United States Attorney's Office for the District of New Mexico and does not bind any other federal, state, or local agencies or prosecuting authorities.

VOLUNTARY PLEA

19. The Defendant agrees and represents that this plea of guilty is freely and voluntarily made and not the result of force or threats or of promises (other than the promises set forth in this agreement and any addenda). There have been no representations or promises from anyone as to what sentence the Court will impose. The Defendant also represents that the Defendant is pleading guilty because the Defendant is in fact guilty.

VIOLATION OF PLEA AGREEMENT

20. The Defendant understands and agrees that if he violates any provision of this plea agreement, the United States may declare this plea agreement null and void, and the Defendant will thereafter be subject to prosecution for any criminal violation including, but not limited to, any crime or offense contained in or related to the charges in this case, as well as perjury, false statement, and obstruction of justice.

SPECIAL ASSESSMENT

21. At the time of sentencing, the Defendant will tender a money order or certified check payable to the order of the **United States District Court**, District of New Mexico, 333 Lomas Blvd. N.W., Suite 270, Albuquerque, New Mexico 87102, in the amount of \$100.00 in payment of the special penalty assessment described above.

ENTIRETY OF AGREEMENT

22. This document and any addenda are a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties. This agreement is effective upon signature by Defendant and an Assistant United States Attorney.

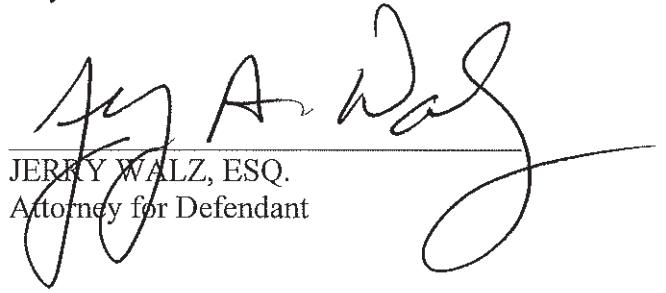
AGREED TO AND SIGNED this 7th day of August, 2020.

JOHN C. ANDERSON
United States Attorney



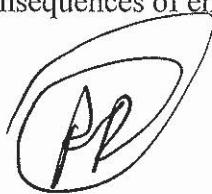
SAMUEL A. HURTADO
Assistant United States Attorney
201 Third Street N.W., Suite 900
Post Office Box 607
Albuquerque, New Mexico 87102
(505) 346-7274

I have carefully discussed every part of this agreement with my client. Further, I have fully advised my client of my client's rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant Sentencing Guidelines provisions, and of the consequences of entering into this agreement. In addition, I have explained to my client the elements to each offense to which he is pleading guilty. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.



JERRY WALZ, ESQ.
Attorney for Defendant

I have carefully discussed every part of this agreement with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant Sentencing Guidelines provisions, and of the consequences of entering into this agreement.

A handwritten signature in black ink, appearing to read "RR".

RODOLFO RODRIGUEZ, JR.
Defendant

NOV 24 2020

AO 243 (Rev. 5/85)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

MITCHELL R. ELFERS /mn

United States District Court	District	NEW MEXICO CLERK ALBUQUERQUE
Name of Movant	Prisoner No.	Case No.
Rodolfo Rodriguez	47735-079	CR-18-15684J
Place of Confinement	CCA CabotA	
UNITED STATES OF AMERICA	v. Rodolfo Rodriguez (name under which convicted)	

MOTION

1. Name and location of court which entered the judgment of conviction under attack NEW MEXICO

Albuquerque

2. Date of judgment of conviction NOV. 18, 2020

3 Length of sentence 46 months

4. Nature of offense involved (all counts) ONE Count, 21 USC.
841 (a)(1) and (b)(1)(A)

5. What was your plea? (Check one)

(a) Not guilty
(b) Guilty
(c) Nolo contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury
(b) Judge only N/A

7. Did you testify at the trial?

Yes No

N/A

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

"Pending"

(a) Name of court _____

(b) Result _____

N/A

(c) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes No

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court ALBUQUERQUE NEW MEXICO(2) Nature of proceeding CIVIL Rights Complaint (BIVINS)42 U.S.C. § 1983 #CU-19-0011 (Action)(3) Grounds raised PURJURY "U.S. V. DE LA CAMPAS - RANGEL 519 F3d 1258" Also SEE Proceeding DATED NOV. 18, 2020 Sentencing of DEFENDANT AND LAST ARGUMENT BEFORE SENTENCING of 46 months

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No (5) Result dismissed FOR lack of Payment Filing FEE(6) Date of result Aug. 2020

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

N/A

(2) Nature of proceeding _____

(3) Grounds raised _____

N/A

A.O. 243 (Rev. 5-3-1)

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

(5) Result _____

N/A

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes No
(2) Second petition, etc. Yes No

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

Yes I did Appeal, But it was dismissed with out prejudice for lack of payment

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: Civil + Criminal Purjary, on the Stand, in grand jury Proceedings Claiming To BE D.E.A.

Supporting FACTS (state briefly without citing cases or law) Agent Perry Lied ACCORDING TO 10th (10) Court of APPEALS in RE: DELA-CAMPA-RANGEL. THEN AGAIN DURING SUPPRESSION HEARING Claiming To BE D.E.A. EVEN going SO FAR AS TO Hold up A D.E.A. BADGE THAT WAS NOT HIS IT Belonged To: ?

B. Ground two: Illegal SEARCH and SEIZURE, TRANSPASSING, Kidnapping etc.

Supporting FACTS (state briefly without citing cases or law): Recording, Clearly STATES "NO I AM ASLEEP ASLEEP!" MORE THEN ONCE, THE TRANSCRIPT SHOWS AND READS "INAUDIBLE". IS THIS RECORDING TANDEM WITH 3, such BAD QUALITY WAS ALLOWED AS EVIDENCE (Rule) NO I.D. W/bridge

C. Ground three: CITY MANAGER'S OFFICE + LAW ENFORCEMENT operating PROCEDURES Doc. 461 Dated 3-8-14 EXHIBIT "A" + "B"

Supporting FACTS (state briefly without citing cases or law): Greyhound / Amtrak is PRIVATE PROPERTY AND YOU MUST NAME A designated Film CREW FROM THE CITY MANAGER'S OFFICE EXHIBIT "A" #4-3# TO PREVENT Violations of THE TRAVELING

Public's Civil Rights greyhound will not Allow Warrantless Searches, Amtrak need Consider D. Ground four: SECURITY & CONSUMER PRIVACY Protection Act. Violation

Supporting FACTS (state briefly without citing cases or law): THE FEDERAL TRADE COMMISSION Protects From Amtrak Giving up INFO ON THE TRAVELING CIVIL RIGHTS PERRY AND OTHER HAD ACCESS TO "Passenger NAMED RECORDS" (PNR) in Violation of TRANSPORTATION STATUTE" AND Boosting About it in THE MCKENZIE CASE SEE: Transcript ENCLOSED

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

THE RECORD is SO LONG THAT it could Bi 5 HRS. in ONE PROCEEDING. SO RECORD ENCLOSED ENCLOSED is ALL PROCEEDING SEE ATTACHMENT:

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein: WALZ & ASSOCIATES Jerry WALZ 133 EUBANK Blvd N.E., ABQ NEW MEXICO 87123

(a) At preliminary hearing

WALZ

(SAMS)

(b) At arraignment and plea

WALZ

A

(c) At trial

WALZ

Above

(d) At sentencing

AO 243 (Rev. 5/85)

(e) On appeal

Pending Direct Appeal

(f) In any post-conviction proceeding

None

(g) On appeal from any adverse ruling in a post-conviction proceeding

None

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court which imposed sentence to be served in the future:

Supervised Released 3 yrs

(b) Give date and length of the above sentence:

Nov. 18, 20203 yrs Supervised Released

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

(date)


Signature of Movant
Roberto Rodriguez

Law Enforcement Operating Procedures

This procedure is to clarify the relationship between Greyhound Lines Inc. and Law Enforcement operating within Greyhound terminal property.

Greyhound welcomes Law Enforcement as it is our mission to create an atmosphere of safety and security for its passengers and staff. Greyhound also recognizes that due to its national presence in the passenger transportation field and its growing presence in the bulk package arena, Greyhound can be a target of opportunistic individuals or entities.

Greyhound therefore welcomes a partnership with Law Enforcement to enhance our passengers, staff and the local community's safety but at the same time insure that the rights of our staff and passengers are not infringed upon. Therefore the following is Greyhound's Memorandum of Understanding to Law Enforcement for activities within the terminal property and during its operations when invited on Greyhound property.

1. Law Enforcement Officers are allowed unsupervised and unimpeded access to any area of the property that is also open to the general public:
 - a. Parking areas
 - b. Lobby and Food Service Areas
 - c. Boarding and loading areas
 - d. Restrooms
 - e. Designated area within the terminal to be used as a law enforcement substation
2. Law Enforcement Officers must receive specific permission from the City Manager, be escorted by Greyhound or security staff and give the reason for entering the following locations:
 - a. Greyhound Offices
 - b. Stored Baggage/Package areas
 - c. Maintenance Shop
 - d. Garage Areas
 - e. Bus Service Stations
3. City Managers will designate a quiet, private and camera equipped area to speak with individuals who may be observed or suspected of criminal activity. This area is to be used to determine if an individual will be arrested or allowed to continue with their travel and not to be used to conduct a lengthy interrogation. This does not apply to a pre-approved and designated substation for law enforcement.
4. Law Enforcement may view video and review documents in the terminal and in the presence of a City Manager or in their absence the highest ranking Greyhound Supervisor if related to an active incident that occurred in the terminal but may not make copies for removal from the terminal property. Copies and request for documentation to be taken off the property must be

DEFENDANT'S
EXHIBIT

A

approved in advance by Greyhound Corporate Legal. Requests for video or documentation related to an ongoing investigation or an incident that became knowledgeable after the fact must be approved by Greyhound Corporate Legal.

5. Greyhound staff will not communicate verbally or through written documentation on any legal matter that Greyhound potentially may be involved in. Requests to provide information either verbally, written or by subpoena by an outside entity should be forwarded immediately to the City Manager and Corporate Legal. Failure by staff to notify Greyhound of the above is in violation of Greyhound Employee Policy.
6. Law Enforcement Officers will not use Greyhound staff or contracted security officers as extension of law enforcement to conduct searches of Greyhound owned equipment or passenger's baggage or packages without the expressed permission of those parties and is not to involve Greyhound staff or contracted security officers.

This does not apply to internal Greyhound practice of conducting wandng or bag searches. This is done on a random basis of passengers by our contracted security officers with the permission of the passenger. Should the passenger deny permission of wandng or bag search the passenger is merely denied ridership. Law Enforcement becomes involved only should the search reveal the presence of illegally prohibited items (firearms, drugs, etc.)

7. Request to conduct an operation within the terminal. (VIPER or Drug Task Force)

Greyhound welcomes agencies to provide K9s for Interdiction of Drug trafficking and to conduct operations in Human trafficking and other illegal activities, Greyhound respectfully requests prior notification to the City Manager and to Greyhound's Security Operations Manager. This is not to prevent or impeded in any way such operation but to insure Greyhound provides the necessary support to insure our passengers are not unduly inconvenienced and operations continue on schedule.

8. This Memo Of Understanding is in no way to comply with an official court order or warrant issued by any Local, State , or Federal Court

From: Streiff, David <David.Streiff@greyhound.com>
Sent: Friday, June 29, 2018 2:36 PM
To: Armijo, Jeffrey L. <JLArmijo@DEA.USDOJ.GOV>
Subject: DEA Access to our property in Albuquerque

Jeffrey

I have several concerns that we need to discuss concerning DEA access to our property in Albuquerque. Effectively immediately, Greyhound is respectfully rescinding our approval for any DEA agent to operate within the terminal and /or Greyhound Areas at the Albuquerque terminal. Please give me a call to discuss this further

682-500-5440

Dave Streiff
Security Operations Manager
Greyhound Lines, Inc.
office: 214 849 8118 | 350 N. St. Paul Street, Dallas, TX 75201
fax: 214-849-6966 | david.streiff@greyhound.com | USA
greyhound.com • facebook.com/greyhoundbus • twitter.com/greyhoundbus

DEFENDANT'S
EXHIBIT

B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

in re: RODOLFO RODRIGUEZ

Petitioner.

D.C. No. CV 19-00111 MV/SMV

VS

re: 19-2098 - 19-2103

NATIONAL RAILROAD PASSENGER CORP.

d/b/a AMTRAK, AGENT J PERRY,

AGENT C. CHAVEZ,

Defendant.

MOTION FOR RELEASE ON APPEAL BOND

ENTER EXHIBITS TO SUPPORT NEW EVIDENCE

Now comes, petitioner in the entitled case, that had his appeal dismissed for lack of prosecution pursuant to 10th Cir R. 42.1. most resent new found evidence as to recording and pictures.

On February 2, 2018 Perry testified before U.S. Magistrate Judge that Rodriguez "was sitting" but in the new recording it is clear that Rodriguez said "no I am asleep"

this perjury went on during the grand jury proceeding, Perry perjured himself by not being truthful to the grand jury and to U.S.

Magistrate Judge as to the recording that was not authorized by the courts. Above all the recording was never played for the grand jury, nor was the grand jury advised that Perry had perjured himself at the appeals court, this exculpatory evidence see: United States v. De La Campa Rangel, 519 F.3d 1258, violated the equal protection clause for not advising grand jury.

This prosecutorial misconduct is harmful behavior, this civil irresponsibility is regarded as socially unacceptable, it is necessary to teach the wrongdoer that perjury is fraud against the government this court has placed important procedural safeguard for the plaintiff. Unsafe conduct is causing antisocial activities a violation of criminal civil rights statute.

PRAYER

Plaintiff prays upon this court to be released on appeal bond pending the outcome of the criminal case, review of detention order according to rule 23 (c) F.R.A.P due to this newly found evidence, order district court to panel grand jury proceedings to review Amtrak employees for violating (National Labor relations Act, 29 U.S.C. @151 et seq (a) and title 49 USCS 101) civil rights of its passenger

RODOLFO RODRIGUEZ

47735-079

FILED

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

MAY 23 2019

MICHELL R. ELFERS
CLERK

UNITED STATES DISTRICT COURT
DISTRICT of NEW MEXICO

RODOLFO RODRIGUEZ

Plaintiff pro se

vs.

Case #1:19-CV-00111-MV-SMV

AMTRAK "ET. AL."

Defendant

MOTION FOR SUMMARY JUDGMENT

NOW COMES , Plaintiff in the above entitled case asking this court for relief according to Federal Rules of Civil Procedure summary judgment 56 (a) for violation of 28 U.S.C @ 1442 (c) (1)(2), 1331 ,1343 (a) ,1332 (a) 1332 (a)(1) and 509(sec 7) (1)+(2)

Count 1: Title 18 Part 1 chapter 55 @1201 Kidnapping from public transportation.

Count 2: Title 42 Chapter 21 @ 2000 (a) public health and welfare civil rights public accommodation.

Count 3: Title 18 @ 241and 242 criminal conspiracy deprivation of rights under the the color of law.

Count 4: Title 47 chapter 5 @151 interfering with telecommunications wire or radio .

NATURE OF THE CASE

In a case that involves ex.D.E.A. agents Perry and Chavez, I had four different encounters with ex D.E.A. Perry at times on a bus, other times I was on a train. Every time ex D.E.A agent Perry would try to search me. I would not allow my civil rights to be violated.

My last encounter, I was sleeping on the Amtrak train coach car when I was awoken and asked 2 questions: where is my ticket ?, Can I see your ID? All along the 2 agents were standing over me.(the paying customer with a tag on the over head luggage rack proving that I am a paying customer). With ex D.E.A. agents Perry and Chavez, in civilian clothes, with no badge or Task force vest to I.D. Them, With there hands on there weapons, in civilian clothing, working private property, with civilians, with out approval from the city managers office manages office, see exhibit: "A and B"

It was intimidating, being awoken from a deep sleep. While 2 armed men towering over me in civilian clothing. and with there hands on their weapons. I was told " Get up and raise your hands!" As I started to stand I notice I did not have any witnesses, I could have been "killed!" if I did not act right, at this point I took a chance reaching for my cell phone, in hopes that I could record my last conversation. Of this violation of my civil rights, "Due process". But to no avail, one agent pulled his weapon and the other cuffed me. I felt I was kidnapped and soon I would be killed, never saying "you are under arrest" or reading me my rights, When I was escorted to the Parking lot I asked ex D.E.A agent Chaves to see his badge, he said " I will get it for you" he opened the door to his pick up truck reached in and produced his badge proving he was on the train arresting civilians with out his D.E.A. Badge. TERM: *Debet sua cuique domus esse perfugium tutissimum.* TEXT: Each man's home should be a very safe refuge. "The law has a tender regard for the asylum of a private dwelling." like over night stay in a motel, bus ,train etc. "that is your home stead for the night".RYAN AUSTIN COLLINS, Petitioner v. VIRGINIA SUPREME COURT OF THE UNITED STATES 138 S. Ct. 1663; 201 L. Ed 2d 9; 2018 U.S. LEXIS 3210; 86 U.S.L.W. 4324; 27 Fla. L. Weekly Fed. S 279 No. 16-1027.

January 9, 2018, Argued May 29, 2018, Decided, it was well settled for the last century.

SUPPORTING LEGAL FACT
all cases at law.

More then ten years ago the U. S. court of appeals tenth circuit ruled on, "De La Campa-Rangel,

519 F.3d 1258 (10th Cir. 2008) . Saying: " We are concerned with perjury in this case and that ex. D.E.A. Agent Perry concocted a story". The appeal was abated pending direct appeal, the district court acknowledged that perjury was one issue and released "De La Campa-Rangel" with time served after 4 years of a 10 year sentence. At this point the district court refused to press charges for perjury. In violation of 1746 of title 28 U.S.C. And it reads: Who ever--(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered; that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. 976. Act Oct. 18, 1976 substituted this section for one which read: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.". 1994. Act Sept. 13, 1994, in the concluding matter, substitute "under this title" for "not more than \$2,000".

For the last 10 years ex D.E.A. Agent Jarrell Perry has continued to violated the civil rights of paying customers traveling on greyhound and Amtrak. From my personal experience I have witness

Perry opening luggage on Amtrak, down stairs while passengers are up stairs asleep, all this is going on with out supervision from the city managers office or a "body cam" to prove daily how many civilians civil rights are violated, all this paying customer deserve the equal protection clause and due process from the Fourteenth Amendment. People like: NORA ASUSENA AMADOR-BELTRAN, spoke no English, JESUS FRANCISCO FERNANDEZ Ms. Ramos-Burciaga .EDGAR GARCIA-GARIBAY, . UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO 2018 U.S. Dist. LEXIS 136888 Crim. No. 17-0691 MV August 14, 2018, Decided August 14, 2018, Filed, SA Perry introduced himself as a police officer, TFO Davis testified, he did not hear Mr. Garcia-Garibay's question, court finds this testimony to lack credibility. Mr. Garcia-Garibay's question is just as audible in the recording as his earlier statements throughout their conversation. (the court noted)

The practice of turning the devices on and off during the encounter prevents the Court from knowing the precise duration of the encounter and leaves open the possibility that additional relevant interactions occurred while the devices were turned off. "all with the same M.O.!"

Plaintiff questions, Is ex D.E.A. Perry a mind reader that he can predict what the civilian traveler is about to say, turning the recordings off for his convenience?, or is he tampering with evidence ?

RULE 60 (3) (b)

In the Eleventh Circuit case granting Rule 60(b)(3) relief discussed by the majority, Harre, 750 F.2d at 1503, the court found "that the record support[ed] Appellants' argument that a material expert witness testified falsely on the ultimate issue in the case, where the defense attorneys knew or should have known of the falsity of the testimony." Id. at 1503 (emphasis added). Nothing in Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988), is to the contrary. Bonar, a case involving

vacation of an arbitrator's punitive damages award, cites Harre for the proposition that "[t]here is

no doubt that perjury constitutes fraud," and that the perjury is

material when it goes to a "central issue" in a case. Id. at 1383 n.7 & 1385.

The Eleventh Circuit in Bonar did not discuss Harre in the context of party complicity under Rule 60(b)(3) within the meaning of the Federal Arbitration Act .REMBRANDT VISION TECHNOLOGIES, L.P., Plaintiff-Appellant v. JOHNSON & JOHNSON VISION CARE, INC., Defendant-Appellee 818 F.3d 1320; 2016 U.S. App. LEXIS 6332; 118 U.S.P.Q.2D (BNA) 1523; 94 Fed. R. Serv. 3d (Callaghan) 827 2015-1079

Did the grand jury know of this exculpatory evidence, that ex D.E.A. Perry committed perjury or that NORA BELTAN did not speak English,? along with U.S. v. Rodriguez case# 18-cr-1568 WJ the grand jury should have been advised that ex D.E.A. Perry committed fraud. Now could he have been a convicted felon in possession of a weapon, trespassing and kidnapping on greyhound property, This violation of due process needs to be addressed. (**Government failed to prosecute**)

RELIEF REQUESTED

For the conspiracy between, Amtrak employees, ex D.E.A. Perry, Chavez and the United States Attorney's office Plaintiff seeks Rule 23. Class Actions certification along with 1989. Racketeer Influenced and Corrupt Organizations Act (RICO) 28 USCS • 1738, on federal action under Racketeer

Corrupt Organizations Act (RICO) (18 USCS • • 1961 et seq.) where it was clear that factual issues to

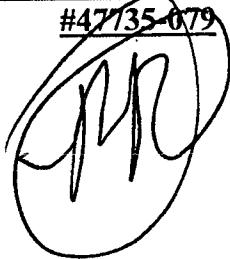
be litigated under RICO claim were identical with those litigated in prior action and were essential to judgment in perjury case, so that summary judgment pursuant to Rule 56 applies with equal force in context of habeas corpus cases. Clark v. Johnson, 202 F.3d 760 (5th Cir.), cert. denied, 531 US 831, 121 S Ct 84, 148 L Ed 2d 46 (2000). may be properly entered in favor of Plaintiffs in RICO action. J.M. Muniz, Inc. v. Mercantile Texas Credit Corp., 833 F.2d 541 (5th Cir. 1987). moreover I must be

releases from custody A.S.A.P. According to habeas corpus relief, and have ex D.E.A. Perry prosecuted for perjury and threats directed at Plaintiff via U.S. Attorney's office, my attorney Jerry waltz and Sam Wise. Pay attorney's fees, as well as. \$ 10,000,000 U.S.D. For pain and suffering.

That is quantify 10 times, for each count, for a total of 4 counts along with settlement of D.O.J Litigation 2018 against the city of Albuquerque police department as well as the city managers office.

RODOLFO RODRIGUEZ

#47735-079



UNITED STATES DISTRICT COURT

DISTRICT of NEW MEXICO

RODOLFO RODRIGUEZ

Plaintiff pro se

vs.

Case #1:19-CV-00111-MV-SMV

AMTRAK "ET. AL."

Defendant

MOTION FOR PRESERVATION OF EVIDENCE

NOW COMES, Plaintiff pro se in the above entitled case asking this court to intervene in the criminal courts, to preserve evidence according to Fed. R. Evid. 1002 and Fed. R. Evid. 1004(1) specifically, U.S. v. Rodriguez case # 18-cr-1568 WJ

CASE SUMMARY

Motion for preservation will state all grounds that could meet reasonable specification standard to comply with particularity requirement of Rule 7(b)(1); , amendments are allowed if they consist of elaboration of ground already set out in original motion, **“ie GRAND JURY perjury”**

1) Transcript of proceedings from October 22, 2018 9:35 am. Heard before the honorable Laura Fashing have certain inconsistency, on page 12 line 4 **“Threatening him, et cetera”**. What was said by my attorney, was, **“threatening him and he feels he was kidnapped”** then Judge Fashing interrupted, **“we know all about Perry!”** why this exchange reads **et. Cetera** on transcripts behooves Plaintiff, same page line 5 **“this was not their first encounter”**. Plaintiffs first 3 encounter ended with

civilians being present when ex Perry was told "I know who you are and no you can't search me or I have no time." (coming from a famous movie, from the 1960 "I know who you are and I saw what you did".) In my last encounter with ex D.E.A. Perry and Chavez, I was taken advantage of. With no witnesses.

2) Transcripts dated February 1, 2018. Interview of Rodolfo Rodriguez "bag Search" page 2 line 3 and page 3 line2, claim to be "inaudible." Plaintiff responds two times with "I know who you are and no you can't search me". The transcript show inaudible both times. Plaintiff insist recordings were tampered with. After I was escorted off the Amtrak by ex D.E.A Chavez, I was placed on greyhound property as I waited to be transported I asked ex D.E.A Chavez if I could see his D.E.A. badge, he opened his pick up truck reached into the side pocket producing a D.E.A. Badge while standing in the parking lot proving to me that he was on board the Amtrak with no badge.

3) Transcripts dated May 8, 2018. FEDERAL GRAND JURY page 2 line 13 ex D.E.A Perry claims to be employed by the D.E.A. I have asked the criminal courts, via my attorney, for a F.O.I.A. But to no avail. Page 3 line 5 thru 9. The GRAND JURY was never told that I was asleep, after a long over night trip. I was rudely awaken, as I looked up, I sounded of "I know who you are and no you cant search me." no D.E.A. badge was ever displayed nor did Perry announce he was D.E.A. All this could have been avoided if ex D.E.A. Perry had a body cam or if the city manager was aware of agents boarding public transportation in violation of "greyhound policy" Plaintiff questions, "was the GRAND JURY properly vetted, as well as informed, as to policy's that exist when dealing with the Traveling civilized public for its safety?" Federal Rules of Criminal Procedure Rule 6.(a)1,(b)2 and 28 U.S.C. 1867(e). The court must order that enough legally qualified persons be summoned to meet this requirement. This standard was not met.

CONCLUSION

Transcripts from grand jury do not match transcripts from recording of February,1 2018 and that

proves that Perry has perjured him-self, once again, continues to have a disregard for the oath he has taken. More over Perry failed to ask Plaintiff for a prescription for the medication he was traveling with, GRAND JURY shall consist of not less than 16 and not more than 23 members continues existing law, 28 U.S.C. § 419 [see 18 U.S.C. § 3321]. But only one juror questioned Perry about asking for a prescription for medication, response was vague. **This exchange leads to suspicion.** If transcripts don't show inaudible they show et cetera TERM: et cetera. TEXT: 1. And so forth, and others, and other things, and the rest, and so on. **When freedom is at stake every essences of a court exchange must be on film or recorded.** Plaintiff's questions why? "we know all about Perry" showed up as et. Cetera. For the last ten years this court had knowledge of the misconduct but refuses to put a stop to it see: 233 F.3d 1067 (8th Cir. 2000), cert. denied, 534 U.S. 1023, 122 S. Ct. 552, 151 Ed. 2D 428 (2001) (when defendant has alleged prosecutorial misconduct during grand jury proceedings, dismissal of indictment is proper only when defendant demonstrates flagrant misconduct and substantial prejudice.) **The recordings were never played for the GRAND JURY.**

Fed.R.Crim.P. 41,

PRAYER

Plaintiff prays upon this court for relief to grant, a court order. For F.O.I.A on Perry. Fed. R. Evid. 1002 and Fed. R. Evid. 1004(1) as well as appoint a team of independent investigators to preserve all evidence from U.S. Rodriguez case # 18-cr-1568 WJ (criminal case), applying all evidence to this civil case including but not limited to all court room proceeding **"video as well as audio".**

RODOLFO RODRIGUEZ
47735-079

3

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RODOLFO RODRIGUEZ

Plaintiff pro se

vs.

Case #1:19-CV-00111-MV-SMV

AMTRAK "ET. AL."

Defendant

Writs of Mandamus

NOW COMES, Plaintiff in the above entitled case asking this court for leave according to Rule 21 Federal Rules of Appellate Procedure. In this particular case, Plaintiff is asking permission from the courts to be excluded from the requirements of Rule 21(a)(2)(C). allowing review under Rule 21(b)(4)+(c) +(d) by order in a particular case. Release from custody according to rule 23 (c) F.R.A.P.

CASE SUMMARY

The facts necessary to understand this issues are presented by the petitions enclosed. The case of ex D.E.A. Jerrall Perry committed perjury more the ten years ago, this courts acknowledgment of the De la campa-rangel case no. 519 F.3d 1258; 2008 U.S. App. LEXIS 6286 went largely unnoticed by the lower courts, violating due process, misprision of a felony by officers of the courts see: Bratton v United States (CA10 Okla) 73 F2d 795 harboring of a criminal, intimidation of witnesses, such concealment or failure to disclose being that of one owing allegiance to the United States .although the defendant was released with time served, ex. D.E.A. Perry was never prosecuted for perjury. For the last ten years the lower courts continue to use the testimony of ex. D.E.A. Perry in the Grand jury proceeding without the Grand Jury knowing, that the testimony that they are about to receive is coming from a perjured individual, who has violated the civil rights of the travailing public for the last ten years years, by going against greyhound policy titled: Operating Procedures. The most recent perjury came in

the case of .EDGAR GARCIA-GARIBAY, 2018 U.S. Dist. LEXIS 136888 Crim. No.17-0691MV August 14, 2018, Decided. In the span of ten years at least one time has ex. D.E.A. Perry conspired with Amtrak employees by sending the passenger manifest from flagstaff AZ. To Albuquerque NM. To ex. D.E.A. Perry's e-mail or cell phone. **perjury AUTHORITY:** 1. State v Miller, 26 RI 282, 58 A 882. 2. State v Ledford, 195 Wash 581, 81 P2d 830. Perry told the grand jury Plaintiff was seated, **I was asleep!** With my back pack as my pillow. Most recent threats coming from this agent directed at Plaintiff via A.U.S.A. To my now attorney Jerry Walz. This has been brought to my attention more then one time.

CONCLUSION

1 The relief sought; Injunction relief, restraining order issued pursuant to an order or decree obtained through this honorable court against Jerrall Perry, preventing Perry from testifying or pursuing any investigations, **keeping Perry a safe distance from plaintiff**. In a case of perjury nobody is above the law, not the president's one time fixer nor Perry. CONGRESS MADE THAT CLEAR. Emergency relief from Custody, dismiss indictment settle civil matter to prevent further abuse. According to D.O.J.

Settlement of 2018 against Albuquerque police. **DUE PROCESS AUTHORITY:** Brown v Grant,

2 The issues presented; prosecution misconduct, threatening bodily injury, Grand jury manipulation, (withholding recordings) perjury to petite jury and Grand jury proceedings, Judges accepting a plea agreements on perjured testimony, with no objection from attorneys. **In violation of due process.**

The use of recent tech is a must. Our peers deserve to know what agents are doing with our courts.

3 The facts necessary to understand the issue presented by the petition; TITLE 49 TRANSPORTATION SUBTITLE V. RAIL PROGRAMS PART C. PASSENGER TRANSPORTATION CHAPTER 243.

AMTRAK 24316. c) Use of information. Neither the National Transportation Safety Board, the Secretary of Transportation, the Secretary of Homeland Security, nor a rail passenger carrier may release to the public any personal information on a list obtained under subsection (b)(1), but may provide information on the list about a passenger to the passenger's family members to the extent that the Board or a rail passenger carrier considers appropriate. This Statue was violated by

Amtrak employees by sending the passenger manifest from flagstaff AZ. To Albuquerque NM. To ex. D.E.A. Perry's e-mail or cell phone. This case was litigated by my now criminal attorney Jerry Walz from Walz and associates. (e) Limitation on liability. A rail passenger carrier shall not be liable for damages in any action brought in a Federal or State court arising out of the performance of the rail passenger carrier in preparing or providing a passenger list, or in providing information concerning a train reservation, pursuant to a plan submitted by the rail passenger carrier under subsection (b), unless such liability was caused by conduct of the rail passenger carrier which was grossly negligent or which constituted intentional misconduct. "Accidents and incidents" are covered by 20101. Purpose [49 USCS cc 20101] 24710. Long-distance routes (a) Annual evaluation.

4 The reasons why the writ should be issued: If you do not have permission from the city managers office, as required via greyhound policy titled: Operating Procedures, then you are stalking then harassing traveling civilian public. Violation of D.O.J. Settlement of 2018 against Albuquerque police Dept. This corruption has found its way to the UNITED STATES COURTS. This disrespect for the authority of the UNITED STATES GOVERNMENT must be address and stopped See: Ruiz v. Estelle, 503 F. Supp. 1265, 1385-1390 (S.D.Tex.1980). In the case of Ruiz, The UNITED STATES GOVERNMENT maintained control for more then 20 years. Albuquerque police Dept. as well as the city managers office, will need at less this much supervision from the higher courts to prevent civil rights violation, perjury . And Due process violation. See:, 325 US 853 Napue v. Ragen

PRAYER

Plaintiff, prays upon this court to investigate ex. D.E.A. Agent Perry and criminal case U.S. v. Rodriguez case # 18-cr-1568 WJ, Release plaintiff, dismiss indictment, protect Traveling civilians from ex. D.E.A. Agent Perry committing perjury to the GRAND JURY to obtain INDICTMENTS. Emergency relief, Review of Detention, Ordering Release. according to rule 23 (c) F.R.A.P.

RODOLFO RODRIGUEZ 47735-079

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Case Name	U.S. v. City of Albuquerque	PN-NM-0002
Docket / Court	1:14-CV-1025-RB-SMV (D.N.M.)	
State/Territory	New Mexico	
Case Type(s)	Policing	
Attorney Organization	U.S. Dept. of Justice Civil Rights Division	
Case Summary	<p>On November 12, 2014, the U.S. Department of Justice (DOJ) filed this lawsuit against the city of Albuquerque in the U.S. District Court for the District of New Mexico. The DOJ brought this action under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, alleging that officers of the Albuquerque Police Department (APD) were engaging in a pattern or practice of use of excessive force, including deadly force, in violation of the Fourth Amendment and § 14141. Specifically, the DOJ claimed that the APD used excessive force unreasonable deadly force during arrests and detentions, posing an unacceptable risk to the Albuquerque community, and that the city and the APD had failed to address these issues. The DOJ requested declaratory and injunctive relief against the APD to enjoin them from this unlawful conduct. This lawsuit resulted from a civil investigation conducted by the DOJ beginning in 2012, documented in a findings letter sent to the Albuquerque city government on April 10, 2014.</p>	

MANAG 072

On November 14, 2014, the parties filed a joint motion notifying the court that a settlement had been reached. The agreement required the APD to revise and implement force policies, training, and accountability systems to ensure compliance with the Fourth Amendment and other applicable law. In addition, the agreement established a new Civilian Police Oversight Agency to receive and investigate complaints of misconduct against the APD. The agreement called for the appointment of an independent monitor to assess and report on the implementation of the agreement. Finally, the parties also moved for an opportunity for community members and other stakeholders to express their views as amici curiae to assist the court in the development and evolution of the agreement.

On January 21, 2015, District Judge Robert C. Brack held a fairness hearing for interested parties to express their views on the proposed agreement. Seven groups presented their arguments, among them the Albuquerque Police Officers' Association (APOA), the exclusive bargaining representative of the police force. Prior to the hearing, the APOA and 23 concerned citizens filed motions to intervene in this action. Of the 23 individual motions, 14 were eventually withdrawn. On February 19, 2015, Judge Brack granted the APOA's motion to intervene, finding that the APOA had a sufficient interest in this action for intervention as of right. Judge Brack denied the individual motions to intervene, finding that the government (through the DOJ) adequately represented the individuals' interests. In a separate order also filed on February 19, Judge Brack appointed Dr. James D. Ginger as independent monitor to assess and report on whether the APD was fulfilling its obligations under the agreement.

On March 6, 2015, Disabilities Rights New Mexico, the ACLU of New Mexico, and the Native American Voters Alliance Education Project filed a motion to intervene. On June 2, 2015, Judge Brack denied the motion to avoid delays in the implementation of the agreement and the litigation of the current parties' rights. In a separate order also filed on June 2, Judge Brack approved the settlement agreement and entered it as a consent decree. Reviewing amici submitted by

community organizations, Judge Brack found that amendments to the agreement adequately addressed the community's concerns. In addition, Judge Brack found no conflicts in the (agreement) with the APOA's collective bargaining agreement, state, or federal law. Regarding the duration of the consent decree, the parties said that if after six years from the effective date the parties (go 21) disagree whether the City has been in full and effective compliance for two years, either party may seek to terminate the settlement agreement.

On August 21, 2015, the parties filed a joint stipulation to modify certain deadlines set forth in the consent decree. [The independent monitoring team] determined that while the APD had made significant progress, an extension of certain deadlines would be beneficial. On September 24, Judge Brack granted the motion.

Since the settlement began, numerous status reports have been filed without [indication of significant noncompliance]. As of May, 2017, the APD had accomplished most of the "low-hanging fruit" required by the consent decree, such as writing and approving policies and designing and initiating training programs. However, Dr. Ginger identified [eight specific actions] by the APD that had substantially slowed compliance achievement, such as extended delays in revising the department's use of [force policy] and use of covert "Special Orders" to subvert policies agreed upon by the parties and Dr. Ginger. Dr. Ginger also issued over 300 recommendations for the APD.

As of November 3, 2018, implementation of the consent decree is ongoing. According to Dr. Ginger's latest report, APD leadership (which has undergone some changes in personnel over the past few years) has been fully committed to complying with the consent decree. Dr. Ginger has noted that the current leadership grasps key issues involved in the compliance process and are quickly building effective problem-solving mechanisms.

John He - 12/22/2015

Jake Parker - 07/11/2018

Eva Richardson - 11/03/2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RODOLFO RODRIGUEZ
Plaintiff

No.CV19-00111MV/SMV

v.

NATIONAL RAILROAD PASSENGER CORP.
d/b/a AMTRAK, AGENT J PERRY,
AGENT C. CHAVEZ.
Defendant.

WRIT OF HABEAS CORPUS

NOW COMES, Plaintiff in the above entitled case asking this court for habeas corpus relief, per document 10 filed 6/19/2019 case management orders preliminary screening of complaint filed 2/8/2019. Also FOIA Disclosure of all records of SA J. Perry as required unless exempted.

Since the original complaint was filed plaintiff has discovered a web of lies. A conspiracy to

defraud the government that started with agents of Amtrak, SA J. Perry, now the A.U.S.A. Is covering up this action, Trying to enjoin this honorable Judge. Plaintiff is avoiding filing unnecessary motions. The more research is done the more is uncovered: see 1:14-cv-1025-RB-SMV U.S. v. city of ABQ:

TITLE 49 Transportation, SUBTITLE V. PART C CHAPTER 243, @ 24316. (c) Use

of

information (e) Limitation on liability. grossly negligent or which constituted intentional misconduct. @ 20101 24710 (a) Annual evaluation.

TITLE 29 Labor CHAPTER 7 Labor-Management Relations 151. Findings and declaration of policy (a)impairing the efficiency, safety, or operation of the instrumentalities of commerce; in violation National Labor Relations Board and National Labor Relations Act. Exerted within its proper field, need not embrace all the evils within its reach. NLRB v Jones & Laughlin Steel Corp.

TITLE 18 part 1 chapter 19,55 @ 371,1201 conspiracy to commit offense or to defraud United States (perjury is fraud) it is in fact a crime to lie to federal Judges laws that have been violated.

TITLE 42 chapter 21 @ 2000 (a) public health and welfare civil rights public accommodation.

TITLE 18 @ 241.242 CRIMINAL conspiracy against rights, deprivation of rights under the color of law.

TITLE 47 CHAPTER 5 @ 151 interfere with telecommunication, wire or radio. Use of Amtrak information P.N.R. (passenger named record) was released via FAX.

F.R.CV.P Rule 60. Relief from a Judgment or Order (b)Grounds for Relief from a Final Judgment, Order, or Proceeding. (3)fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; Campa-Rangel matter, and the DEA Office of Professional Responsibility has investigated this matter and determined Special Agent Perry did not engage in misconduct. Its not hard to determine that if you get a call from a supervisor and in your report you claim that an employee

informed you, all within 24 hours. In my case the recording of 2/1/2018 sounds off “no I'm asleep” the very next day 2/2/20018 “J. Perry” testified that “I was siting” does this agent have a doctors excuse for habitual forgetfulness or is he a habitual liar?

For the last 2 years Plaintiff has been asking for evidence to prove that the recording has been tampered with, along with freedom of information act material on J. Perry. Moreover the courts have denied Plaintiff legal representation, claiming that “ Plaintiff has been adequately presenting his claims.” At this time the appeals court have denied Plaintiff relief because of his lack of knowledge at the appeals courts. Complexity when dealing with Amtrak multi District litigation will require assistance. **Plaintiff request legal representation,** for his appeals.

CONCLUSION

The federal habeas corpus statutes provide the proper respondent to a habeas petition is the person who has custody over the petitioner. In this case, federal prisoner challenges present physical confinement, person who has the immediate custody of party detained has the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary. Release on recognizance see: Marino v. Vasquez, 812 F.2d at 507. Accord, e.g., Ostrer v. United States, 584 F.2d at 597; Jago v. United States Dist. Ct., 570 F.2d at 623~~3~~26; In re Wainwright, 518 F.2d at 174, 175 n.1; United States ex rel. Thomas v. New Jersey, 472 F.2d at 741.

PRAYER

Plaintiff prays upon this court to justify the granting of this writ of habeas corpus, Plaintiff has shown exceptional circumstances, asking this Court to exercise its

discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

Rodolfo Rodriguez

47735-079

RR

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RODOLFO RODRIGUEZ

Plaintiff pro se

Vs.

**Case #1:19-CV-00111-MV-SMV
19-2103, In re: Rodriguez, et al**

AMTRAK "ET. AL."

Defendant

MEMORANDUM BRIEF

NOW COMES, Plaintiff in the above entitled civil action case submitting memorandum brief for order filed July 3, 2019 the cases listed below are ripe for writ of review and do affect this civil action. Command of Rule 1 that Federal Rules of Civil Procedure †shall be construed to secure just, speedy, and inexpensive determination of every action, † gives all other Rules life, meaning, and timbre in realistic world of trial court, making Rules useful tools for trial of actual litigation. In re Paris Air Crash, 69 FRD 310 (C.D. Cal. 1975).

UNITED STATES OF AMERICA, Plaintiff, vs. OLLISHA NICOLE EASLEY, Defendant.

“Not a single passenger on Ms. Easley's bus declined to speak with SA Perry, and that everyone who was asked to do so gave consent for SA Perry to search their person and belongings. A **Latino** passenger apparently even consented to SA Perry's cutting into his stiff shoe with a knife that SA Perry borrowed from another passenger.”

In this particular case, agents conspiracy cross the line by using a so called civilian to produce a knife, that happen to be sitting close by it would be my guess that the person that produced the knife was part of Perry's co-conspirators or he made a co-conspirators out of civilian traveler without his knowledge or just cause, this issue could have been prevented if agents were educated as to policies and procedures that are in place to protect our peers.

We live in a new day and age where we have live T.V. Shows from the Pacific to the gulf coast, real time footage of agents doing their job on the southern border, but we do not have cameras at Amtrak on the tarmac. Plaintiff questions, whose job is it to make sure the city manager does his job? Our peers have a right to know what every agency is doing to prevent

abuse and the loss of life, this is a tragedy in the making waiting to happen in our own back yard.

Like the incident of January 2018

If the Albuquerque task force is claiming rights under "Touhy" If my research prove right. ROGER TOUHY, Petitioner, was ruled ON WRIT of Certiorari to the United States Court of Appeals for the Seventh Circuit to review a judgment reversing an order of the United <*pg. 419> States District Court for the Northern District of Illinois which found an employee of the Department of Justice guilty of contempt in refusing to produce subpoenaed records of the department.

Once again this case is obsolete, 50 years old, technology could prove the protector of life, before a life is lost on greyhound or Amtrak property at the hands of rogue agents.

UNITED STATES OF AMERICA, Plaintiff, vs. RICHARD ANTHONY McKENZIE,

Defendant,

TRANSCRIPTS START

"Administrative Law > Governmental Information > Personal Information > General Overview In Ehm, the Fifth Circuit held that Amtrak is not subject to the Privacy Act, 5 U.S.C.S. § 552a. Noting that Amtrak's charter, 45 U.S.C.S. 541, specifically provides that Amtrak will not be an agency or establishment of the United States Government, the Ehm Court held that Amtrak was not an "agency" within the meaning of the Privacy Act. In Lebron, the U.S. Supreme Court specifically noted that, Amtrak's charter is dispositive of Amtrak's status as a government entity for the purposes of the Administrative Procedure Act because Congress controls whether Amtrak is subject to the provisions of the statutes which it enacts. The Privacy Act is part of the Administrative Procedure Act."

On Monday, July 7, 2009, Hyland and Task Force Officer ("TFO") Stephen Suprenant de Garcia reviewed an east bound Amtrak Passenger Named Record ("PNR") for a Richard McKenzie. See Tr. At 9:13-18:16 (Martinez, Hyland)(explaining that Hyland went to the Amtrak station on July 7, 2008 because Hyland "had information on a passenger name record, a reservation showing one-way travel from Flagstaff, Arizona to New York City."); Government Exhibit 11, at 4 ("Warrant and Affidavit"). An Amtrak ticketing agent sent the PNR by facsimile transmission to the DEA. See Tr. at 76:3-82:4 (Padilla, Hyland). Amtrak ticketing agents regularly send PNRs by facsimile transmission to the DEA if the ticketing agent identifies, based on training that the DEA provides, a PNR with characteristic fitting the drug-courier profile. See Tr. at 102:6-105:23 (Padilla, Hyland); See Transcript of Hearing at 12:6-18 (taken February 18, 2010) ("Second Tr.")(Padilla, Hyland).

Amtrak ticketing agents who provide information to the DEA which results in a narcotics-related arrest receive monetary rewards. See Tr. at 106:6-13 (Padilla, Hyland). The ticketing agent who provided the PNR that Hyland and Garcia received on July 7, 2009 had provided reliable information to the DEA in the past, which resulted in an arrest and/or confiscation of drugs. See Second Tr. at 11:4-23 (Padilla, Hyland). The PNR for McKenzie indicated one-way,

credit-card travel from Flagstaff, Arizona to New York, New York. See Tr. at 12:14-13:25 (Martinez, Hyland); Government Exhibit 3 ("PNR"); Government Exhibit 4 ("Amtrak Tickets"); Warrant and Affidavit at 4.

TRANSCRIPTS END

It is fruitless to appeal to the district court because they have entertained this violation of civil rights for the last decade. At what point was TITLE 49 TRANSPORTATION superseded by AMTRAK employees, with agents of the task force Noting that Amtrak's charter, 45 U.S.C.S. 541 was quoted in the McKENZIE case April 8, 2011, Parties on both sides failed to research with due diligent, should have noted that 45 U.S.C.S. 541. has been **[Repealed]** by Act July 5, 1994, P. L. 103-272, **20 years later the courts continue to entertain** 45 U.S.C.S. 541 with no objections from attorneys noted that This section (Act Oct. 30, 1970, P. L. 91-518, Title III, 301, 84 Stat. 1330; Oct. 5, 1978, P.L. 95-421, 11, 92 Stat. 928; Aug. 13, 1981, P. L. 97-35, Title XI, Subtitle F, 1188(a), 95 Stat. 699; June 22, 1988, P. L. 100-342, 18(a), 102 Stat. 636) was repealed by Act July 5, 1994, P. L. 103-272, 7(b), 108 Stat. 1379, except for rights and duties that matured, penalties that were incurred, and proceedings that were begun before enactment, as provided by 7(b) of such Act, which appears as a note preceding 49 USCS 101. The section provided for establishment of the National Railroad Passenger Corporation. The subject matter formerly covered in this section is now covered generally in 49 USCS 20101 et seq.

Fourth Amendment, violation was at the heart of the McKENZIE case, what was never mention was due process and equal protection clause violations. Protection from the courts, against the city manager office, AMTRAK employees and agents of the task force who refuse to wear body cameras!

Plaintiff question what are they hiding?

All this transactions violated TITLE 49 TRANSPORTATION SUBTITLE V. RAIL PROGRAMS PART C. PASSENGER TRANSPORTATION CHAPTER 243. AMTRAK 24316. **c) Use of information. Neither the National Transportation Safety Board, the Secretary of Transportation, the Secretary of Homeland Security, nor a rail passenger carrier may release to the public any personal information on a list obtained under subsection (b) (1), but may provide information on the list about a passenger to the passenger's family members to the extent that the Board or a rail passenger carrier considers appropriate.**

(e) Limitation on liability. A rail passenger carrier shall not be liable for damages in any action brought in a Federal or State court arising out of the performance of the rail passenger carrier in preparing or providing a passenger list, or in providing information concerning a train reservation, pursuant to a plan submitted by the rail passenger carrier under subsection (b),

unless such liability was caused by conduct of the rail passenger carrier which was grossly negligent or which constituted intentional misconduct. "Accidents and incidents" are covered by 20101. Purpose [49 USCS \mathbb{C} 20101] 24710. Long-distance routes (a) Annual evaluation.

If you do not have permission from the city manager's office, as required via greyhound policy titled: Operating Procedures, then you are stalking then harassing traveling civilian public, because both greyhound and . AMTRAK are located on the same property this agents are violating both greyhound policy titled: Operating Procedures and TITLE 49 TRANSPORTATION SUBTITLE V. RAIL PROGRAMS PART C. PASSENGER TRANSPORTATION CHAPTER 243. AMTRAK 24316. Accidents and incidents" are covered by 20101. Purpose. [49 USCS \mathbb{C} 20101] 24710. Long -distance routes (a) Annual evaluation. "that was never conducted" or nothing was ever done The UNITED STATES ATTORNEYS OFFICE WOULD WOULD BE QUICK TO POINT OUT qualified immunity or Homeland Security immunity. Even total immunity is 30 years old, we now have body cams and licensed K9 units that meet each states prerequisites, as well as Federal standards immunity is for he that follows the law, once you break the law you pay for it.

If you are not a professional on the job, then your official capacity is no longer entitled to immunity. Personal capacity sets in for failing to follow protocol. Jail time would be the only alternative, the courts do not harbor rouge agents. Ignorance of the law is no excuse. Case in point agents had time to prepare licensed K9 units, then ask a judge for a warrant, with permission from the city manager's office and where Board or a rail passenger carrier considers appropriate. Standard protocol could have been meet, as well as greyhound policy, escorted by city manager's office would have proof that no laws were broken TITLE 49 Statue was violated by rouge agents conspiring with AMTRAK employees, if no "Accidents and incidents" occurred then why was the PNR released.?

Then no Annual evaluation was taking place to protect the traveling civilizing public, conspiring to oppress by agents, AMTRAK employees in violation of the National Labor Relations Board and The National Labor Relations Act, 29 U.S.C. \mathbb{C} 151 et seq (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce;

This violations could prove jail time for agents as well as AMTRAK employees for violating civil rights according to TITLE 18 241 242. Conspiracy against rights, Deprivation of rights under color of law. Overzealous prosecution, attorneys refusing to file pretrial motions is a violation of due process. A conviction obtained through the knowing use of perjured testimony violates due process. Morales v. Johnson, 659 F.3d 588, history of prosecutorial misconduct that is so systematic and pervasive that it affects the fundamental fairness of the proceeding or if the independence of the grand jury is substantially infringed. This errors are not harmless,

nor have an end in sight. De La Campa-Rangel with time served **after 4 years of a 10 year sentence.** NORA ASUSENA AMADOR-BELTRAN, spoke no English, was the grand jury advised? JESUSFRANCISCO FERNANDEZ Ms. Ramos-Burciaga EDGAR GARCIA-GARIBAY, RELEASED U.S. Rodriguez case # 18-cr-1568 WJ the grand jury was not advised that "**I was asleep!**"

This is just a hand full of civil rights violations, the list will grow as the research continues, to the point that ten years of plea bargaining and hundreds of cases will be affected res ipsa loquitur. Plaintiff is asking this court for leave according to Rule 21 Federal Rules of Appellate Procedure. In this particular case, Plaintiff is asking permission from the courts to be excluded from the requirements of Rule 21(a) (2) (C). Allowing review under Rule 21(b) (4) + (c) + (d) by order in a particular case. Release from custody according to rule 23 (c) F.R.A.P.

The case of ex D.E.A. Jerrall Perry committed perjury more the ten years ago, this courts acknowledgment of the De la campa-rangel case no. 519 F.3d 1258; 2008 U.S. App. LEXIS 6286 went largely unnoticed by the lower courts, violating due process, **misprision of a felony** by officers of the courts see: Bratton v United States (CA10 Okla) 73 F2d 795 harboring of a criminal, intimidation of witnesses, such concealment or failure to disclose being that of one owing allegiance to the United States .although the defendant was released with time served, ex. D.E.A. Perry was never prosecuted for perjury. For the last ten years the lower courts continue to use the testimony of ex. D.E.A. Perry in the Grand jury proceeding without the Grand Jury knowing, that the testimony that they are about to receive is coming from a perjured individual, who has violated the civil rights of the travailing public the last ten years, by going against greyhound policy titled: Operating Procedures.

The most recent perjury came in the case of .EDGAR GARCIA-GARIBAY, 2018 U.S. Dist. LEXIS 136888 Crim. No.17-0691MV August 14, 2018. In a span of ten years at least one time has ex. D.E.A. Perry conspired with Amtrak employees by sending the passenger manifest from flagstaff AZ. To Albuquerque NM. To ex. D.E.A. Perry's fax. **Perjury AUTHORITY:** 1. State v Miller, 26 RI 282, 58 A 882. 2 State v Ledford, 195 Wash 581, 81 P2d 830. Perry told the grand jury Plaintiff was seated, **I was asleep!** With my back pack as my pillow. Most recent threats coming from this agent directed at Plaintiff via A.U.S.A. To my now attorney Jerry Walz. This has been brought to my attention more than once.

The relief sought; Injunction relief, restraining order issued pursuant to an order or decree obtained through this honorable court against Jerrall Perry, preventing Perry from testifying or pursuing any investigations, **keeping Perry a safe distance from plaintiff**. In a case of perjury nobody is above the law, not the president's one time fixer nor Perry. CONGRESS MADE THAT CLEAR. Emergency relief from Custody, dismiss indictment settle civil matter to prevent further abuse. According to D.O.J. Settlement of 2018 against Albuquerque police. **DUE PROCESS AUTHORITY:** Brown v Grant,

The issues presented; prosecution misconduct, threatening bodily injury, Grand jury manipulation, (withholding recordings) perjury to petite jury and Grand jury proceedings, Judges

accepting a plea agreements on perjured testimony, with no objection from attorneys. In violation of due process. The use of recent tech is a must. Our peers deserve to know what agents are doing with our courts.

The facts necessary to understand the issue presented by the petition; TITLE 49 TRANSPORTATION SUBTITLE V. RAIL PROGRAMS PART C. PASSENGER TRANSPORTATION CHAPTER 243. AMTRAK 24316. c) Use of information. Neither the National Transportation Safety Board, the Secretary of Transportation, the Secretary of Homeland Security, nor a rail passenger carrier may release to the public any personal information on a list obtained under subsection (b) (1), but may provide information on the list about a passenger to the passenger's family members to the extent that the Board or rail passenger carrier considers appropriate.

This Statute was violated by Amtrak employees by sending the passenger manifest from flagstaff AZ. To Albuquerque NM. To ex. D.E.A. Perry's office fax. This case was litigated by my now criminal attorney Jerry Walz from Walz and associates. (e) Limitation on liability. A rail passenger carrier shall not be liable for damages in any action brought in a Federal or State court arising out of the performance of the rail passenger carrier in preparing or providing a passenger list, or in providing information concerning a train reservation, pursuant to a plan submitted by the rail passenger carrier under subsection (b), unless such liability was caused by conduct of the rail passenger carrier which was grossly negligent which constituted intentional misconduct. "Accidents and incidents" are covered by 20101. Purpose [49 USCS § 20101] 24710. Long-distance routes (a) Annual evaluation.

The reasons why the writ should be issued: If you do not have permission from the city manager's office, as required via greyhound policy titled: Operating Procedures, then you are stalking then harassing traveling civilian public. Violation of D.O.J. Settlement of 2018 against Albuquerque police Dept. This corruption has found its way to the UNITED STATES COURTS. This disrespect for the authority of the UNITED STATES GOVERNMENT must be address and stopped See: Ruiz v. Estelle, 503 F. Supp. 1265, 1385-1390 (S.D.Tex.1980). In the case of Ruiz, The UNITED STATES GOVERNMENT maintained control for more than 20 years. Albuquerque police Dept. as well as the city manager's office, will need at less this much supervision from the higher courts to prevent civil rights violation, perjury. And Due process violation. See: 325 US 853 Napue v. Ragen

Plaintiff in the above entitled case asking this court for relief according to Federal Rules of Civil Procedure summary judgment 56 (a) for violation of 28 U.S.C § 1442 (c) (1)(2), 1331 ,1343 (a) ,1332 (a)1 and 509(sec 7) (1)+(2) Count 1: Title 18 Part 1 chapter 55 @1201 Kidnapping from public transportation. Count 2: Title 42 Chapter 21 @ 2000 (a) public health and welfare civil rights public accommodation. Count 3: Title 18 @ 241and 242 criminal conspiracy deprivation of rights under the the color of law. Count 4: Title 47 chapter 5 @151 interfering with telecommunications wire or radio.

NATURE OF THE CASE

In a case that involves ex .D.E.A. agents Perry and Chavez, I had four different encounters with ex D.E.A. Perry at times on a bus, other times I was on a train. Every time ex D.E.A agent Perry would try to search me. I would not allow my civil rights to be violated.

My last encounter, I was sleeping on the Amtrak train coach car when I was awoken and asked 2 questions: where is my ticket?, Can I see your ID? All along the 2 agents were standing over me. (The paying customer with a tag on the overhead luggage rack proving that I am a paying customer). With ex D.E.A. agents Perry and Chavez, in civilian clothes, with no badge or Task force vest to I.D. Them, With their hands on their weapons, in civilian clothing, working private property, with civilians, without approval from the city manager's office manages office, see exhibit: "A and B"

It was intimidating, being awoken from a deep sleep. While 2 armed men towering over me in civilian clothing. And with their hands on their weapons. I was told "Get up and raise your hands!" As I started to stand I notice I did not have any witnesses, I could have been "killed!" if I did not act right, at this point I took a chance reaching for my cell phone, in hopes that I could record my last conversation. Of this violation of my civil rights, "Due process". But to no avail, one agent pulled his weapon and the other cuffed me. I felt I was kidnapped and soon I would be killed, never saying "you are under arrest" or reading me my rights, When I was escorted to the Parking lot I asked ex D.E.A agent Chavez to see his badge, he said "I will get it for you" he opened the door to his pickup truck reached in and produced his badge proving he was on the train arresting civilians without his D.E.A. Badge. TERM: *Debet sua cuique domus esse perfugium tutissimum.* TEXT: Each man's home should be a very safe refuge. "The law has a tender regard for the asylum of a private dwelling." like overnight stay in a motel, bus, train etc. "that is your home stead for the night". RYAN AUSTIN COLLINS, Petitioner v. VIRGINIA SUPREME COURT OF THE UNITED STATES 138 S. Ct. 1663; 201 L. Ed 2d 9; 2018 U.S. LEXIS 3210; 86 U.S.L.W. 4324; 27 Fla. L. Weekly Fed. S 279 No. 16-1027. January 9, 2018, argued May 29, 2018, decided, it was well settled for the last century.

SUPPORTING LEGAL FACT

More than ten years ago the U. S. court of appeals tenth circuit ruled on, "De La Campa-Rangel, 519 F.3d 1258 (10th Cir. 2008). Saying: "We are concerned with perjury in this case and that ex. D.E.A. Agent Perry concocted a story." The appeal was abated pending direct appeal, the district court acknowledged that perjury was one issue and released "De La Campa-Rangel" with time served after 4 years of a 10 year sentence. At this point the district court refused to press charges for perjury. In violation of 1746 of title 28 U.S.C. And it reads: Who ever--(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or



statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. 976. Act Oct. 18, 1976 substituted this section for one which read: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.". 1994. Act Sept. 13, 1994, in the concluding matter, substitute "under this title" for "not more than \$2,000".

For the last 10 years ex D.E.A. Agent Jarrell Perry has continued to violated the civil rights of paying customers traveling on greyhound and Amtrak. From my personal experience I have witness Perry opening luggage on Amtrak, down stairs while passengers are up stairs asleep, all this is going on without supervision from the city manager's office or a "body cam" to prove daily how many civilians civil rights are violated, all this paying customer deserve the equal protection clause and due process from the Fourteenth Amendment. People like: NORA ASUSENA AMADOR-BELTRAN, spoke no English, JESUS FRANCISCO FERNANDEZ Ms. Ramos-Burciaga .EDGAR GARCIA-GARIBAY, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO 2018 U.S. Dist. LEXIS 136888 Crim. No. 17-0691 MV August 14, 2018, Decided August 14, 2018, Filed, SA Perry introduced himself as a police officer, TFO Davis testified, he did not hear Mr. Garcia-Garibay's question, court finds this testimony to lack credibility. Mr. Garcia-Garibay's question is just as audible in the recording as his earlier statements throughout their conversation. (the court noted)

The practice of turning the devices on and off during the encounter prevents the Court from knowing the precise duration of the encounter and leaves open the possibility that additional relevant interactions occurred while the devices were turned off. "All with the same M.O.!"

Plaintiff questions, is ex D.E.A. Perry a mind reader that he can predict what the civilian traveler is about to say, turning the recordings off for his convenience? or is he tampering with evidence ?

In the Eleventh Circuit case granting Rule 60(b)(3) relief discussed by the majority, Harre, 750 F.2d at 1503, the court found "that the record support[ed] Appellants' argument that a material expert witness testified falsely on the ultimate issue in the case, where the defense attorneys knew or should have known of the falsity of the testimony." Id. at 1503 (emphasis added). Nothing in Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988), is to the contrary. Bonar, a case involving vacation of an arbitrator's punitive damages award, cites

Harre for the proposition that "[t]here is no doubt that perjury constitutes fraud," and that the perjury is material when it goes to a "central issue" in a case. Id. at 1383 n.7 & 1385. The Eleventh Circuit in Bonar did not discuss Harre in the context of party complicity under Rule 60(b)(3) within the meaning of the Federal Arbitration Act .REMBRANDT VISION TECHNOLOGIES, L.P., Plaintiff-Appellant v. JOHNSON & JOHNSON VISION CARE, INC., Defendant-Appellee 818 F.3d 1320; 2016 U.S. App. LEXIS 6332; 118 U.S.P.Q.2D (BNA) 1523; 94 Fed. R. Serv. 3d (Callaghan) 827 2015-1079

Did the grand jury know of this exculpatory evidence, that ex D.E.A. Perry committed perjury or that NORA BELTAN did not speak English? Along with U.S. Rodriguez case # 18-cr-1568 WJ the grand jury should have been advised that ex D.E.A. Perry committed fraud. Now could he have been a convicted felon in possession of a weapon, trespassing and kidnapping on greyhound property, This violation of due process needs to be addressed. (**Government failed to prosecute**)

RELIEF REQUESTED

For the conspiracy between, Amtrak employees, ex D.E.A. Perry, Chavez and the United States Attorney's office Plaintiff seeks Rule 23. Class Actions certification along with 1989. Racketeer Influenced and Corrupt Organizations Act (RICO) 28 USCS § 1738, federal action under Racketeer Corrupt Organizations Act (RICO) (18 USCS §§ 1961 et seq.) where it was clear that factual issues to be litigated under RICO claim were identical with those litigated in prior action and were essential to judgment in perjury case, so that summary judgment pursuant to Rule 56 applies with equal force in context of habeas corpus cases. Clark v. Johnson, 202 F.3d 760 (5th Cir.), cert. denied, 531 US 831, 121 S Ct 84, 148 L Ed 2d 46 (2000). May be properly entered in favor of Plaintiffs in RICO action. J.M. Muniz, Inc. v. Mercantile Texas Credit Corp., 833 F.2d 541 (5th Cir. 1987). Moreover I must be releases from custody A.S.A.P. According to habeas corpus relief, and have ex D.E.A. Perry prosecuted for perjury and threats directed at Plaintiff via U.S. Attorney's office, my attorney Jerry waltz and Sam Wise. Pay attorney's fees, as well as. \$ 10,000,000 U.S.D. For pain and suffering.

That is quantify 10 times, for each count, for a total of 4 counts along with settlement of D.O.J Litigation 2018 against the city of Albuquerque police department as well as the city manager's office.

The proposed defendants are proper parties in this action as their liability arises out of the same occurrences and series of Greyhound policy that were violated, upon which the claims against the original defendants are predicated and common questions of law and fact will arise as to the parties against whom suit has already been brought and proposed defendants. In fact, the evidence needed to establish the liability of these proposed defendants will in great part be the

same as that which will be offered at trial against the original defendants, i.e. public safety. D.O.J. Settlement of 2018 against Albuquerque police.

Plaintiff pro se in the above entitled case asking this court to intervene in the criminal courts, to preserve evidence according to Fed. R. Evid. 1002 and Fed. R. Evid. 1004(1) specifically, U.S. v. Rodriguez case # 18-cr-1568 WJ

CASE SUMMARY

Motion for preservation will state all grounds that could meet reasonable specification standard to comply with particularity requirement of Rule 7(b)(1); , amendments are allowed if they consist of elaboration of ground already set out in original motion, "i.e. GRAND JURY perjury"

1) Transcript of proceedings from October 22, 2018 9:35 am. Heard before the honorable Laura Fashing have certain inconsistency, on page 12 line 4 "Threatening him, et cetera". What was said by my attorney, was, "threatening him and he feels he was kidnapped" then Judge Fashing interrupted, "we know all about Perry!" why this exchange reads et. Cetera on transcripts behooves Plaintiff, same page line 5 "this was not their first encounter". Plaintiffs first 3 encounter ended with civilians being present when ex Perry was told "I know who you are and no you can't search me or I have no time." (Coming from a famous movie, from the 1960 "I know who you are and I saw what you did".) In my last encounter with ex D.E.A. Perry and Chavez, I was taken advantage of. With no witnesses.

2) Transcripts dated February 1, 2018. Interview of Rodolfo Rodriguez "bag Search" page line 3 and page 3 line2, claim to be "inaudible." Plaintiff responds two times with "I know who you are and no you can't search me". The transcript show inaudible both times. Plaintiff insist recordings were tampered with. After I was escorted off the Amtrak by ex D.E.A Chavez, I was placed on greyhound property as I waited to be transported I asked ex D.E.A Chavez if I could see his D.E.A. badge, he opened his pickup truck reached into the side pocket producing a D.E.A. Badge while standing in the parking lot proving to me that he was on board the Amtrak with no badge.

3) Transcripts dated May 8, 2018. FEDERAL GRAND JURY page 2 line 13 ex D.E.A Perry claims to be employed by the D.E.A. I have asked the criminal courts, via my attorney, for an F.O.I.A. But to no avail. Page 3 line 5 thru 9. The GRAND JURY was never told that I was asleep, after a long overnight trip. I was rudely awoken, as I looked up, I sounded of "I know who you are and no you can't search me." no D.E.A. badge was ever displayed nor did Perry announce he was D.E.A. All this could have been avoided if ex D.E.A. Perry had a body cam or if the city manager was aware of agents boarding public transportation in violation of "greyhound policy" Plaintiff questions, "was the GRAND JURY properly vetted, as well as informed, as to policy's that exist when dealing with the Traveling civilizing public for its safety?" Federal Rules of Criminal Procedure Rule 6. (a)1,(b)2 and 28 U.S.C. 1867(e). The court must order that enough legally qualified persons be summoned to meet this requirement. This standard was not met

CONCLUSION

Transcripts from grand jury do not match transcripts from recording of February, 1 2018 and that proves that Perry has perjured him-self, once again, continues to have a disregard for the oath he has taken. More over Perry failed to ask Plaintiff for a prescription for the medication he was traveling with, GRAND JURY shall consist of not less than 16 and not more than 23 members continues existing law, 28 U.S.C. § 419 [see 18 U.S.C. § 3321]. But only one juror questioned Perry about asking for a prescription for medication, response was vague. This exchange leads to suspicion. If transcripts don't show inaudible they show et cetera TERM: et cetera. TEXT: 1. And so forth, and others, and other things, and the rest, and so on. When freedom is at stake every essences of a court exchange must be on film or recorded. Plaintiff's questions why? "We know all about Perry" showed up as et. Cetera. For the last ten years this court had knowledge of the misconduct but refuses to put a stop to it see: 233 F.3d 1067 (8th Cir. 2000), cert. denied, 534 U.S. 1023, 122 S. Ct. 552, 151 Ed. 2D 428 (2001) (when defendant has alleged prosecutorial misconduct during grand jury proceedings, dismissal of indictment is proper only when defendant demonstrates flagrant misconduct and substantial prejudice.) The recordings were never played for the GRAND JURY. Fed.R.Crim.P. 41,

PRAYER

Plaintiff, prays upon this court to grant relief and MEMORANDUM BRIEF, investigate ex. D.E.A. Agent Perry and criminal case U.S. v. Rodriguez case # 18-cr-1568 WJ, Release plaintiff, dismiss indictment, protect Traveling civilians form ex. D.E.A. Agent Perry committing perjury to the GRAND JURY to obtain INDICTMENTS. Emergency relief, Review of Detention Ordering Release according to rule 23 (c) F.R.A.P.

RODOLFO RODRIGUEZ 47735-079



Rod 160 Rodriguez
Box 3370
Milan NM
07021

CoreCivic
Inmate Mail
Not responsible
for content

RECEIVED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

NOV 24 2020

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CLERK

CoreCivic
Inmate Mail
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for content

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NEW MEXICO
ALBUQUERQUE, NEW MEXICO

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MITCHELL GELFERS
CLIENT

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for content



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333 LOMAS BLVD.
ALBUQUERQUE, NM.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

RODOLFO RODRIGUEZ,

Movant,

vs.

No. CV 20-01227 WJ/KBM
No. CR 18-01568 WJ

UNITED STATES OF AMERICA,

Respondent.

**MEMORANDUM OPINION AND ORDER DISMISSING
MOTION TO VACATE, SET ASIDE, OR DISMISS UNDER 28 U.S.C. § 2255**

THIS MATTER is before the Court on the Motion to Vacate, Set Aside, or Dismiss Under 28 U.S.C. § 2255 filed November 24, 2020 by Defendant/Movant, Rodolfo Rodriguez (CV Doc. 1; CR Doc.124) (“Motion to Vacate”). The Court will dismiss the Motion to Vacate, without prejudice, as premature.

Judgment was entered on Defendant Rodriguez’s conviction and sentence on December 1, 2020. (CR Doc. 126). Defendant Rodriguez appealed from that Judgment on December 2, 2020. (CR Doc. 127). Rodriguez’s appeal was docketed in the United States Court of Appeals for the Tenth Circuit as case No. 20-2173 and is presently pending before the Tenth Circuit. (CR Doc. 129). Defendant Rodriguez filed his Motion to Vacate on November 24, 2020, collaterally challenging his conviction and sentence. (CV Doc. 1; CR Doc. 124). The § 2255 Motion was filed after the sentencing hearing but prior to entry of the Judgment on the conviction and sentence. (CR Doc. 123, 126).

Absent extraordinary circumstances, the orderly administration of criminal justice precludes a district court from considering a petitioner’s collateral challenge while review of

claims raised on direct appeal is pending. As a general rule, a defendant may not pursue both a direct appeal and a collateral action simultaneously. *See United States v. Prows*, 448 F.3d 1223 (10th Cir.2006); *United States v. Cook*, 997 F.2d 1312, 1318–19 (10th Cir.1993) (citing Rule 5, *Rules Governing § 2255 Proceedings*, advisory committee note). The rule is designed to avoid possible conflicting rulings and to promote judicial economy since the disposition of the appeal may render the § 2255 motion moot. *See, e.g., United States v. Robinson*, 8 F.3d 398, 405 (7th Cir.1993); *United States v. Gordon*, 634 F.2d 638, 638–39 (1st Cir.1980); *United States v. Davis*, 604 F.2d 474, 484 (7th Cir.1979); *Jack v. United States*, 435 F.2d 317, 318 (9th Cir.1970); *Womack v. United States*, 395 F.2d 630, 631 (D.C.Cir.1968).

In this case, Defendant Rodriguez has only recently commenced his direct appeal. There appears to be considerable overlap between the claims raised in this action and the claims raised on direct appeal, resulting in a waste of judicial resources if both actions were allowed to proceed simultaneously. (See CV Doc. 1; CR Doc. 127-2). Moreover, it appears that any issues raised by Rodriguez in his § 2255 Motion to Vacate will still be available to him to raise in a post-appeal collateral challenge. As a result, the Court finds that extraordinary circumstances warranting collateral review during the pendency of Petitioner's direct appeal do not exist and collateral relief in this Court is premature.

The Court will dismiss the Motion to Vacate without prejudice. The dismissal of this § 2255 motion without prejudice will not count against Movant Rodriguez should he pursue a collateral challenge under § 2255 after conclusion of his direct appeal. Movant Rodriguez is notified that his exclusive post-conviction remedy will be a motion to vacate, set aside or correct sentence filed pursuant to 28 U.S.C. § 2255. If he files further premature motions for collateral

review, he may subsequently be subjected to the restrictions on “second or successive” motions in 28 U.S.C. §§ 2244 and 2255(h).

IT IS ORDERED that the Motion to Vacate, Set Aside or Dismiss Under 28 U.S.C. § 2255 filed by Defendant/Movant, Rodolfo Rodriguez (CV Doc. 1; CR Doc. 126) is **DISMISSED** without prejudice as premature and case No. CV 20-01227 WJ/KBM is **CLOSED**.



WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE