No. _____

IN THE

Supreme Court of the United States

SERGIO GUERRERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Sent by Federal Express on January 12, 2023, for delivery on January 13, 2023.

QUESTION PRESENTED

Probable cause for a warrantless arrest requires a "probability or substantial chance" of criminal activity. *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). When suspicion is based on acts or materials that are not *per se* illegal, "the relevant inquiry is … the degree of suspicion that attaches to particular types of noncriminal acts" or, more precisely, what "reasonable inference[s]" can be drawn. *Id.* at 586, 588 (citations omitted).

When suspicion is based on "materials presumptively protected by the [Bill of Rights]," the same probable cause standard applies. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986). There, however, the Fourth Amendment requires examination of "what is 'unreasonable' in the light of the values" in other Bill of Rights amendments. *See Roaden v. Kentucky*, 413 U.S. 496, 501, 504 (1973).

Ammunition is legal to own in any quantity in Arizona and is presumptively protected by the Second Amendment; "without bullets, the right to bear arms would be meaningless." *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), *abrogated on other grounds by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

The dispositive concurrence in the Ninth Circuit's *per curiam* majority opinion concluded, over a dissent, that the transportation of twenty 1,000-round boxes of legal ammunition for handguns and high-powered rifles, in a car with two illegally tinted windows, alone justified an arrest.

Is the Ninth Circuit's decision consistent with this Court's precedents?

RELATED PROCEEDINGS

United States District Court (D. Ariz.):

United States v. Guerrero, No. 4:19-cr-01468-CKJ (Aug. 31, 2021)

United States Court of Appeals (9th Cir.):

United States v. Guerrero, No. 21-10248 (Oct. 18, 2022)

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OPINION BELOW

The opinion of the court of appeals is reported at *United States v. Guerrero*, 47 F.4th 984 (9th Cir.), *amended on denial of reh'g*, 50 F.4th 1291 (9th Cir. 2022).

JURISDICTION

The court of appeals issued its opinion on September 2, 2022, and it amended the opinion and denied a petition for rehearing en banc on October 18, 2022. App. 2a, 22a. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely. *See* SUP. CT. R. 13.1, 13.3.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides, in relevant part, "[t]he right of the people to be secure in their persons … against unreasonable … seizures, shall not be violated, and no warrants shall issue, but upon probable cause…." U.S. CONST. amend. IV.

STATEMENT OF THE CASE

This case calls for the Court to determine under the Fourth Amendment the degree of suspicion that attaches to the possession of a large quantity of legal ammunition, and to modernize the reasonable inferences that may be drawn from such possession, in light of the newly recognized individual right to keep and bear arms. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008). "[A]s public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt." *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment).

The question in this case has sharply divided every court to consider it: Whether a person may be *arrested* for possessing a large quantity of legal ammunition for semiautomatic handguns and high-powered rifles, in a car with two illegally tinted front windows, without any inquiry into the ammunition's intended use. A federal magistrate judge recommended that Mr. Guerrero's motion to suppress be granted. App. 41a ("[T]he Court cannot agree that the police may arrest any person who carries 20,000 rounds of ammunition on Interstate 10 towards Tucson."). The district court disagreed and denied the motion, but it allowed Mr. Guerrero to remain released pending appeal because it recognized that the issue presented a "substantial question." *See* 18 U.S.C. § 3143(b)(1). On appeal, three longtime Ninth Circuit judges disagreed as to the rationale for resolving the question, producing a splintered *per curiam* majority opinion that affirmed the denial of the motion over a dissent by Judge Thomas. App. 6a ("Affirmance is required by the conclusions of the judges in the majority, even though the reasoning of Judge Gould and Judge Bea in their separate concurrences … is different."). The court of appeals denied a petition for rehearing en banc, which Judge Thomas would have granted, but it stayed the mandate and allowed Mr. Guerrero to remain released pending this Court's disposition of the instant petition because it recognized that the issue presented a "substantial question." *See* FED. R. APP. P. 41(d)(1); 18 U.S.C. § 3143(b)(1). The disagreement among so many experienced jurists on such an important and recurring question underscores the need for this Court's guidance.

A. Detention and Arrest

At the time of his arrest for a federal ammunition-exporting offense under 18 U.S.C. § 554(a), Mr. Guerrero was a 22-year-old lawful permanent resident of the United States who had no prior arrests or convictions. C.A. DktEntry No. 6 ("PSR") at ¶¶ 22-29, p. 2. He grew up in Arizona, he spoke English fluently, and his father was born in the United States. *Id.* at ¶¶ 31-32, 43.

The facts elicited at the suppression hearing were not disputed below.

At 3:22 p.m. on April 17, 2019, Arizona Department of Public Safety trooper Amick initiated a traffic stop of Mr. Guerrero's vehicle for a window-tint violation on eastbound Interstate 10 between Phoenix and Tucson. C.A. E.R. 20-21, 23-24. Mr. Guerrero was traveling in a "southeasterly" direction and the stop occurred "23 miles [north of] Tucson, and almost 90 miles from the Mexican border." App. 19a (Thomas, J. dissenting). The Tucson metropolitan area has over a million people (*id.*) and "two veins of highways": Interstate 10 "runs east and west" and Interstate 19 runs south to Mexico (C.A. E.R. 72).

Mr. Guerrero was the only occupant of the Arizona-plated 2013 Dodge Journey. C.A. E.R. 24-25, 135. The trooper approached on the passenger side and asked Mr. Guerrero to lower the rear window. *Id.* at 25. Through the lowered rear window, he could see two 1,000-round boxes of ammunition in the rear cargo area. *Id.* at 26, 51. He suspected a federal ammunition-exporting offense. *Id.* at 27.

The valid vehicle registration showed that the car was registered out of Tucson, and Mr. Guerrero's valid Arizona driver's license showed that his home address was in Tucson. C.A. E.R. 28, 49, 135. He was "cooperative." *Id.* at 28. Mr. Guerrero said

that the car was his sister's, and he did not have the insurance information. *Id.* at 29. When asked for his sister's name, the name he gave initially (Jacqueline) did not match the first name on the car's registration (Martha), which drew the trooper's "concern," but he corrected himself "seconds later," which the trooper testified "just dispelled any suspicions I had of him having the car." *Id.* at 29, 66-67.[1]

The trooper instructed Mr. Guerrero to stand on the passenger side of the patrol car during the records checks. C.A. E.R. 29. Mr. Guerrero remained "cooperative." *Id.* at 30. He told the trooper that he was returning home to Tucson after visiting his mother in Phoenix. *Id.* at 32, 55.

The trooper issued a warning for the window tint violation. C.A. E.R. 30, 135. The only illegal tint was on the front "driver and passenger side windows" (*id.* at 24, 31) because tint of any darkness is legal on all rear and rear side windows in Arizona. Ariz. Rev. Stat. § 28-959.01(A). *See also United States v. Greene*, 826 F. Supp. 314, 315 n.2 (D. Ariz. 1993) (Roll, J.) ("Heavily tinted" windows are "hardly remarkable in the sunny climate of southern Arizona.").

Mr. Guerrero signed the warning and the trooper returned his license and registration. C.A. E.R. 33. He remained "cooperative." *Id.* When he turned and began to walk away, the trooper asked if he would be willing to answer a few questions. *Id.* at 34, 68-69. He agreed and, when asked, said that he had no weapons or illegal items. *Id.* The trooper emphasized, "may I please note, he was 100 percent cooperative and

[1] According to the PSR, he gave his sister's middle name and then her first name. PSR ¶ 34 ("The defendant's sister, Martha Jaqueline Guerrero, was contacted telephonically … and confirmed much of [his] … history.").

very courteous the entire time." *Id.* When asked about ammunition, Mr. Guerrero said that he had about 20,000 rounds. *Id.* He freely consented to a search of the car at 3:33 p.m. *Id.* at 35-36, 38. He remained "just as cooperative." *Id.* at 38-39.

Before the search, the trooper made Mr. Guerrero stand 25 to 50 feet ahead of the car and 30 feet to the side, near the freeway's right-of-way fence. C.A. E.R. 39. During the search, he emphasized, Mr. Guerrero "was nothing but courteous the entire time" and "completely cooperative." *Id.* at 53. The search quickly confirmed Mr. Guerrero's statements and revealed twenty 1,000-round boxes of rifle and handgun ammunition in the rear cargo area. *Id.* at 40. The trooper found the amount "unusual" and, based on a prior experience, he suspected a federal ammunition-exporting crime. *Id.* at 40-41, 63. He did not ask Mr. Guerrero any further questions.

Instead, the trooper cuffed Mr. Guerrero's hands behind his back. C.A. E.R. 40-41, 56. He first called Mr. Guerrero back to the patrol car because, "like I keep saying, he was really polite the entire time." *Id.* at 55-56. During the cuffing, "might I add[,] he was super cooperative the entire time, very respectful young man." *Id.* at 40-41.

The trooper acknowledged that it is "not illegal," without more, to "drive down Interstate 10 with 20 boxes of ammunition." C.A. E.R. 54. Homeland Security Investigations Special Agent Boisselle also testified that "it's not inherently illegal to have ammunition." *Id.* at 75.

The search of the car and the handcuffing took about five minutes. C.A. E.R. 43. The cuffing took place 15 minutes into the stop. *Id.* at 56. The trooper said he applied the handcuffs because "I have heard cases of people following cars that are

carrying contraband or illegal items and, for my protection I wanted to make sure that I had him under control in case somebody came in behind me, which has happened before, other cars come in behind us." *Id.* at 41.

Three to five minutes after the handcuffing, at 3:42 p.m., trooper Amick called agent Boisselle. C.A. E.R. 41-42, 43, 72-73. He had been taught to "ask for the assistance" of federal agents when finding "large amounts of ammunition" so "they can come and … take it from there." *Id.* at 42. Agent Boisselle explained that the "informal … understanding" is "that they contact us to take over what they suspect … may be trafficking." *Id.* at 72. According to the trooper, agent Boisselle arrived approximately 40 minutes later at 4:23 p.m. *Id.* at 44. (Agent Boisselle said that he arrived at "about" 4:20 p.m. (*id.* at 77), as stated in his report (*id.* at 81), but he later changed his testimony and said he arrived between 4:10 and 4:15 p.m. (*id.* at 85).)

During those approximate 40 minutes, Mr. Guerrero stood handcuffed on the freeway shoulder next to the patrol car waiting to be turned over to the federal agents. C.A. E.R. 44-45, 56, 58-59, 60, 64. The trooper asked him no questions during that time, and in fact told him he was not being arrested but would "be talking to other people." *Id.* at 45, 59. During those 40 minutes of "just standing there waiting," the trooper volunteered, "I'd note again[,] nothing but courteous young man." *Id.* at 45.

When the federal agents arrived, they uncuffed Mr. Guerrero, placed him into their car, and obtained a waiver of his *Miranda* rights. C.A. E.R. 77-78. He then made statements admitting that he had been paid to deliver the ammunition to Nogales, Arizona, where another person would export it to Mexico. App 33a; PSR ¶¶ 7-8.

B. District Court Proceedings

Mr. Guerrero was indicted under 18 U.S.C. § 554(a), "Smuggling goods from the United States." C.A. E.R. 133. As later narrowed in a Notice of Election of Offenses, the government alleged that he "concealed, bought … and in any manner facilitated the transportation" of 7,000 rounds of 9mm ammunition and 13,000 rounds of 7.62x39mm ammunition, "knowing the same to be intended for exportation contrary to any law or regulation of the United States," to wit: 22 U.S.C. § 2778; 22 C.F.R. § 121.1; and 22 C.F.R. § 123.1; in violation of 18 U.S.C. § 554(a). C.A. E.R. 133; D. Ct. Doc. 67 (ellipses in original). As charged, the exportation would be contrary to laws requiring a license to export items on the United States Munitions List, including ammunition. *United States v. Rivero*, 889 F.3d 618, 621 (9th Cir. 2018). Under Ninth Circuit law, a violation thus required that he concealed, bought, or facilitated the transportation of the ammunition knowing that it was intended for exportation and knowing that the exportation would be unlawful. *See* 9TH CIR. CRIM JURY INSTR. 8.35A (Apr. 2019) (18 U.S.C. § 554), http://www3.ce9.uscourts.gov/jury-instructions/node/738/.[2]

[2] Effective June 25, 2022, Congress created several new federal crimes involving ammunition not charged here. *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Title II, § 12004(e), 136 Stat. 1313, 1329-30 (2022) (revising 18 U.S.C. § 924(h) to penalize receiving or transferring ammunition knowing it will be used to commit a felony); *id.* § 12004(f) (revising 18 U.S.C. § 924(k) to penalize smuggling ammunition into or out of the United States with intent to engage in or promote conduct that would constitute a felony if it had occurred within the United States); *id.* § 12004(b) (adding 18 U.S.C. § 922(d)(10) and (11) to penalize the sale or disposal of ammunition to any person knowing that the person intends to sell or dispose of the ammunition in furtherance of a felony or to a prohibited possessor).

Mr. Guerrero moved to suppress the statements obtained after the federal agents arrived. C.A. E.R. 127-32. He argued that (1) he was unlawfully detained after the trooper completed the traffic stop's mission without "independent reasonable suspicion" of criminal activity, and (2) the "detention turned into an unlawful arrest without probable cause." *Id.* at 130, 132.

The government presented the testimony of the trooper and the federal agent, as well as two exhibits. C.A. E.R. 17. Mr. Guerrero argued that his detention in handcuffs after the traffic stop was not supported by reasonable suspicion and also that the trooper's actions escalated the encounter into a *de facto* arrest. *Id.* at 106.

The magistrate judge who conducted the hearing recommended that the motion be granted. App. 31a. The magistrate judge held, and neither party contested, that the stop became a consensual encounter after the issuance of the warning and that the subsequent consent to search was valid. *Id.* at 34a-35a. The magistrate judge concluded, however, that (1) placing Mr. Guerrero in handcuffs was a new detention that was not supported by a reasonable suspicion of criminal activity (*id.* at 35a-36a), and, alternatively, (2) that the detention in handcuffs was a *de facto* arrest because "forcing [him] to stand on the roadside in handcuffs for 30 to 40 minutes" was "far more intrusive than necessary" (*id.* at 38a) and the trooper asked no questions about the ammunition (*id.* at 38a-39a). The magistrate judge further held that the arrest was not supported by probable cause. *Id.* at 40a-41a. Because the statements obtained by the federal agents were the fruits of the unlawful seizure, the magistrate judge concluded, suppression was required. *Id.* at 41a-42a.

The district court adopted the magistrate judge's undisputed factual findings but it rejected the recommendation and denied the motion to suppress. App. 23a-30a. It agreed that the encounter became a consensual one after the issuance of the warning, that the subsequent search was consensual, and that the handcuffing constituted a new seizure. *Id.* at 24a. But it concluded that the new seizure was supported by reasonable suspicion and was not a *de facto* arrest. *Id.* at 26a-30a.

The district court did not address the question of probable cause but it relied on several factors in concluding that the trooper had sufficient reasonable suspicion of an unlawful-exportation offense to detain Mr. Guerrero for further investigation: that Mr. Guerrero was transporting a large amount of ammunition south toward Mexico; that in the trooper's experience the quantity "may be indicative" of smuggling out of the country; that Mr. Guerrero "was traveling on a common smuggling route towards an international border"; that the car had "very dark window tint, which could have obscured items in the vehicle"; that Mr. Guerrero was not the registered owner of the car; and that "it appeared [he] may have been nervous." App. 26a. The district court further relied on the collective knowledge supplied by the federal agent's experience "when [the trooper] shared this information with [the agent]"—even though the agent was not contacted until after the cuffing—because the agent also suspected ammunition smuggling. *Id.* at 26a-27a.

In reasoning that the detention did not become an arrest, the district court correctly recognized that whether an investigatory stop becomes a *de facto* arrest requires evaluating the "totality of the circumstances," including "not only [1] how

intrusive the stop was, but also [2] whether the methods used were reasonable given the specific circumstances." App. 25a. But it reasoned only that the trooper acted reasonably in waiting for the federal agents and that the "delay of 30-40 minutes" was not unreasonably prolonged. *Id.* at 27a-30a. It did not address the intrusiveness of, and the purported justification for, the lengthy handcuffing.

Pursuant to conditional guilty plea that preserved his right to appeal the denial of the suppression motion, Mr. Guerrero pleaded guilty to the one-count indictment and the district court imposed a sentence of 24 months of imprisonment. C.A. E.R. 2, 5. The district court allowed him to remain released pending appeal pursuant to 18 U.S.C. § 3143(b)(1). C.A. E.R. 5.

C. Opinion of the Court of Appeals

The Ninth Circuit affirmed the denial of the suppression motion in a splintered *per curiam* opinion, over a dissent, "because of the consistent conclusions of Judge Gould and Judge Bea, … even though the reasoning of … their separate concurrences is different." App. 6a. Judge Gould and Judge Thomas agreed that the stop escalated into a *de facto* arrest. Judge Gould concluded that the trooper "effectuated a *de facto* arrest" but had probable cause to do so because of the quantity and type of ammunition and the dark window tint. App. 6a (Gould, J., concurring). Judge Bea concluded that the trooper "did not effectuate a *de facto* arrest" but added, "even if [he] had arrested Guerrero," he had probable cause to do so for various reasons, some of which Judge Gould accepted and some of which he rejected. App 9a-12a (Bea, J., concurring). Dissenting, Judge Thomas agreed with Judge Gould that the stop "ripened into an arrest" but concluded that the trooper had "no probable cause to do

so." App. 14a (Thomas, J., concurring). Judge Gould's determination of probable cause was thus dispositive in affirming the denial of the motion to suppress.

Judge Gould's concurrence reasoned that the detention in handcuffs was not "akin to a *Terry* stop, it was a *de facto* arrest," but "there was probable cause that Guerrero was smuggling ammunition in violation of 18 U.S.C. § 554(a)." App. 8a-9a (Gould, J., concurring). He explained:

> Probable cause supported Guerrero's *de facto* arrest. Guerrero's car had heavily tinted windows. After Guerrero consented to a search of his car, Trooper Amick found 20,000 rounds of rifle and handgun ammunition in Guerrero's car, and the ammunition included rounds suitable for high-powered assault weapons. I give no weight to the fact Guerrero was driving southward towards the Mexican border on Highway 10. Highway 10 leads directly to Tucson, where Guerrero lived, and he was only stopped 23 miles north of Tucson. In these circumstances, if standing alone, a natural and reasonable inference would be that Guerrero was heading home, and no reasonable inference of criminal activity from this southward travel could be inferred. But the tinted windows and the massive amount of ammunition point in another direction: that Trooper Amick's stop had opened a window to a crime in process.

Id.

After Judge Gould found probable cause for an unlawful-exportation offense, he drew additional inferences about "domestic terrorism" and "activities of a militia." App. 9a (Gould, J., concurring). He explained:

> The extremely high volume of ammunition in the car called for extra caution and for bringing in federal authorities. During this era in which the Department of Justice is actively investigating threats such as domestic terrorism, it was reasonable for Trooper Amick to want to defer a decision about Guerrero until after federal authorities arrived and could make their own assessment. 20,000 rounds of high-powered ammunition could fuel significant illicit activities of a militia hostile to democracy or other highly dangerous criminal behavior. Although the possession of ammunition was not illegal in Arizona, the extremely large volume of ammunition here raises risks to society that needed to be

> assessed more carefully and could not be done by a lone state trooper. The federal authorities, with their special expertise and databases, were properly invited to assess the situation before Guerrero was sent on his way with the ammunition. It was reasonable for Trooper Amick to believe this, and reasonableness is indeed the touchstone of the Fourth Amendment so far as searches and detentions are concerned.

Id.

Judge Bea responded that "Judge Gould's concerns about domestic terrorism are misplaced" and "would not be reasonable under the circumstances." App. 14a (Bea, J., concurring).

Mr. Guerrero filed petitions for rehearing and for rehearing en banc. Citing to Judge Thomas's persuasive dissent, he argued that probable cause may not be established on the basis of noncontraband materials without more information about how the person intends to use them. Pet. for Reh'g 2, 5-7. He emphasized that the ammunition was legal for adults who are not prohibited possessors under 18 U.S.C. § 922(g) to own in any quantity in Arizona and that it pertained to firearms that are covered by the Second Amendment. *Id.* at 8. He further argued that the reasonableness or the relative weight of the inferences to be drawn must be assessed in light of the newly recognized individual right to possess firearms. *Id.* at 2-3, 8 (citing *Bruen*, 142 S. Ct. at 2127; *Heller*, 554 U.S. at 635-36; *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), *abrogated on other grounds by Bruen*, 142 S. Ct. at 2127). Citing to this Court's caution that judges must not "considerably narrow the daylight between the showing required for probable cause [to arrest] and the 'less stringent' showing required for reasonable suspicion" to detain, *Kansas v. Glover*, 140 S. Ct. 1183, 1190 (2020), he argued that the 20,000

rounds created at most only a weak or an unreasonable inference of criminal activity, and one that falls far short of a probability. Pet. for Reh'g at 4, 8.

The Ninth Circuit denied the petition for panel rehearing in relevant part, amended the opinion, and denied the petition for rehearing en banc. App. 22a. Judge Thomas would have granted both petitions. *Id.* The panel allowed Mr. Guerrero to remain released pending the issuance of the mandate and it stayed the mandate pending this Court's disposition of the instant petition. C.A. DktEntry Nos. 33, 37.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Conflicts With This Court's Precedents.

The Ninth Circuit's opinion conflicts with this Court's precedents in four ways. *First*, it failed to apply this Court's framework for evaluating Fourth Amendment reasonableness when a seizure implicates values enshrined in another Bill of Rights amendments. *Second*, at the intersection of the Second and Fourth Amendments, it drew inferences from the possession of a large quantity of legal ammunition that are outdated and unreasonable after *Bruen* and *Heller* and that do not give rise to a "probability" of criminal activity. *Third*, even apart from Second Amendment considerations, it conflicts with this Court's precedents holding that probable cause may not be established on the basis of lawful materials without further information or inquiry about their intended use. *Fourth*, it eliminates the daylight between the showing required for probable cause and the less stringent showing required for reasonable suspicion, in contravention of this Court's recent instruction. Police and courts nationwide will increasingly confront the question presented in the wake of *Bruen* and *Heller*, and this case presents an ideal vehicle for its resolution.

A. Fourth Amendment reasonableness must be measured in part by the Second Amendment individual right to keep and bear arms.

Warrantless arrests are unreasonable unless supported by probable cause, which requires "a probability or substantial chance of criminal activity" under all the circumstances. *District of Columbia v. Wesby*, 138 S. Ct. 577, 586-87 (2018). In determining the existence of probable cause based on potentially lawful acts, "[t]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* at 588 (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983)); *accord Illinois v. Wardlow*, 528 U.S. 119, 128-29 (2000) (same for reasonable suspicion). More precisely, the inquiry is what "reasonable inferences," if any, can be drawn respecting the person's motives. *Wesby*, 138 S. Ct. at 586 (quoting *Maryland v. Pringle*, 540 U.S. 366, 372 (2003)); *accord Ornelas v. United States*, 517 U.S. 690, 700 (1996); *see also Wardlow*, 528 U.S. at 128 (Stevens, J., concurring in part and dissenting in part) ("The question in this case concerns 'the degree of suspicion that attaches to' a person's flight—or, more precisely, what 'commonsense conclusions' can be drawn respecting the motives behind that flight.").

When a search or seizure involves acts or "materials presumptively protected by the [Bill of Rights]," the "same standard" of probable cause applies. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874-75 (1986). However, in cases involving materials "presumptively under the protection of the [Bill of Rights]," the Fourth Amendment requires "examin[ing] what is 'unreasonable' in the light of the values" in other Bill of Rights amendments. *See Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

In *Roaden*, this Court held that the seizure of a film that an officer perceived to be obscene, which was "presumptively under the protection of the First Amendment," could not be justified under the Fourth Amendment's search-incident-to-arrest exception because a "prior restraint of the right of expression … calls for a higher hurdle in the evaluation of reasonableness." *Id.* at 497, 504; *see also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) ("[W]hile the general rule under the Fourth Amendment is that any and all evidence of crimes may be seized on probable cause … , it is otherwise when materials presumptively protected by the First Amendment are involved."). The *Roaden* court ruled that a warrant was instead required because, under the Fourth Amendment, "we examine what is 'unreasonable' in the light of the values of freedom of expression" in the First Amendment. 413 U.S. at 504. "[W]hen the 'things' [to be seized] are [films], and the basis for their seizure is the ideas which they contain," a warrant describing them with "scrupulous exactitude" is required. *Id.* (quoting *Stanford v. Texas*, 379 U.S. 476, 486 (1965)); *see also Maryland v. Macon*, 472 U.S. 463, 468 (1985) ("The First Amendment imposes special constraints on … seizures of presumptively protected material.") (citation omitted). Thus, "[t]he Fourth Amendment … must not be read in a vacuum." *Roaden*, 413 U.S. at 501.

The *Roaden* court effectively applied the "whole-document" canon of statutory and constitutional construction by interpreting "unreasonable" in the Fourth Amendment in light of the whole Bill of Rights. Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2391 (2020). Doing so was appropriate because

other Bill of Rights amendments "identify constitutional values that are elements of [Fourth Amendment] reasonableness," as well as "furnish benchmarks against which to measure reasonableness and components of reasonableness itself." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 805 (1994).

Just as the Fourth Amendment requires "examin[ing] what is 'unreasonable' in the light of the values of freedom of expression" in the First Amendment, *Roaden*, 413 U.S. at 504, it requires doing so in the light of the Second Amendment's individual right to keep and bear arms. Thus, where a warrantless arrest is unreasonable unless supported by probable cause, the Second Amendment must inform the probable cause inquiry of the degree of suspicion that attaches and the reasonableness of the inferences. The Ninth Circuit failed to recognize and apply this framework.

B. After *Bruen* and *Heller*, a large quantity of legal ammunition cannot alone give rise to a "probability" of criminal activity.

The Fourth Amendment requires "*reasonable* inference from the[] facts" in establishing probable cause. *Pringle*, 540 U.S. at 372 (emphasis added). Judge Gould's dispositive concurrence drew inferences from the type and quantity of the ammunition that are unreasonable after *Bruen* and can no longer establish the degree of suspicion necessary to find a "probability" of criminal activity.

Possession of the ammunition here was fully legal in any quantity for adults who are not prohibited possessors under 18 U.S.C. § 922(g). *See* App. 20a (Thomas, J., dissenting) ("possession of it was unquestionably legal"); App. 9a (Gould, J., concurring) ("the possession of ammunition was not illegal in Arizona"). Arizona

regulates the sale and ownership of ammunition only by restricting its sale to minors without parental consent. *See* Ariz. Rev. Stat. § 13-3109.

The 7,000 rounds of 9mm ammunition and the 13,000 rounds of 7.62x39mm ammunition were also presumptively protected by the newly recognized individual right to possess firearms. *See Bruen*, 142 S. Ct. at 2127; *Heller*, 554 U.S. at 635-36. The Second Amendment necessarily guarantees a corresponding right to obtain ammunition because, "without bullets, the right to bear arms would be meaningless." *Jackson*, 746 F.3d at 967, *abrogated on other grounds by Bruen*, 142 S. Ct. at 2127. The ammunition here pertained to semi-automatic handguns and rifles that are covered by the Second Amendment. *See Staples v. United States*, 511 U.S. 600, 612 (1994) (holding that semi-automatic handguns "traditionally have been widely accepted as lawful possessions"); *Jones v. Bonta*, 34 F.4th 704, 716 (9th Cir.) (agreeing with the district court that "'semi-automatic centerfire rifles are commonly used by law abiding citizens for lawful purposes such as hunting, target practice, and self-defense,' and thus that they are not 'dangerous and unusual'" under *Heller*), *vacated on other grounds*, 47 F.4th 1124, 1125 (9th Cir. 2022) (remanding for further proceedings consistent with *Bruen*). Thus, due to its legality and presumptively protected status, the quantity and type of ammunition here created at most only a very weak inference of criminal activity, and one that falls far short of a probability.

Allowing a full-scale arrest based solely on the possession of a large quantity of legal ammunition would effectively eliminate Fourth Amendment protections for persons lawfully exercising their Second Amendment rights. In *Beck v. Ohio*, 379 U.S.

89, 97 (1964), this Court held that police do not have probable cause to arrest based solely on knowledge that a person has "a previous record of arrests or convictions"; otherwise, "anyone with a previous criminal record could be arrested at will" and "the protections of the Fourth Amendment would evaporate." So too here. The probable cause requirement must "be strictly enforced." *Henry v. United States*, 361 U.S. 98, 102 (1959), *abrogated on other grounds by Terry v. Ohio*, 392 U.S. 1, 30-31 (1968). As the magistrate judge reasoned, "[t]he Court cannot agree that the police may arrest any person who carries 20,000 rounds of ammunition on Interstate 10 towards Tucson." App. 41a.

Therefore, examining Fourth Amendment reasonableness in the light of the values in the Second Amendment, the mere possession of any quantity of legal ammunition cannot alone supply the degree of suspicion or inferences necessary to find probable cause after *Bruen*. The Ninth Circuit's opinion fails to harmonize, and draw reasonable inferences at the intersection of, this Court's Fourth and Second Amendment jurisprudence.

C. Probable cause may not be established on the basis of lawful materials without further information about their intended use.

Even apart from the presumptively protected status of ammunition under the Second Amendment, probable cause may not be established "on the basis of noncontraband materials" without "information about how the suspect intends to use the[m]." App. 20a (Thomas, J., dissenting). Judge Gould's dispositive concurrence reasoned, contrary to this Court's precedents, that a person may be arrested for

transporting 20,000 rounds of legal ammunition, in a car with two illegally tinted front windows, without *any* further investigation into the ammunition's intended use.

This Court requires more when the possession of an item is not *per se* unlawful. In *Florida v. Royer*, the Court held that "[we] cannot agree … that every nervous young man paying cash [at an airport] for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested." 460 U.S. 491, 507 (1983) (plurality opinion); *id.* at 509 (Brennan, J., concurring). Similarly, in *Henry*, 361 U.S. at 103-04, the Court held that picking up outwardly legal "cartons" in a residential alley, without any flight of furtive behavior, did not establish probable cause absent information that the cartons were contraband.

Wesby itself demonstrates that when noncriminal acts form the basis for suspicion, further information or inquiry is essential to establishing a probability of criminal activity. In *Wesby*, the circumstances raised a possibility that partygoers should have known that they lacked permission to enter a vacant home for a party: The group claimed to be having a bachelor party, yet there was no bachelor, in a house with no furniture even though sexual activity was occurring, and many fled when police arrived. *Wesby*, 138 S. Ct. at 586-87. Nonetheless, police made no arrests until *after* they interviewed all the suspects. *Id.* at 583-84. The interviews produced "vague and implausible responses," including that no one "could not say who had invited them," as well as an admission by the purported lessee that she lied about having permission to use the home—all of which permitted an "entirely reasonable inference" that the partygoers were "lying." *Id.* at 586-88 (quoting *Pringle*, 540 U.S. at 372).

Here, as in *Royer* and *Henry*, and unlike in *Wesby*, the trooper did nothing more to develop suspicion after verifying Mr. Guerrero's statement that the legal ammunition was present. The ammunition could only be contraband under the smuggling statute—the only crime the trooper suspected—if it was intended to be exported unlawfully as Mr. Guerrero knew as much. Without further investigation before making the arrest, however, because the ammunition was otherwise legal to transport in any quantity, any inference that it was contraband was unreasonable, or very weak at most.

Other courts have required additional information in similar circumstances. In states where open gun possession is presumptively legal, the courts of appeal have held that mere gun possession is insufficient to establish reasonable suspicion. *See, e.g.*, *United States v. Ubiles*, 224 F.3d 213, 217-18 (3d Cir. 2000); *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013); *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1131-33 (6th Cir. 2015); *United States v. Watson*, 900 F.3d 892, 895-96 (7th Cir. 2018) (Barrett, C.J.); *United States v. Brown*, 925 F.3d 1150, 1153-54 (9th Cir. 2019). The Ninth Circuit has further held that, in such a state, displaying a firearm does "not create enough of a possibility of criminal activity that [the suspect] [i]s subject to immediate *arrest* without further investigation." *United States v. Willy*, 40 F.4th 1074, 1088 (9th Cir. 2022) (emphasis added). A tip that a person has a gun, in a state in which carrying a concealed gun is "presumptively lawful," "create[s] at most a very weak inference" that he is carrying it without a license. *Brown*, 925 F.3d at 1153-54. More information about the person or the firearm is required.

In a related line of cases, courts have similarly held that the smell of a legal substance, which has legitimate uses but might be used to make an illegal substance, alone does not establish probable cause. WAYNE R. LAFAVE, 2 SEARCH & SEIZURE § 3.6(b) n.32 (6th ed.); *United States v. Tate*, 694 F.2d 1217, 1221 (9th Cir. 1982), *vacated on other grounds*, 468 U.S. 126 (1984), *reaffirmed as to point under consideration here*, 795 F.2d 1487 (9th Cir. 1986).

Therefore, even apart from the presumptively protected status of ammunition under the Second Amendment, any inference of criminal activity from the legal ammunition's type and quantity cannot establish a *probability* of criminal activity without further information or inquiry about its intended use. The Ninth Circuit's opinion conflicts with this Court's rule in *Royer*, *Henry*, and *Wesby*.

D. Courts must not narrow the daylight between the showings required for probable cause and for reasonable suspicion.

This Court recently instructed that judges must not "considerably narrow the daylight between the showing required for probable cause [to arrest] and the 'less stringent' showing required for reasonable suspicion" to detain for investigation. *Glover*, 140 S. Ct. at 1190. Reasonable suspicion can be established with information "that is different in quantity or content than that required to establish probable cause." *Id.* at 1188 (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)). The Ninth Circuit's decision eliminates this critical distinction. Even if the trooper had reasonable suspicion under *Terry* to detain for further investigation, based on all the remaining factors, he did not have probable cause for an arrest.

Probable cause requires examining the "totality of the circumstances" of "the events leading up to the arrest, and then decid[ing] 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Wesby*, 138 S. Ct. at 586 (quoting *Pringle*, 540 U.S. at 371). "[E]ven 'strong reason to suspect' [i]s not adequate to support [an] arrest." *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (quoting *Henry*, 361 U.S. at 101).

Judge Gould's dispositive concurrence, in addition to drawing unreasonable inferences from the type and quantity of the ammunition, see Part I(B)-(C) *supra*, relied on the car's "heavily tinted windows." App. 8a (Gould, J., concurring). But the tint "adds little to a collective analysis," App. 20a (Thomas, J., dissenting), because, in Arizona, tint of any darkness is legal on all rear and rear side windows. Ariz. Rev. Stat. § 28-959.01(A). As one longtime federal judge in Arizona reasoned on the question of reasonable suspicion of smuggling, "heavily tinted" windows are "hardly remarkable in the sunny climate of southern Arizona." *Greene*, 826 F. Supp. at 315 n.2 (Roll, J.). The only illegal tint was on the front "driver and passenger side windows" (C.A. E.R. 24, 31), where it could not obscure items in the rear cargo area. The significance of the tint is further undermined by the facts that Mr. Guerrero did not cover the ammunition inside the car, he "freely told" the trooper that he had the 20,000 rounds, and he "freely gave his consent" to search the car. App. 19a-20a (Thomas, J., dissenting). Moreover, the tint did not in fact conceal the ammunition, which further tends to undermine its significance (*id.*), because when the trooper first approached the car, he immediately "observed two 1,000-round boxes of ammunition

in the rear cargo area." App. 31a. The tint is minimally probative. *See United States v. Arvizu*, 534 U.S. 266, 277 (2002) ("some factors are more probative than others").

Judge Bea correctly reasoned that Judge Gould's inferences about possible domestic terrorism were unreasonable. App. 14a (Bea, J. concurring) ("There is nothing in the record to suggest that Trooper Amick was concerned about domestic terrorism … and such a concern would not be reasonable under the circumstances."). Even assuming *arguendo* that such inferences could justify an investigatory detention under *Terry*, they do not justify a full-scale arrest without further information or inquiry. And even assuming *arguendo* that it was reasonable to believe that federal agents should be summoned, a mere belief that further investigation is warranted is not in itself an independent factor giving rise to probable cause.

Judge Gould and Judge Thomas correctly agreed that the location of the stop does not lead to a reasonable inference of criminal activity. App. 8a (Gould, J., concurring) ("Highway 10 leads directly to Tucson, where Guerrero lived, and he was only stopped 23 miles north of Tucson"; "no reasonable inference of criminal activity from this southward travel could be inferred."); App. 19a (Thomas, J., dissenting) ("the fact that Guerrero was north of Tucson, a city with a metro area of over a million people *and his home*, renders the direction of this travel relatively innocuous") (emphasis in original). Indeed, driving in a southeasterly direction 23 miles north of a major city and 90 miles north of the border, on a freeway that does not lead to a border in Arizona, contributes little to establishing a probability of unlawful exportation.

No other fact indicated smuggling, let alone out of the country. No hidden or non-factory compartment was found. The quantity was not *per se* unlawful and even if it raised questions, the trooper did not ask any. Mr. Guerrero's quick correction of his sister's name dispelled the trooper's concern about the car, he was fully cooperative, and the trooper acknowledged that motorists are often nervous in stops.

The district court relied on other circumstances that, even taken together, are not meaningfully probative. Those included that Mr. Guerrero "was traveling on a common smuggling route towards an international border"; that Mr. Guerrero was not the registered owner of the car; and that "it appeared [he] may have been nervous" based solely on his initial giving of his sister's middle name. C.A. E.R. 10. Neither Judge Gould nor Judge Thomas found those factors to be significant. *See United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1124 (9th Cir. 2002) (use of a major freeway that also happens to be a smuggling route merits "minimal significance"). Similarly, nothing about the encounter was inconsistent with Mr. Guerrero's statement that he had visited his mother in Phoenix.

The district court also relied on the trooper's experience that a large quantity of ammunition "may be indicative" of smuggling out of the country. C.A. E.R. 10. But "may" falls well short of a probability. Because the possession was not *per se* unlawful, as discussed above, more was required to develop a "reasonable" inference that it was contraband because it was intended for unlawful exportation. *Compare Brown*, 925 F.3d at 1154 (information a person "had a gun" created "at most a very weak inference that he was unlawfully carrying [it] without a license"). Because he did nothing more,

his experience and vague statement that the quantity "may be indicative" of smuggling is only minimally probative. *See id.* And because he did not, no reasonable inference could be drawn that the ammunition was not for personal use, or part of the legitimate commercial transaction, or intended for some other lawful purpose, and instead would be exported unlawfully. *See id.*

The district court also erroneously relied on the collective knowledge supplied by the federal agent whom the trooper contacted *after* the handcuffing. C.A. E.R. 10-11. As this Court has repeatedly held, whether probable cause exists depends upon the facts known to the officer at the time of the arrest. *See, e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). The collective knowledge of others may not be considered where, as here, "[the defendant] was arrested … prior to [the officer's] phone call to [the federal agents]." *Hernandez v. Skinner*, 969 F.3d 930, 943 n.4 (9th Cir. 2020).

Therefore, the Ninth Circuit's opinion and Judge Gould's dispositive concurrence collapse the showings required for probable cause and for reasonable suspicion, in contravention of *Glover*'s admonition.

II. The Question Presented is Recurring and Important.

This Court should grant review to provide clear guidance to courts, police, and the public on the interaction between the Fourth Amendment and an individual's right to possess firearms and ammunition. "[T]he calculus is now quite different." *Williams*, 731 F.3d at 694 (Hamilton, J., concurring in part and concurring in the judgment). States can no longer effectively prevent law-abiding residents from carrying guns outside of the home. *Bruen* 142 S. Ct. at 2156. Laws that regulate the right to bear arms can no longer be upheld or justified by means-end scrutiny to

assess their costs and benefits. *Id.* at 2126-27. In at least 43 states, a concealed-carry license must be issued whenever an applicant satisfies certain requirements. *Id.* at 2123. In a "steady trend of loosening gun restrictions," states continue to expand the rights of their residents to carry firearms in public. *See, e.g.*, Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 17 (2015). These "sweeping changes to America's substantive gun laws reverberate throughout American policing." *Id.* at 4. "The most immediate impact of expanding gun rights on policing tactics is legal uncertainty regarding what police can do when they observe, or learn of, a person carrying a firearm." *Id.* at 25. As shown by the disagreement between so many experienced judges in Mr. Guerrero's case, courts are equally uncertain.

Firearms are also ubiquitous; "nearly 400 million" are now in private hands. *Bruen*, 142 S. Ct. at 2158 (Alito, J., concurring). "Four-in-ten U.S. adults say they live in a household with a gun, including 30% who say they personally own one." Katherine Schaeffer, *Key Facts About Americans and Guns*, Pew Rsch. Ctr. (Sept. 13, 2021), https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/. All firearms require ammunition. *Jackson*, 746 F.3d at 967.

Therefore, guidance from this Court is critically needed, and the prevalence and importance of the issue warrants this Court's attention.

III. This Case Is An Ideal Vehicle.

This case is an ideal vehicle for the Court to modernize the inferences that may reasonably be drawn from, and the degree of suspicion that attaches to, the possession of legal ammunition after *Bruen* and *Heller*.

First, the issues were fully preserved in the district court, they arise here on direct review, and they were squarely presented and considered in the court of appeals, including in a petition for rehearing en banc.

Second, the issues here arise in a case-dispositive setting. In the court of appeals, the government candidly acknowledged at oral argument that, if Mr. Guerrero's motion to suppress his confession were granted, the prosecution "would be a challenge." Oral Argument at 11:55-12:08 (9th Cir. No. 21-10248), https://www.ca9.uscourts.gov/media/video/?20220616/21-10248/. The government also elected in the court of appeals not to contest his further claim that, if a Fourth Amendment violation occurred, the exclusionary rule should apply. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) (finding an intentional waiver in those identical circumstances).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Jon M. Sands
Federal Public Defender

s/ *Jeremy Ryan Moore*
*Jeremy Ryan Moore
Jay Aaron Marble
Assistant Federal Public Defenders
**Counsel of Record*

January 2023

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. SERGIO GUERRERO, *Defendant-Appellant.*	No. 21-10248 D.C. Nos. 4:19-cr-01468-CKJ-MSA-1 4:19-cr-01468-CKJ-MSA OPINION

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted June 16, 2022
San Francisco, California

Filed September 2, 2022

Before: Sidney R. Thomas, Ronald M. Gould, and
Carlos T. Bea, Circuit Judges.

Per Curiam Opinion;
Concurrence by Judge Gould;
Concurrence by Judge Bea;
Dissent by Judge S.R. Thomas

SUMMARY*

Criminal Law

In a per curiam opinion, the panel affirmed the district court's denial of Sergio Guerrero's motion to suppress because of the consistent conclusions of Judge Gould and Judge Bea, which represent a majority of the panel, even though the reasoning of Judge Gould and Judge Bea in their separate concurrences is different.

The panel noted that one exception to the Fourth Amendment's prohibition of searches and seizures conducted without prior approval by judge or magistrate is a *Terry* stop, which allows an officer to briefly detain an individual when the officer has a reasonable articulable suspicion that an individual is engaged in a crime, during which stop an officer may also conduct a limited protective frisk if the officer has reason to believe the individual has a weapon. The panel noted that another exception is when an officer has probable cause to arrest an individual.

Judge Gould concurred on the grounds that Trooper Amick effected a *de facto* arrest supported by probable cause.

Judge Bea concurred on the grounds that Trooper Amick merely detained Guerrero and did not effectuate a *de facto* arrest, but that even if Trooper Amick had arrested Guerrero, there was probable cause to do so.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Dissenting, Judge Thomas wrote that Trooper Amick's stop ripened into an arrest when he held Guerrero handcuffed, on a roadside, for approximately 40 minutes, waiting for federal officers to arrive; and that Trooper Amick had no probable cause to do so.

COUNSEL

J. Ryan Moore (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Tucson, Arizona; for Defendant-Appellant.

Angela W. Woolridge (argued), Assistant United States Attorney; Christina M. Cabanillas, Deputy Appellate Chief; Gary M. Restaino, United States Attorney; United States Attorney's Office, Tucson, Arizona; for Plaintiff-Appellee.

OPINION

PER CURIAM:

After the district court denied his motion to suppress, Sergio Guerrero pled guilty to smuggling ammunition in violation of 18 U.S.C. § 554(a). Guerrero timely appealed the denial of his motion to suppress. This appeal challenges that denial. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review the district court's denial of a motion to suppress *de novo*. *United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014). We review *de novo* mixed questions of law and fact, such as whether a seizure became a *de facto* arrest and whether an officer had reasonable suspicion or probable cause. *Id.*; *Ornelas v. United States*, 517 U.S. 690, 699 (1996). We review whether the exclusionary rule applies *de novo* and the district court's underlying factual findings for clear error. *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc).

The Fourth Amendment prohibits unreasonable searches and seizures by the government. U.S. Const. amend. IV. "Searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject to only a few specifically established and well delineated exceptions.'" *United States v. Brown*, 996 F.3d 998, 1004 (9th Cir. 2021) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)). One exception is a *Terry* stop, which allows an officer briefly to detain an individual when the officer has a reasonable articulable suspicion that an individual is engaged in a crime; an officer conducting a *Terry* stop may also conduct a limited protective frisk of the individual if the officer has reason to believe he or she has a

weapon. *Id.* at 1001; *Terry v. Ohio*, 392 U.S. 1, 21, 30 (1968). Another exception is when an officer has probable cause to arrest an individual. *Brown*, 996 F.3d at 1005. "In distinguishing between a *Terry* stop and a full-blown arrest, we consider whether a reasonable person would believe that he or she is being subjected to more than a temporary detention, as well as the justification for the use of such tactics, *i.e.*, whether the officer had sufficient basis to fear for his safety to warrant the intrusiveness of the action taken." *Id.* at 1006 (simplified and internal quotation marks omitted).

We affirm the denial of Guerrero's motion to suppress because of the consistent conclusions of Judge Gould and Judge Bea, representing a majority of the panel, that we should affirm the denial of the motion to suppress. Affirmance is required by the conclusions of the judges in the majority, even though the reasoning of Judge Gould and Judge Bea in their separate concurrences filed herewith is different. Subjoined to this brief opinion are (1) the separate concurrence of Judge Gould; (2) the separate concurrence of Judge Bea; and (3) the dissent of Judge S.R. Thomas.

GOULD, Circuit Judge, concurring:

I concur in affirming the denial of Guerrero's motion to suppress on the grounds that Trooper Amick effectuated a *de facto* arrest supported by probable cause.

I

Trooper Amick effectuated a *de facto* arrest of Guerrero, which required probable cause. First, Trooper Amick detained Guerrero for approximately one hour. *Terry* stops

are brief detentions. *Id.* at 1005; *United States v. Place*, 462 U.S. 696, 709 (1983) ("[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."). Here, Trooper Amick's detention of Guerrero for approximately one hour, while not dispositive on its own, *see United States v. Sharpe*, 470 U.S. 675, 685 (1985), is a strong indicator that Guerrero's detention was not just a *Terry* stop, but was actually an arrest.

Second, Trooper Amick handcuffed Guerrero while awaiting the arrival of federal agents. "Handcuffing as a means of detaining an individual does not automatically escalate a stop into an arrest, but it 'substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical *Terry* stop.'" *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 941 (9th Cir. 2020) (quoting *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982)). The circumstances surrounding Guerrero's handcuffing are particularly suggestive of intrusiveness beyond a *Terry* stop. Guerrero was handcuffed for a significant amount of time: thirty to forty minutes. Trooper Amick also handcuffed Guerrero despite the fact that Guerrero had been cooperative and respectful during the encounter. *See id.* at 940. And, Trooper Amick had also already searched Guerrero's car for weapons, further indicating that Guerrero was unlikely to be a threat.

In combination, (1) the length of the detention and (2) the use of handcuffs under the circumstances transformed Guerrero's detention into a *de facto* arrest. A reasonable person in Guerrero's situation would not have thought that they were free to leave. Instead, Guerrero was not free to leave, and a reasonable person would have

realized that departure was not possible. This was more than a brief detention akin to a *Terry* stop, it was a *de facto* arrest.

II

Probable cause supported Guerrero's *de facto* arrest. Guerrero's car had heavily tinted windows. After Guerrero consented to a search of his car, Trooper Amick found 20,000 rounds of rifle and handgun ammunition in Guerrero's car, and the ammunition included rounds suitable for high-powered assault weapons. I give no weight to the fact Guerrero was driving southward towards the Mexican border on Highway 10. Highway 10 leads directly to Tucson, where Guerrero lived, and he was only stopped 23 miles north of Tucson. In these circumstances, if standing alone, a natural and reasonable inference would be that Guerrero was heading home, and no reasonable inference of criminal activity from this southward travel could be inferred. But the tinted windows and the massive amount of ammunition point in another direction: that Trooper Amick's stop had opened a window to a crime in process.

The central legal point that should govern our resolution of this case is that probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *D.C. v. Wesby*, 138 S. Ct. 577, 586 (2018) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983)). Further, probable cause "is not a high bar: It requires only the 'kind of fair probability on which reasonable and prudent [people,] not legal technicians, act.'" *Kaley v. United States*, 571 U.S. 320, 338 (2014) (quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013)). Here, there was probable cause that Guerrero was smuggling ammunition in violation of 18 U.S.C. § 554(a), which was

sufficient to support Trooper Amick's detaining Guerrero until federal agents arrived.

The extremely high volume of ammunition in the car called for extra caution and for bringing in federal authorities. During this era in which the Department of Justice is actively investigating threats such as domestic terrorism, it was reasonable for Trooper Amick to want to defer a decision about Guerrero until after federal authorities arrived and could make their own assessment. 20,000 rounds of high-powered ammunition could fuel significant illicit activities of a militia hostile to democracy or other highly dangerous criminal behavior. Although the possession of ammunition was not illegal in Arizona, the extremely large volume of ammunition here raises risks to society that needed to be assessed more carefully and could not be done by a lone state trooper. The federal authorities, with their special expertise and databases, were properly invited to assess the situation before Guerrero was sent on his way with the ammunition. It was reasonable for Trooper Amick to believe this, and reasonableness is indeed the touchstone of the Fourth Amendment so far as searches and detentions are concerned. *Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020) ("This Court's precedents have repeatedly affirmed that 'the ultimate touchstone of the Fourth Amendment is reasonableness.'") (quoting *Heien v. North Carolina*, 574 U.S. 54, 60 (2014)).

I concur.

BEA, Circuit Judge, concurring:

I concur in affirming denial of Guerrero's motion to suppress. First, Trooper Amick merely detained Guerrero;

he did not effectuate a de facto arrest. Second, even if Trooper Amick had arrested Guerrero, there was probable cause to do so.

I

In determining when an investigatory stop becomes an arrest, courts must consider the "totality of the circumstances," *United States v. Del Vizo*, 918 F.2d 821, 824 (9th Cir. 1990), including "the severity of the intrusion, the aggressiveness of the officer's actions, and the reasonableness of the officer's methods." *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 940 (9th Cir. 2020). In evaluating the severity of the intrusion, courts consider "the brevity of the invasion on the individual's Fourth Amendment interests," *United States v. Sharpe*, 470 U.S. 675, 685 (1985), and "whether the officers 'diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" *United States v. Torres-Sanchez*, 83 F.3d 1123, 1129 (9th Cir. 1996) (quoting *Sharpe*, 470 U.S. at 686). Although "handcuffing is not part of a typical *Terry* stop," *United States v. Bautista*, 684 F.3d 1286, 1289 (9th Cir. 1982), an officer's use of handcuffs does not automatically "escalate a stop into an arrest" if the use of handcuffs is justified by the circumstances. *Reynaga Hernandez*, 969 F.3d at 941.

The issue here is whether Trooper Amick's decision to prolong the stop until investigators from the Bureau of Alcohol, Tobacco, and Firearms (ATF) arrived escalated the stop into an arrest. This court has previously found that a detention did not become an arrest when the detention was prolonged to await the arrival of specialized federal officers. *See United States v. O'Looney*, 544 F.2d 385 (9th Cir. 1976); *United States v. Moore*, 638 F.2d 1171 (9th Cir. 1980).

In *O'Looney*, police suspected the defendant of illegally exporting firearms to the Irish Republican Army. *O'Looney*, 544 F.2d at 388. The defendant granted the police permission to search his vehicle, which revealed evidence that he was connected to another individual who was also suspected of being involved in illegal firearms exportation. *Id.* at 388. After the consensual search of his vehicle, the defendant was transported in a police car to the police station. *Id.* at 389. Police questioned the defendant at the station for about twenty minutes, and after determining that no violation of local law had been committed, placed the defendant in an interrogation room to wait for ATF agents. *Id.* The court held that the defendant was not arrested while he was held in the interrogation room to await ATF agents because "[i]t was not unreasonable to detain [the defendant] temporarily at the station to await the arrival of federal officers who are more familiar with the federal firearms laws and more experienced in their enforcement," particularly in light of the "secrecy and intrigue surrounding the purchase of an otherwise legal weapon." *Id*.

O'Looney is directly on point with the present case. In both cases, the defendant was suspected of using a legal object for an illegal purpose, namely for transporting firearms outside of the United States. In both cases, the defendant was temporarily detained by a state law enforcement officer until ATF officers could arrive to question the defendant about a federal crime. The major factual difference between the present case and *O'Looney* is that Guerrero was placed in handcuffs, and the defendant in *O'Looney* was not. But the defendant in *O'Looney* was transported to a police station, in a police car, and held in an interrogation room—conditions that arguably constitute a greater intrusion into an individual's liberty than the use of handcuffs. Thus, although Guerrero was detained for an

extended period and placed into handcuffs, he was not subject to a de facto arrest under the law of this circuit. *See also Moore*, 638 F.2d at 1173–74 (holding that appellants were not arrested when placed in the rear seat of a police car because it was necessary to secure appellants while awaiting the arrival of customs officers and the means of securing them was reasonable under the circumstances).

II

Even if the stop had constituted a de facto arrest, it was nevertheless supported by probable cause. I agree in substantial part with Judge Gould's analysis of the facts constituting probable cause, but I separately write to emphasize some particular details.

Probable cause "exists when . . . a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime." *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007). The court considers the totality of circumstances because "the whole is often greater than the sum of its parts." *D.C. v. Wesby*, 138 S. Ct. 577, 586 (2018).

Guerrero was in possession of 7,000 rounds of 9mm ammunition and 13,000 rounds of 7.62x39mm ammunition. 9mm ammunition is used in handguns, and 7.62x39mm ammunition is used in AK-47 assault rifles, as well as certain light machine guns. Significant weight should be given to the fact that Guerrero possessed a large quantity of ammunition fit for use in high-powered assault weapons. Moreover, the large quantity of ammunition suggests that Guerrero intended the ammunition for commercial, rather than personal, use. But Guerrero was transporting this ammunition in a passenger car rather than a commercial vehicle. The incongruity between the commercial quantity

of ammunition and noncommercial type of vehicle strengthens the inference of illegal activity.

In addition, Guerrero told Trooper Amick he was returning home after visiting his mother. Carrying 20,000 rounds of ammunition in the back of one's vehicle is not consistent with an ordinary trip to one's mother's house. It is reasonable for this seemingly out-of-the-ordinary pattern of events to raise further suspicion.

When asked who owned the car, Guerrero first said it belonged to his sister "Jaqueline" then corrected himself and said it belonged to his sister "Martha." The dissent places little weight on the fact that Guerrero initially named the wrong sister, noting that Guerrero gave only one inconsistent answer. I disagree with this assessment of the facts. Although Guerrero's naming of the wrong sister could reasonably be interpreted as a benign mistake, it could also be indicative of nervousness, increasing a reasonable officer's suspicion of illegal activity. Also, as discussed above, multiple aspects of Guerrero's story were inconsistent, including the fact that he was returning from his mother's house with a large amount of ammunition, and the fact that he was carrying a commercial quantity of ammunition in a personal vehicle. When taken together, these inconsistencies increase the reasonable possibility of criminal activity.

The dissent gives little weight to Guerrero's use of tinted windows, to Guerrero's proximity to the border, and to Guerrero's southward direction of travel. Although each of these facts, standing alone, may offer only a slight basis for suspicion, the probable cause analysis must be based on a totality of the circumstances. *Wesby*, 138 S. Ct. at 586. The question is not whether Guerrero's tinted windows or proximity to the border were independently sufficient to

create probable cause for arrest, but whether Guerrero's proximity to the border, use of tinted windows, proffering of inconsistent statements, and possession of a large quantity of assault-rifle ammunition in a passenger vehicle heading south all combine to create a fair probability that Guerrero was engaging in illegal activity. I believe that they do.

On a final note, Judge Gould's concerns about domestic terrorism are misplaced. The language in his concurrence regarding "illicit activities of a militia hostile to democracy" undoubtedly refers to the January 6, 2021, attack on the United States Capitol. But the events in the present case took place in April of 2019, nearly two years prior to the events of January 6, 2021. There is nothing in the record to suggest that Trooper Amick was concerned about domestic terrorism at the time of the detention, and such a concern would not be reasonable under the circumstances.

For these reasons, I concur.

S.R. THOMAS, Circuit Judge, dissenting:

I respectfully dissent from the panel majority's affirmance. I would reverse the district court. Trooper Amick's stop ripened into an arrest when he held Guerrero handcuffed, on a roadside, for approximately 40 minutes, waiting for federal officers to arrive. Trooper Amick had no probable cause to do so. Thus, I agree with the Magistrate Judge's findings and recommendations, and would reverse the district court's denial of the suppression motion.

I

There are two aspects to this stop that make it unreasonably intrusive in light of the circumstances. The first is Trooper Amick's unjustified use of handcuffs. The second is Trooper Amick's decision to cease his investigation for 40 minutes to wait for more experienced officers to arrive.

During a *Terry* stop "police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest." *Florida v. Royer*, 460 U.S. 491, 499 (1983) (plurality opinion). For a brief investigatory stop to retain its character as a *Terry* stop, it must "last no longer than is necessary to effectuate the purpose of the stop . . . . [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.* at 500.

An officer's use of handcuffs does not automatically "escalate a stop into an arrest" where handcuff use is justified by the circumstances, including:

> 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed; 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur.

Reynaga Hernandez v. Skinner, 969 F.3d 930, 940 (9th Cir. 2020) (quoting *Washington v. Lambert*, 98 F.3d 1181, 1189 (9th Cir. 1996)).

In this case, Trooper Amick placed Guerrero in handcuffs following initial questioning. The record is undisputed that Guerrero was "super cooperative," "very respectful," and "nothing but courteous" throughout their encounter. During the Trooper's consensual search of Guerrero's car, Guerrero obeyed instructions to stand approximately 30 feet from the vehicle. Guerrero's demeanor was entirely consistent with lawful behavior. The Trooper had no information Guerrero was armed; indeed, he had already searched the car for weapons. The stop did not follow a violent crime; Guerrero was stopped for a window tint violation. And Trooper Amick had no information that a crime of violence was about to occur. In sum, the handcuffing was not justified under *Lambert.*

The second aspect of the detention that indicates the *Terry* stop had transformed into a de facto arrest is the length of the detention. A *Terry* stop must "last no longer than is necessary to effectuate the purpose of the stop[.]" *Royer*, 460 U.S. at 500. "[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." *United States v. Place*, 462 U.S. 696, 709 (1983); *see also United States v. Jennings*, 468 F.2d 111, 115 (9th Cir. 1972) (holding that, after an initial investigative inquiry on the street is completed, continued detention of an individual for fingerprinting and photographing is constitutionally invalid without probable cause to arrest). "[I]n assessing the effect of the length of the detention, [a court] take[s] into account

whether the police diligently pursue[d] their investigation." *Place*, 462 U.S. at 709.[1]

In this case, Trooper Amick's initial investigation of the tinted window violation resolved quickly. The Trooper's subsequent investigation of his suspicion of smuggling activity took approximately 20 minutes. Following the Trooper's call to the federal authorities, Guerrero was detained in handcuffs for an additional 40 minutes, without Trooper Amick conducting any further investigation. Thus, the Trooper did not "diligently pursue a means of investigation that was likely to quickly dispel his suspicion" of smuggling goods from the United States. *United States v. Torres-Sanchez*, 83 F.3d 1123, 1129 (9th Cir. 1996) (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985)). Indeed, the Trooper put his investigation on hold for an additional 40 minute detention after completing the search of the vehicle. In other words he chose a means of further investigation—waiting for federal officers—that necessitated considerable delay.

In short, the confluence of the handcuffs and 40 minute delay after completion of the initial investigation exceeded the scope of a brief investigatory detention. At no point was Guerrero free to leave. Thus, under these circumstances, the extended detention constituted a de facto arrest.

[1] Although there is no bright line rule as to the detention time deemed to be unreasonable, *see Place*, 462 U.S. at 709, the American Law Institute's Model Code for Pre-Arraignment Procedure states that a *Terry* detention should be "for such period as is reasonably necessary for the accomplishment of the purposes authorized . . . but in no case for more than twenty minutes." § 110.2(1) (1975); *see Place*, 462 U.S. at 709 n.10.

II

Trooper Amick lacked probable cause for the arrest. "Probable cause to arrest exists when . . . . [given the facts] known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime." *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (citations omitted). Although it "is not a high bar," *D.C. v. Wesby*, 138 S. Ct. 577, 586 (2018), it requires more than "[m]ere suspicion, common rumor, or even strong reason to suspect," a crime is being committed, *Lopez*, 482 F.3d at 1072. Rather than viewing each fact in isolation, a court reviews the totality of circumstances because "the whole is often greater than the sum of its parts." *Wesby*, 138 S. Ct. at 588. And, where innocent facts form the basis for an officer's suspicion, "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* (citation omitted). "Probable cause is an objective standard." *Lopez*, 482 F.3d at 1072.

There are five facts which the probable cause determination is defended: (1) the amount of ammunition; (2) the type of ammunition; (3) the tinted window violation; (4) the car's proximity to the border and south-bound route; and (5) Guerrero's contradictory answers to Trooper Amick's questions. I agree with this assessment of the relevant facts with one exception. Guerrero gave only one contradictory answer. He first told Trooper Amick the car belonged to his sister "Jacqueline" but then he corrected himself and said it belonged to "Martha." The Magistrate Judge determined that Trooper Amick did not find this misstatement unusual or suspicious, and the district court adopted this finding. Although the probable cause inquiry is

objective, *Lopez*, 482 F.3d at 1072, like the district court, I place little weight on this fact.

The suspicion inquiry hinges on three facts: Guerrero's possession of 20,000 rounds of rifle and handgun ammunition, the tinted automobile windows, and Guerrero's southbound travel in the general direction of Mexico. As the last two facts are almost entirely benign, I begin with those.

Guerrero was stopped traveling southeasterly on Highway 10 about 23 miles from Tucson, and almost 90 miles from the Mexican border. The district court characterized this corridor as a "common smuggling route," However, highway 10 is the artery connecting Arizona's two largest cities, Tucson and Phoenix. The Supreme Court has listed proximity to the border as a factor in assessing reasonable suspicion. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). However, it has also cautioned against placing much weight on heavily trafficked highways with "a large volume of legitimate traffic." *Id.* at 882. In this case, the fact that Guerrero was north of Tucson, a city with a metro area of over a million people *and his home*, renders the direction of this travel relatively innocuous. The officer's examination of Guerrero's driver's license verified that he lived in Tucson. Had Guerrero been on the south side of Tucson heading towards the border, or on a back road, perhaps this fact would be more suggestive of intent to smuggle goods out of the country. But he was on a busy Interstate north of Tucson, proceeding in the direction of his home in Tucson, and some 90 miles away from the Mexican border.

Turning to the tinted windows, it is noteworthy that Guerrero did nothing further to conceal the ammunition, which tends to undermine the significance of this fact. Guerrero did not cover the ammunition with a tarp or

otherwise attempt to hide it and, when asked, freely gave his consent for Trooper Amick to search his car—which rendered any benefit from the window tint fruitless. In sum, the fact of tinted windows does not independently support probable cause, and adds little to a collective analysis.

The only question then is what reasonable inferences can be drawn from the fact that Guerrero legally possessed 20,000 rounds of ammunition. There was no suggestion that he possessed the ammunition illegally, and Guerrero made no effort to conceal it. When an officer becomes suspicious on the basis of noncontraband materials, an officer does not have probable cause of criminal activity unless the officer has more information about how the suspect intends to use the item. *See United States v. Tate*, 694 F.2d 1217, 1221 (9th Cir. 1982), *vacated on other grounds*, 468 U.S. 1206 (1984).

Here, there was no additional information or other indication of illegal activity. As the Magistrate Judge pointed out, "Defendant freely told Trooper Amick that he was carrying that amount of ammunition." The Magistrate Judge further noted that the "Defendant's demeanor was perfectly consistent with lawful behavior." Significantly, Trooper Amick never asked Guerrero what he was doing with 20,000 rounds of ammunition or asked any other questions about it. And the possession of it was unquestionably legal.

Given the negligibly suspicious value of the surrounding facts, here, the "whole is [*not*] greater than the sum of its parts." *See Wesby*, 138 S. Ct. at 588 (citing *Arvizu*, 543 U.S. at 277–78). Although probable cause is not a high bar, a reasonable officer in Trooper Amick's shoes would have, at

most, a "strong reason to suspect" smuggling, which is not enough under our case law.

For these reasons, I respectfully dissent.

FOR PUBLICATION

FILED

OCT 18 2022

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SERGIO GUERRERO, Defendant-Appellant.	No. 21-10248 D.C. Nos. 4:19-cr-01468-CKJ-MSA-1 4:19-cr-01468-CKJ-MSA District of Arizona, Tucson ORDER

Before: S.R. THOMAS, GOULD, and BEA, Circuit Judges.

The opinion in the above-captioned matter filed on September 2, 2022 and published at __ F.4th __, 2022 WL 4005324 is AMENDED as follows:

At the end of the first paragraph, the following language should be added:

> We remand this case, however, for the limited purpose of amending the judgment to reflect only 18 U.S.C. § 554(a) as the offense of conviction.

A majority of the panel has voted to deny the Petition for Rehearing and the Petition for Rehearing En Banc. Judge SR Thomas would have granted the petitions. The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35.

Appellant's Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Sergio Guerrero, Defendant.	No. CR 19-1468-TUC-CKJ (MSA) **ORDER**

On February 19, 2020, Magistrate Judge Maria S. Aguilera issued a Report and Recommendation ("R&R") (Doc. 33) in which she recommended that the Motion to Suppress Evidence Obtained as a Result of an Unlawful Detention (Doc. 21) filed by Sergio Guerrero ("Guerrero") be granted. The government has filed an objection (Doc. 38). Guerrero has filed a response (Doc. 40) and the government has filed a reply (Doc. 43).

The standard of review that is applied to a magistrate judge's report and recommendation is dependent upon whether a party files objections – the Court need not review portions of a report to which a party does not object. *Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 472-73, 88 L.Ed.2d 435 (1985). However, the Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instruction." Fed. R. Civ. P. 72(b)(3); *see also* 288 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.").

Report and Recommendation – Factual Background

The Court adopts the factual background of the R&R, to which there were no objections.

Traffic Stop and Consensual Search

The magistrate judge determined the traffic stop was not unlawfully prolonged to conduct the consensual search. Neither party has objected to this finding. The Court adopts this portion of the R&R.

Reasonable Suspicion Without De Facto Arrest

The magistrate judge determined Trooper Amick did not have reasonable suspicion to detain Guerrero following the consensual encounter and vehicle search. Rather, she found the detention of Guerrero became a *de facto* arrest unsupported by probable cause.

A law enforcement officer conducting a traffic stop may question a suspect about issues unrelated to the purpose of the stop, but cannot unduly prolong the detention. *Muehler v. Mena*, 544 U.S. 93, 101 (2005); *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (authority for a seizure ends "when tasks tied to the traffic infraction are—or reasonably should have been—completed" because the purpose of a traffic stop is to address the traffic violation); *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007). Indeed, if officers develop an independent reason to detain a suspect beyond the period of time necessary to complete the traffic investigation, they may prolong the detention. *See United States v. Evans*, 786 F.3d 779, 788 (9th Cir. 2015), *citing Mendez*, 476 F.3d at 1080. Additionally, the detention of a suspect during an investigative stop is justified while officers diligently pursue the means of investigation. *United States v. Sharpe*, 470 U.S. 675, 685-87 (1985) (rejecting a "bright line" rule of time limitation on investigative stops).

The magistrate judge determined Trooper Amick did not have reasonable suspicion to detain following the consensual search. As summarized by the magistrate judge:

[R]easonable suspicion 'exists when an officer is aware of specific, articulable facts

> which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion.'" [*United States v. Landeros*, 913 F.3d 862, 868 (9th Cir. 2019) (emphasis in original) (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc)]. This determination turns on "the totality of the circumstances surrounding the stop, including 'both the content of information possessed by police and its degree of reliability.'" *United States v. Brown*, 925 F.3d 1150, 1153 (9th Cir. 2019) (quoting *United States v. Williams*, 846 F.3d 303, 308 (9th Cir. 2016)).

R&R, p. 5. The magistrate judge determined Trooper Amick did not use "the 'least intrusive means reasonably available to verify or dispel' his suspicions of ammunition[] smuggling[,]" thereby converting the investigatory stop into a *de facto* arrest. R&R, p. 7, *citing Florida v. Royer*, 460 U.S. 491, 500 (1983). The magistrate judge further summarized:

> There is no bright-line rule for determining whether and when an investigatory stop turns into a de facto arrest. [*Sharpe*, 470 U.S.] at 685. This is a case-specific determination that turns on the totality of the circumstances. *United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014). In considering the circumstances, courts "evaluat[e] not only how intrusive the stop was, but also whether the methods used were reasonable given the specific circumstances.'" *United States v. Rousseau*, 257 F.3d 925, 929 (9th Cir. 2001) (emphasis in original) (quoting *Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996)). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

R&R, p. 7. The magistrate judge concluded, "There was another obvious, less-intrusive means of investigation reasonably available to Trooper Amick: He could have questioned [Guerrero] himself. Trooper Amick did not lack the experience necessary to question [Guerrero] about ammunition[] smuggling—a straightforward offense which Trooper Amick accurately described." R&R, p. 8. Indeed, the magistrate judge determined the circumstances in this case were distinguishable from those in which a delay was necessary, *see e.g.*, *Sharpe*, 470 U.S. at 679, 687 n.5 (holding that an officer reasonably detained a motorist while awaiting the arrival of a federal agent, where reasonable suspicion for the stop was based on the agent's, not the officer's, observations); *Rousseau*, 257 F.3d at 927–30 (holding that an officer reasonably detained two suspects at gunpoint until other officers arrived, where one suspect was known to be armed and dangerous), rather than the informal arrangement with Homeland Security Investigations that it be called to respond to certain traffic stops.

After the consensual search of the vehicle, Trooper Amick knew Guerrero was transporting a large amount of ammunition south toward Mexico. As Trooper Amick testified, possession of ammunition is in fact illegal "[i]f it's trying to be smuggled out of the country into a foreign country." Transcript of 2/4/2020 Hearing ("TR"), p. 45. Indeed, Trooper Amick testified that was the crime he suspected was being committed. *Id*. In fact, based on his experience, the large amount of ammunition may be indicative that there "may have been, would be, or there was going to be a crime committed of ammunition being taken out of the country into Mexico. *Id*. at 12. Guerrero argues the facts of the case do not connect the circumstances to a possible unlawful possession. Response, p. 3. However, it is the quantity itself, based on the experience of the agents, that provides the connection. In considering the totality of circumstances, the Court also takes note that Guerrero was traveling on a common smuggling route towards an international border, which Trooper Amick testified, in his experience, was consistent with ammunition intended to be smuggled into Mexico. TR, p. 48. Further, the vehicle had a very dark window tint, which could have obscured items in the vehicle, *id*. at 11, Guerrero was not the registered owner of the vehicle, *id*. at 35, and it appeared Guerrero may have been nervous.[1]

The Court recognizes that "'under the totality of the circumstances, and even though individual acts may be "innocent when view in isolation, taken together, they may warrant further investigation." *United States v. Raygoza-Garcia*, 902 F.3d 994, 1000 (9th Cir. 2018), *citing Valdes-Vega*, 738 F.3d at 1078.

Additionally, when Trooper Amick shared this information with Agent Boisselle,

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[1]Guerrero had given suspicious statements to Trooper Amick. *See e.g., United States v. Richards*, 500 F.2d 1025 (9th Cir.1974) (implausible and evasive answers to questions may add to initial suspicions). Guerrero argues Trooper Amick acknowledged that "Guerrero quickly corrected his mistake of the registered owner and 'that just dispelled any suspicions [Trooper Amick] had of him having the car." Response, pp. 2-3. However, Trooper Amick also testified that "when people get nervous, they might say the wrong name." TR, p. 52. In other words, while Trooper Amick's suspicions regarding Guerrero having the car were dispelled, he also recognized Guerrero was nervous.

Agent Boisselle was concerned that the amount of ammunition was indicative of trafficking ammunition out of the country. *Id*. at 59. *See e.g.,United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989) (reasonable suspicion is based on the collective knowledge of all officers involved in the investigation); *United States v. Butler*, 74 F.3d 916, 921 (9th Cir. 1996) ("collective knowledge of police officers involved in an investigation, even if some of the information known to other officers is not communicated to the arresting officer" can establish probable cause). In fact, the volume of ammunition in Guerrero's vehicle was one of the highest Agent Boisselle had seen. TR, p. 59.

Additionally, in considering whether the least intrusive means reasonably available to verify or dispel the suspicion was used, the Court considers that, while Trooper Amick testified he had experience interdicting contraband being transported on interstate highways, he did not testify he had the experience and means to conduct an ammunition smuggling investigation. Rather, he testified that, "based on previous experiences with large amounts of ammunition found on the roadside," he contacts the ATF or HSI for assistance. TR, p. 27. Indeed, Trooper Amick testified his duties were to enforce state traffic laws; he did not testify that his duties, training or ability was to investigate federal ammunition smuggling offenses. Also, Agent Boisselle testified regarding the distinction between the interdiction of items on the freeway versus the HSI's focus on investigating suspected trafficking items. *Id*. at 57. Further, as stated by the government:

> There is no Arizona state law equivalent or similar to 18 U.S.C. §554(a). Trooper Amick is a state trooper with the ability to enforce state traffic law (Tr. 8); his duties and abilities do not extend to offenses that are solely punishable by federal law and the responsibililty [sic] of federal law enforcement agents.

Response, p. 9 n. 3.

The Supreme Court has addressed whether "the investigative methods employed [were] the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983). The Ninth Circuit has summarized:

> In *Royer*, a plurality of the Supreme Court determined that the circumstances surrounding the questioning did not meet this test. Royer was taken to a small room

> characterized as a "large closet" with one desk and two chairs. *Royer*, 460 U.S. at 502, 103 S.Ct. at 1327. In addition, the plurality said there was no reason indicated in the record for transferring the site of the interrogation to the small room. *Id*. at 505, 103 S.Ct. at 1328. The plurality also stated that the state failed to touch on the question of "whether it would have been feasible to investigate the contents of Royer's bag in a more expeditious way." *Id*.

United States v. $25,000 U.S. Currency, 853 F.2d 1501, 1507 (9th Cir. 1988). Here, Trooper Amick did not transfer the site of the interrogation to the location of federal agents experienced in trafficking investigations. Rather, he arranged for an experienced agent to arrive at the scene in a short amount of time – Agent Boisselle arrived at the scene in less than 40 minutes from when Trooper Amick contacted him.

Moreover, the "question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *See e.g. United States v. Sharpe*, 470 U.S. 675, 687 (1985). Indeed, "as a highway patrolman, [Trooper Amick] lacked [Agent Boisselle's] training and experience in dealing with [ammunition trafficking] investigations[,]" *id*. at 687, n.5, and acted reasonably and diligently in awaiting Agent Boisselle's arrival. Although the trooper in *Sharpe* was assisting a federal agent and was not aware of all of the facts that had aroused the federal agent's suspicion, the Court finds it significant the Supreme Court determined a delay awaiting the arrival of an experienced investigator was lawful. As in *Sharpe*, the trooper acted reasonably and diligently in awaiting assistance from the federal agent. *Sharpe*, 470 U.S. at 685, *citation omitted* ("in assessing the effect of the length of the detention, [courts] take into account whether the police diligently pursue their investigation").

In this case, Trooper Amick acted reasonably in contacting Agent Boisselle – by making this contact he was diligently pursuing the investigation. Further, at that point, Agent Boisselle concern regarding the volume of ammunition is considered in the totality of the circumstances. *Hoyos*, 892 F.2d at 1392 (reasonable suspicion is based on the collective knowledge of all officers involved in the investigation). Agent Boisselle was assigned to a weapons trafficking task force with ATF and worked closely with DPS due to the majority of calls coming from two highways near Tucson – I-10 and I-19. Additionally, there is "no

rigid time limitation" on an investigative detention, but the detention may not involve "delay unnecessary to the legitimate investigation of the law enforcement officers." *Sharpe*, 470 U.S. at 685–87 (finding a 20 minute detention reasonable where police acted diligently and the defendant contributed to the delay).

"Given the totality of the circumstances, the prolonged traffic stop was supported by reasonable suspicion that criminal activity was afoot." *United States v. Pinex*, 720 F. gApp'x 345, 347 (9th Cir. 2017) (where car was rented to non-present third party, stop took place in alleged drug corridor, defendant gave officers false name, false social security number, and false date of birth, defendant lied about location of third party, and rental car company authorized search of car and requested that it be impounded the two-hour long traffic stop was permissible); *see also United States v. Mayo*, 394 F.3d 1271, 1275 (9th Cir. 2005) (forty minutes to pursue the inquiries that arose was not unreasonable); *United States v. Maltais*, 403 F.3d 550, 557 (8th Cir. 2005) (finding a detention of approximately two hours and 55 minutes reasonable while the officer was awaiting a narcotics dog to arrive at a remote location); *but see United States v. Place*, 462 U.S. 696, 709–10 (1983) (finding a 90 minute detention of the defendant's luggage unreasonable when agents did not act diligently to minimize the delay).

In considering the totality of the circumstances, the Court finds the government used the least intrusive means reasonably available to investigate the suspicion of ammunition trafficking. The individual acts, which may be viewed in isolation as innocent, included one of the largest volumes of ammunition seen by Agent Boisselle. Further investigation was warranted, *Raygoza-Garcia*, 902 F.3d at 1000, and Trooper Amick's conduct of immediately contacting an agent experienced in investigating the federal crime of ammunition trafficking was the least intrusive and reasonable means to investigate. Not only was the delay necessary to efficiently investigate the offense, but it may have resulted in less delay compared to, for example, if Trooper Amick had transported Guerrero to an HSI office and arranged to have Guerrero's vehicle removed from the scene. Although Trooper Amick could have himself questioned Guerrero about the ammunition rather than wait for the federal

agents to arrive, the fact that he chose instead to wait for the experienced federal agents was a reasonable alternative particularly given the massive quantity of ammunition involved.

Further, in the specific circumstances of this case, the least intrusive means *reasonably* available to confirm or dispel the suspicion in a *short period of time* warranted questioning by an experienced investigator rather than an agent whose experience focused on traffic stops and the interdiction of contraband. The minimal delay of 30-40 minutes, therefore, did not turn the detention into a *de facto* arrest. *Royer*, 460 U.S. at 500; *United States v. Rousseau*, 257 F.3d 925, 929 (9th Cir. 2001), *quoting Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996) (the court "evaluat[es] not only how intrusive the stop was, but also whether the methods used were reasonable given the specific circumstances.").

The Court having found the detention of Guerrero was not a *de facto* arrest, suppression of the ammunition is not appropriate.

Statements of Guerrero

Guerrero requests that his statement be suppressed as a remedy for the alleged unlawful *de facto* arrest. However, the Court has concluded Guerrero was lawfully detained without a *de facto* arrest. Therefore, the Court finds Guerrero's statement is admissible.

Accordingly, after an independent review, IT IS ORDERED:

1. The Report and Recommendation (Doc. 33) is ADOPTED IN PART AND REJECTED IN PART.
2. The Motion to Suppress (Doc. 21) is DENIED.

DATED this 28th day of April, 2020.

Cindy K. Jorgenson
United States District Judge

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Sergio Guerrero,

Defendant.

No. CR-19-01468-001-TUC-CKJ (MSA)

REPORT AND RECOMMENDATION

Pending before the Court is Defendant Sergio Guerrero's motion to suppress evidence obtained during an unlawful detention. (Doc. 21.) The Government has filed a response, and an evidentiary hearing was held on February 4, 2020. (Docs. 23, 29.) For the reasons that follow, the Court will recommend that the motion be granted.

Background[1]

On April 17, 2019, at 3:22 p.m., State Trooper Christopher Amick initiated a traffic stop of a vehicle traveling eastbound on Interstate 10 through Marana, Arizona. (Tr. 6–8.) Defendant was the driver and sole occupant of the vehicle, a Dodge Journey (a sport utility vehicle) bearing Arizona state license plates. (*Id.* at 9–10; Pl.'s Ex. 3.) Trooper Amick approached the front passenger window of Defendant's vehicle and observed two 1,000-round boxes of ammunition in the rear cargo area. (Tr. 10–11.)

Trooper Amick informed Defendant that he had been stopped for illegal window tint and requested Defendant's driver's license, vehicle registration, and proof of insurance.

[1] The following statement of facts is taken from testimony and documents presented at the evidentiary hearing.

(*Id.* at 13.) In addition to the registration, Defendant provided his Arizona driver's license, which listed his home address in Tucson, Arizona.[2] (*Id.* at 13, 34.) At Trooper Amick's request, Defendant waited near the passenger side of the patrol car while Trooper Amick ran checks and completed the paperwork for the stop. (*Id.* at 14–15.) While completing the paperwork, Trooper Amick inquired about Defendant's travels. (*Id.* at 17.) Defendant responded that he was returning to Tucson after visiting his mother in Phoenix for a few hours. (*Id.* at 17, 39–40.)

Trooper Amick returned Defendant's documents and issued Defendant a warning citation, which Defendant signed. (*Id.* at 18.) At that point, according to Trooper Amick, Defendant was free to leave. (*Id.* at 19.) Trooper Amick did not tell Defendant he was free to leave or say anything else that might imply that state of events (e.g., "have a good day"). (*Id.* at 37.) Trooper Amick waited until Defendant started moving away, then asked if Defendant was willing to answer some additional questions. (*Id.* at 19, 53.) Defendant agreed. (*Id.* at 19.) In response to Trooper Amick's questions, Defendant stated that he was transporting approximately 20,000 rounds of ammunition. (*Id.* at 20.) Trooper Amick then obtained Defendant's verbal and written consent to a search of the vehicle. (*Id.* at 20–21; Pl.'s Ex. 2.) During the search, Trooper Amick found 20,000 rounds of rifle and handgun ammunition. (Tr. 25.)

Based on the large amount of ammunition, Trooper Amick believed he had reasonable suspicion that Defendant was engaged in the smuggling of ammunition into Mexico. (*Id.* at 26.) Trooper Amick handcuffed Defendant and notified him that he was being detained. (*Id.* at 25–26.) Trooper Amick then called Special Agent Jacob Boisselle of Homeland Security Investigations ("HSI") and notified Agent Boisselle of the search results. (*Id.* at 28.) The phone call was made at approximately 3:40 p.m. (*Id.* at 42.)

Accompanied by another agent, Agent Boisselle left his office in Tucson and traveled to the scene, arriving between 4:10 p.m. and 4:20 p.m. (*Id.* at 58, 61.) There, he

[2] Defendant initially told Trooper Amick that the vehicle belonged to his sister, "Jacqueline." (Tr. 14.) Defendant quickly corrected himself, stating that his sister's name is "Martha." (*Id.*) Trooper Amick did not find the misstatement unusual or suspicious. (*Id.* at 51–52.)

obtained a *Mirandized* confession from Defendant that the ammunition was being transported to Nogales, Arizona, to then be smuggled into Mexico. (*Id.* at 64; *see* Doc. 1.) During the 30- to 40-minute wait for Agent Boisselle, Defendant stood handcuffed on the roadside. (Tr. 43–45.) Trooper Amick did not question Defendant about the ammunition during this period. (*Id.* at 30.)

Discussion

These facts implicate three issues: (1) whether Trooper Amick prolonged the traffic stop unlawfully; (2) if the prolonged stop was lawful, whether Trooper Amick had reasonable suspicion to detain Defendant after the vehicle search; and (3) if Trooper Amick had reasonable suspicion to detain Defendant, whether that detention transformed into a de facto arrest for which probable cause was required.

I. Prolongation of the Traffic Stop

Defendant contends that that Trooper Amick unlawfully prolonged the traffic stop. He argues that, at the conclusion of the traffic stop, no reasonable person would have felt free to leave after Trooper Amick requested consent to questioning. The Government argues that Defendant was in fact free to leave, and that the prolonged encounter was consensual. The Court agrees with the Government.

"A seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). However,

> traffic stops can last only as long as is reasonably necessary to carry out the "mission" of the stop, unless police have an independent reason to detain the motorist longer. The "mission" of a stop includes "determining whether to issue a traffic ticket" and "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." A stop that is unreasonably prolonged beyond the time needed to perform these tasks ordinarily violates the Constitution.

United States v. Gorman, 859 F.3d 706, 714 (9th Cir. 2017) (quoting *Rodriguez*, 575 U.S. at 355).

The Ninth Circuit Court of Appeals has stated that "a traffic stop may be extended to conduct an investigation into matters other than the original traffic violation *only if* the

officers have reasonable suspicion of an independent offense." *United States v. Landeros*, 913 F.3d 862, 867 (9th Cir. 2019) (emphasis added) (citing *Rodriguez*, 575 U.S. at 357–58). Other courts have held that a traffic stop may alternatively be prolonged based on voluntary consent. *See, e.g.*, *United States v. Bernard*, 927 F.3d 799, 805 (4th Cir. 2019) ("A police officer can extend the duration of a routine traffic stop only if the driver gives consent or if there is reasonable suspicion that an illegal activity is occurring."). The Court agrees that consent is an independent basis for extending a traffic stop. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991) (stating that consensual encounters do not violate the Fourth Amendment).

Here, there is no question that Trooper Amick lacked reasonable suspicion to prolong the traffic stop. "Reasonable suspicion 'exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion.'" *Landeros*, 913 F.3d at 868 (emphasis in original) (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc)). At the conclusion of the traffic stop, Trooper Amick had observed only two 1,000-round boxes of ammunition, which are legal to possess. Although Trooper Amick's observation aroused his suspicions, the two boxes of ammunition by themselves do not support a particularized inference that Defendant was engaged in illegal activity.

The Government contends, however, that Defendant voluntarily consented to further interaction with Trooper Amick. "No Fourth Amendment seizure occurs when a law enforcement officer merely identifies himself and poses questions to a person if the person is willing to listen." *United States v. Washington*, 490 F.3d 765, 770 (9th Cir. 2007). However, "the police [must] not convey a message that compliance with their requests is required." *Id.* (quoting *Bostick*, 501 U.S. at 435). Whether a consent was voluntary or the product of coercion "is to be determined by the totality of all the circumstances and is a matter which the Government has the burden of proving." *United States v. Mendenhall*, 446 U.S. 544, 557 (1980) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 227 (1973)).

The Government has met its burden in this case. Trooper Amick testified that he asks for consent only after there is a clear ending to the traffic stop, usually when the motorist starts to leave. (Tr. 53–54.) In this case, although he could not recall specifically what action Defendant took to leave, he was sure that Defendant either backed away or turned and started walking away. (*Id.* at 54–55.) The Court agrees with Defendant that the circumstances were fairly coercive—Defendant was removed from his vehicle for a minor window-tint violation and made to stand next to the patrol car, and Trooper Amick said nothing indicating that Defendant was free to leave—but the evidence indicates that Defendant attempted to leave despite these circumstances. Therefore, the traffic stop was not unlawfully prolonged, but rather became a consensual encounter.

II. Reasonable Suspicion for the Detention

The Government concedes that Trooper Amick seized Defendant by handcuffing him after the vehicle search. Defendant contends that this detention was unlawful, as it was not supported by reasonable suspicion. The Government disagrees, arguing that the ammunition alone gave Trooper Amick reasonable suspicion. The Court agrees with Defendant.

As noted above, "[r]easonable suspicion 'exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion.'" *Landeros*, 913 F.3d at 868 (emphasis in original) (quoting *Montero-Camargo*, 208 F.3d at 1129). This determination turns on "the totality of the circumstances surrounding the stop, including 'both the content of information possessed by police and its degree of reliability.'" *United States v. Brown*, 925 F.3d 1150, 1153 (9th Cir. 2019) (quoting *United States v. Williams*, 846 F.3d 303, 308 (9th Cir. 2016)).

Although relevant, the fact that Defendant was traveling eastbound on Interstate 10 is of only minimal significance. Interstate 10 is undoubtedly utilized by smugglers. Nevertheless, it cannot be overlooked that Interstate 10 connects Phoenix and Tucson, Arizona's two largest cities. Presumably, most of the traffic between these two cities is lawful. *See United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1124 (9th Cir. 2002)

(presuming that most of the traffic on Highway 86 is lawful, despite its reputation as an alien-smuggling route, because it connects various cities to Interstate 10). The significance of the route and direction of travel is further lowered by the fact that Defendant was stopped passing through Marana, which is just north of Tucson. Given that Defendant's driver's license listed an address in Tucson, Defendant's assertion that he was traveling home was more than plausible.

The Government rightly treats the amount of ammunition as the strongest evidence of criminal activity. Trooper Amick stated that he rarely encounters large amounts of ammunition, and that large amounts are indicative of smuggling activities. (Tr. 46, 48.) However, the significance of the ammunition is diminished by two circumstances. First, ammunition is a legal commodity and it is lawful to carry 20,000 rounds of ammunition in Arizona. (*Id.* at 39); *see Brown*, 925 F.3d at 1153 (observing that it was "presumptively lawful in Washington" to carry a gun). Second, prior to the search, Defendant freely told Trooper Amick that he was carrying that amount of ammunition. Trooper Amick did not say that Defendant reacted nervously to the question, or that Defendant tried to avoid answering it in any way. (Tr. 20.) Defendant's demeanor was perfectly consistent with lawful behavior.

The Court finds that Trooper Amick did not have reasonable suspicion. The only factor holding more than minimal weight is the ammunition. However, in view of its legality and the fact that Defendant readily reported it, the ammunition did not give rise to an objective and reasonable inference that crime was afoot. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (explaining that a mere hunch is insufficient). This remains true when the ammunition is considered with the other factors, none of which particularly bolster the level of suspicion. The detention was consequently unlawful.

III. De Facto Arrest[3]

Defendant contends that the duration and character of his detention transformed the detention into a de facto arrest for which probable cause was lacking. The Government

[3] To reach this issue, the Court assumes that Trooper Amick had reasonable suspicion to detain Defendant.

responds that Trooper Amick and Agent Boisselle diligently pursued the investigation at all times and that the overall length of the detention was reasonable. However, because the evidence presented shows that Defendant was detained for an extended period of time during which Trooper Amick made no attempt to "confirm or dispel" his suspicions, *United States v. Sharpe*, 470 U.S. 675, 686 (1985), the Court finds that the seizure exceeded the bounds of a lawful investigatory stop and became an arrest. The Court also finds that the arrest was not supported by probable cause.

There is no bright-line rule for determining whether and when an investigatory stop turns into a de facto arrest. *Id.* at 685. This is a case-specific determination that turns on the totality of the circumstances. *United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014). In considering the circumstances, courts "evaluat[e] not only how intrusive the stop was, but also whether the methods used were reasonable *given the specific circumstances*.'" *United States v. Rousseau*, 257 F.3d 925, 929 (9th Cir. 2001) (emphasis in original) (quoting *Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996)). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

Following the search, Trooper Amick detained Defendant for further investigation of a possible ammunitions-smuggling offense. (Tr. 26, 44.) The Government contends this detention was reasonable. It emphasizes that Trooper Amick was quick to call Agent Boisselle, and that Agent Boisselle immediately left for the scene of the traffic stop. However, the threshold inquiry is not whether Trooper Amick and Agent Boisselle were diligent in performing these activities. It is whether, in calling and waiting for Agent Boisselle, Trooper Amick used the "least intrusive means reasonably available to verify or dispel" his suspicions of ammunitions smuggling. *Royer*, 460 U.S. at 500.

The answer is no. The testimony reflects that Trooper Amick made no attempt to verify or dispel his suspicions. In fact, he stated that his failure to investigate was

intentional:

> Q: So what happened during the approximately 40 minutes that you were waiting for Special Agent Boisselle to arrive, where are you, where is Mr. Guerrero?
> A: Yes ma'am. He's standing by the front passenger's side tire of my car and I'd note again nothing but courteous young man. *I'm not asking questions about any sort of investigation because I understand he's been detained and we're just standing there waiting*.

(Tr. 29–30 (emphasis added).)

There was another obvious, less-intrusive means of investigation reasonably available to Trooper Amick: He could have questioned Defendant himself. Trooper Amick did not lack the experience necessary to question Defendant about ammunitions smuggling—a straightforward offense which Trooper Amick accurately described. (Tr. 26.) He testified that his "mission" is to interdict contraband (illegal drugs, weapons, and ammunition) being transported on interstate highways, and he knows from experience that large amounts of ammunition are indicative of ammunitions smuggling. (*Id.* at 20, 26.) He has confirmed in the past that seized ammunition was being smuggled into Mexico. (*Id.* at 46–47.) Additionally, Defendant was not combative or otherwise uncooperative, such that a one-on-one interview would have been difficult or unreasonable. To the contrary, Trooper Amick emphasized that Defendant was "100 percent cooperative and very courteous the entire time." (*Id.* at 20, 26.)

The Court is cognizant that it must refrain from "unrealistic second-guessing" of police conduct. *Sharpe*, 470 U.S. at 686. However, these circumstances show that Trooper Amick had the experience and means to investigate Defendant in a more expeditious way. Instead, Trooper Amick suspended the investigation and forced Defendant to stand on the roadside, in handcuffs, for 30 to 40 minutes. Given the reasonableness of the alternative, this was far more intrusive than necessary. *See id.* at 687 ("The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."). Consequently, the Court finds that the detention became a de facto arrest for which probable cause was required.

It must be observed that Trooper Amick was simply following his training. (Tr. 27.)

Pursuant to an informal understanding between HSI and the Department of Public Safety, state troopers who find weapons or ammunition are trained to contact HSI's smuggling task force. (*Id.* at 57.) However, although cooperation between law enforcement agencies is desirable, such informal understandings have no effect on the limits the Constitution sets for investigatory detentions. *See Kaupp v. Texas*, 538 U.S. 626, 632 (2003) (per curiam) (sheriff's department's routine practice of transporting suspects in handcuffs was irrelevant to the objective determination whether transportation of defendant in handcuffs constituted an arrest). Here, the detention of Defendant was not made reasonable merely because it was a result of Trooper Amick following his training. Trooper Amick had a constitutional duty to investigate diligently. *See Royer*, 460 U.S. at 500; *Sharpe*, 470 U.S. at 686. As explained above, he did not do so.

This finding should not be construed as a broader statement that officers can never wait for assistance. There are undoubtedly situations where an officer will need to detain a suspect until help arrives. *See, e.g.*, *Sharpe*, 470 U.S. at 679, 687 n.5 (holding that an officer reasonably detained a motorist while awaiting the arrival of a federal agent, where reasonable suspicion for the stop was based on the agent's, not the officer's, observations); *Rousseau*, 257 F.3d at 927–30 (holding that an officer reasonably detained two suspects at gunpoint until other officers arrived, where one suspect was known to be armed and dangerous). These situations involve circumstances that make delay *necessary*. *See Sharpe*, 470 U.S. at 686 (stating courts "should take care to consider whether the police are acting in a swiftly developing situation"). There were no such circumstances in this case. The delay was not necessitated by a "swiftly developing situation," but rather by HSI's preference that it be called into certain traffic stops. By the time of the phone call, Trooper Amick had initiated the stop, obtained consent to questioning and a search, and found a large amount of ammunition, all with the complete cooperation of Defendant. There was no reason to discontinue what had been a successful investigation up to that point.

Having found that Defendant was arrested, the question becomes whether the arrest was supported by probable cause. Probable cause exists if "under the totality of

circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that the defendant had committed a crime." *United States v. Price*, 921 F.3d 777, 790 (9th Cir. 2019) (quoting *Beier v. City of Lewiston*, 354 F.3d 1058, 1065 (9th Cir. 2004)). "The analysis involves both facts and law. The facts are those that were known to the officer at the time of the arrest. The law is the criminal statute to which those facts apply." *Reed v. Lieurance*, 863 F.3d 1196, 1204 (9th Cir. 2017) (quoting *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1076 (9th Cir. 2011) (per curiam)).

The facts are that, at approximately 3:30 p.m., Defendant was traveling eastbound on Interstate 10 with 20,000 rounds of ammunition in his vehicle. Defendant was stopped north of Tucson, where he lives, and he stated that he was returning to Tucson from Phoenix, where he had visited his mother for a few hours. Taking all relevant facts into account, the Court finds that no reasonable officer could believe there was a fair probability that Defendant was committing, or had committed, a criminal offense.

As noted above, the direction of travel and notoriety of the route are only minimally probative. There are hundreds (if not thousands) of motorists each day who travel the same direction on the same road; most of that traffic is lawful. *See Sigmond-Ballesteros*, 285 F.3d at 1124. Moreover, Defendant had a plausible explanation for his travels—he was heading home after spending a few hours in Phoenix. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018) (requiring courts to consider the plausibility of explanations for suspicious conduct). The 20,000 rounds of ammunition are more probative. However, ammunition is a legal commodity. And although it may be suspicious to travel with 20,000 rounds of ammunition, that activity by itself is presumptively legal. (Tr. 39); *see Harper v. City of Los Angeles*, 533 F.3d 1010, 1022 (9th Cir. 2008) (stating that "even strong reason to suspect" criminal activity is not enough to establish probable cause). Conspicuously absent here is any information suggesting that Defendant was doing something *besides* lawfully transporting the ammunition. *See* 18 U.S.C. § 554(a) (criminalizing the transportation of merchandise *with knowledge* that such merchandise will be illegally exported from the United States).

The Court cannot agree that the police may arrest any person who carries 20,000 rounds of ammunition on Interstate 10 towards Tucson. Therefore, the Court finds that Trooper Amick lacked probable cause for the arrest.

IV. Remedy

Soon after Agent Boisselle's arrival, Defendant confessed that he was transporting the ammunition to Nogales, Arizona so that another individual could smuggle it into Mexico. (Tr. 64.) The confession must be suppressed unless it was "an act of free will [sufficient] to purge the primary taint of the unlawful invasion." *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). Factors relevant to determining whether a confession was an act of free will include the giving of *Miranda* warnings, "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975) (internal citations and footnotes omitted). *Miranda* warnings alone, however, are insufficient to break the causal connection between an illegal arrest and a confession. *Id.* at 602–03. The Government bears the burden of showing the admissibility of a confession that was preceded by an illegal arrest. *Id.* at 604.

The Government has not met its burden, as it has offered no analysis of the foregoing factors. Moreover, the factors weigh in favor of suppression. Defendant gave his confession within two hours of his illegal arrest. *See id.* (finding temporal proximity favored defendant where statements were given less than two hours after the illegal arrest). There were no intervening circumstances; he was not released from custody, nor did he appear before a judge or consult with an attorney. *See United States v. Washington*, 387 F.3d 1060, 1074 (9th Cir. 2004) (explaining that these circumstances tend "to distance the suspect from the coercive effects of temporally proximate constitutional violations"). Finally, the detention had a quality of purposefulness about it, in that there was no reason why Trooper Amick could not himself have questioned Defendant. *See United States v. Perez-Esparza*, 609 F.2d 1284, 1290–91 (9th Cir. 1979) (reaching the same conclusion on similar facts).

Agent Boisselle did advise Defendant of his *Miranda* rights. (Tr. 67.) However, this factor alone does not outweigh the remaining factors. *Brown*, 422 U.S. at 602–03. Therefore, the Court concludes that Defendant's confession must be suppressed.

Conclusion

The Court finds that although Trooper Amick obtained voluntary consent to prolong the encounter, he lacked reasonable suspicion to detain Defendant. Alternatively, if Trooper Amick had reasonable suspicion to detain Defendant, the Court finds that the detention of Defendant transformed into a de facto arrest for which probable cause was lacking. Therefore,

IT IS RECOMMENDED that the motion to suppress (Doc. 21) be **granted** and that any statements made to law enforcement after the illegal detention be **suppressed**.

The parties shall have fourteen days from the date of service of this recommendation to file specific written objections with the District Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days to respond to any objections.

Dated this 19th day of February, 2020.

Maria S. Aguilera

Honorable Maria S. Aguilera
United States Magistrate Judge