IN THE

Supreme Court of the United States

LUIS MIGUEL SIERRA-AYALA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

UNITED STATES of America, Appellee,

v.

Luis Miguel SIERRA-AYALA, Defendant, Appellant.

No. 20-1145

United States Court of Appeals, First Circuit.

July 5, 2022

Background: Defendant was indicted for possession of heroin and cocaine with intent to distribute, possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm with an obliterated serial number. The United States District Court for the District of Puerto Rico, Pedro A. Delgado-Hernandez, J., 2019 WL 3526491 and 2019 WL 4391452, adopted report and recommendation of Bruce J. McGiverin, United States Magistrate Judge, 2018 WL 9801979, as it related to issue of standing, and denied defendant's motion to suppress firearm and drugs recovered during his arrest. Defendant was convicted of charged offenses, and he appealed.

Holdings: The Court of Appeals, Lipez, Circuit Judge, held that:

(1) defendant was seized within meaning of Fourth Amendment;

(2) sergeant did not have reasonable suspicion that defendant was involved in criminal activity, as would justify *Terry* stop;

(3) District Court did not clearly err in crediting sergeant's testimony at suppression hearing that defendant voluntarily displayed bag containing drugs to sergeant;

(4) drugs acquired during defendant's voluntary display of bag were not subject to suppression under fruit-of-the-poisonous-tree doctrine; and

(5) District Court's preclusion of cross-examination was not clearly prejudicial to defendant.

Affirmed.

1. Searches and Seizures ⚿161

Standing for Fourth Amendment purposes is distinct from Article III standing. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 4.

2. United States Magistrate Judges ⚿233, 236

In reviewing de novo the determination of those portions of a magistrate judge's report and recommendation to which objection is made, district court may receive further evidence on matter, including via an evidentiary hearing. 28 U.S.C.A. § 636(b)(1).

3. Bailment ⚿1

The "depositum contract" is a civil law concept, existing in Louisiana as well as Puerto Rico, that has some relationship with the common law concept of bailment.

See publication Words and Phrases for other judicial constructions and definitions.

4. Bailment ⚿11

Under Puerto Rico law, a "depository" assumes a duty of care to the depositor to safeguard the object.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⚿1139, 1158.12

Court of Appeals reviews district court's factual findings at suppression hearing for clear error and its legal conclusions de novo.

6. Criminal Law ⚿1158.12

In reviewing district court's ruling on suppression motion, Court of Appeals is especially deferential to district court's evaluation of witnesses' credibility, which Court of Appeals will overturn only if, after reviewing all of the evidence, it has a definite and firm conviction that a mistake has been committed.

7. Criminal Law ⚿1158.12

In context of Court of Appeals' review of district court's ruling on suppression motion, absent objective evidence that contradicts a witness's story or a situation where the story itself is so internally inconsistent or implausible that no reasonable factfinder would credit it, "the ball game is virtually over" once district court determines that a key witness is credible.

8. Criminal Law ⚿392.4(2)

Evidence acquired in violation of the Fourth Amendment is subject to the exclusionary rule. U.S. Const. Amend. 4.

9. Arrest ⚿60.4(1)

Not every interaction between a police officer and a citizen constitutes a seizure triggering Fourth Amendment protections. U.S. Const. Amend. 4.

10. Arrest ⚿60.4(1)

"Seizure" occurs, within meaning of Fourth Amendment, where the totality of the circumstances shows that officers have restrained the liberty of a citizen through physical force or a show of authority. U.S. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

11. Arrest ⚿60.4(1)

Courts evaluate the coercive effect of an encounter, for purpose of determining whether seizure occurred within meaning of Fourth Amendment, by asking whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. U.S. Const. Amend. 4.

12. Arrest ⚿60.4(2)

Defendant was "seized," within meaning of Fourth Amendment, when sergeant approached him at site of "known drug point" on residential street immediately after unmarked vehicle had pulled up in yard beside a house, officers exited vehicle, yelling "police" and chasing after six or seven fleeing individuals, and additional police officers and vehicles arrived at site; reasonable person, observing show of police authority, would not feel free to leave, and heavy police presence and rapidity with which officers pursued fleeing individuals objectively communicated that law enforcement was exercising its official authority to restrain defendant's liberty of movement. U.S. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

13. Arrest ⚿60.2(10)

Under *Terry*, a police officer may briefly detain an individual for questioning if the officer reasonably suspects that the person apprehended is committing or has committed a crime. U.S. Const. Amend. 4.

14. Arrest ⚿60.2(10)

Reasonable suspicion standard for *Terry* stop requires a particularized and objective basis for suspecting the person stopped of criminal activity, that is both objectively reasonable and grounded in specific and articulable facts. U.S. Const. Amend. 4.

15. Arrest ⚿60.2(10)

In order for *Terry* stop to be justified, critically, the individual facts, taken in the aggregate, must be sufficient to trigger a reasonable suspicion that some criminal

activity was afoot, and that the defendant was involved. U.S. Const. Amend. 4.

16. Arrest ⚿60.2(13)

Sergeant did not have reasonable suspicion that defendant was involved in criminal activity, so as to justify *Terry* stop; although defendant was present at "known drug point," close to his parents' home, and possessed messenger-style bag, unlike other individuals present at scene, defendant neither fled nor acted evasively as sergeant approached, and even if messenger-style bags were commonly used in drug transactions, as sergeant testified as suppression hearing, they were also useful for any number of legitimate purposes. U.S. Const. Amend. 4.

17. Arrest ⚿60.2(7)

Location of a stop in a high crime area may be one factor relevant to the *Terry* analysis. U.S. Const. Amend. 4.

18. Arrest ⚿60.2(10)

Unprovoked flight or nervous, evasive behavior may provide reasonable suspicion justifying an investigatory stop. U.S. Const. Amend. 4.

19. Searches and Seizures ⚿161

Unlike Article III standing, Fourth Amendment "standing" is not jurisdictional, and courts may address whether a seizure or search was adequately supported, by reasonable suspicion or probable cause and exigent circumstances, before resolving whether a defendant has standing to challenge the search or seizure. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 4.

20. Searches and Seizures ⚿194

Where the government defends the validity of a search based on an individual's consent, the government has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. U.S. Const. Amend. 4.

21. Criminal Law ⚿392.49(4)

District court did not clearly err in crediting sergeant's testimony at suppression hearing that defendant voluntarily displayed drugs in messenger-style bag to sergeant without prompting from sergeant, thereby obviating need for probable cause for search of bag; defendant offered no objective evidence that contradicted sergeant's story, nor was sergeant's testimony so internally inconsistent or implausible that no reasonable factfinder would credit it. U.S. Const. Amend. 4.

22. Criminal Law ⚿392.39(1)

"Fruit-of-the-poisonous-tree doctrine" is an extension of the Fourth Amendment exclusionary rule that requires "indirect fruits" recovered after an initial Fourth Amendment violation to be suppressed if they bear a sufficiently close relationship to the underlying illegality. U.S. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

23. Criminal Law ⚿392.5(1), 392.39(10)

Because the exclusionary rule is a prudential doctrine whose sole purpose is to deter future Fourth Amendment violations, suppression as fruit of the poisonous tree is not appropriate where the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint. U.S. Const. Amend. 4.

24. Criminal Law ⚿392.39(10)

In context of fruit-of-the-poisonous-tree doctrine, notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of ille-

gal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost. U.S. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

25. Criminal Law ⚿392.5(2), 392.6

Exclusion of evidence at trial is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search. U.S. Const. Amend. 4.

26. Criminal Law ⚿413.9, 413.11

In the context of a voluntary confession after an illegal arrest, courts examine the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct to determine whether suppression of the statements is warranted under the fruit-of-the-poisonous-tree doctrine. U.S. Const. Amend. 4.

27. Criminal Law ⚿392.39(10)

Key inquiry in determining whether suppression of evidence is warranted under fruit-of-the-poisonous-tree doctrine is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. U.S. Const. Amend. 4.

28. Criminal Law ⚿392.55

In context of fruit-of-the-poisonous-tree doctrine, whether the initial illegality played a significant role in obtaining a defendant's consent is a factual question for the district court. U.S. Const. Amend. 4.

29. Criminal Law ⚿1139, 1158.13

Although how a defendant's mind worked at the time, whether or not the initial illegality significantly influenced his action in confessing, is a factual determination for the district court that Court of Appeals reviews for clear error, in determining the outcome under the attenuation doctrine, the Court of Appeals does not defer to the district court; in other words, the Court of Appeals' review is de novo. U.S. Const. Amend. 4.

30. Criminal Law ⚿392.39(10)

Even assuming a causal connection between defendant's voluntary display of drugs in messenger-style bag to sergeant and defendant's initial illegal seizure effected by arriving officers' show of authority due to their temporal proximity, the causal link was sufficiently attenuated so as to dissipate taint of initial unlawful seizure, and thus drugs acquired during defendant's voluntary display of bag were not subject to suppression under fruit-of-the-poisonous-tree doctrine in prosecution for possession of heroin and cocaine with intent to distribute; nothing about behavior of officers at scene generally, or sergeant's particular actions toward defendant, could be read as exploiting the primary illegality to induce defendant to display contents of bag. U.S. Const. Amend. 4.

31. Criminal Law ⚿662.7

Confrontation Clause guarantees criminal defendants the right to cross-examine those who testify against them. U.S. Const. Amend. 6.

32. Criminal Law ⚿662.7

Right to cross-examine witnesses under Sixth Amendment is not unlimited. U.S. Const. Amend. 6.

33. Criminal Law ⚿662.7
Witnesses ⚿1303

Although the Confrontation Clause encompasses the right to cross-examine a government witness about bias against the defendant and motive for testifying, trial judges may circumscribe extent of cross-examination, within reasonable limits, based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant, despite the limitations of cross-examination. U.S. Const. Amend. 6.

34. Criminal Law ⚿1139

Court of Appeals reviews de novo properly preserved Sixth Amendment challenges to a district court's decision as to whether a defendant had sufficient leeway to establish a reasonably complete picture of a witness's veracity, bias, and motivation despite the limitations on cross-examination; provided this initial threshold is met, Court of Appeals reviews the specific limitations imposed by the district court for abuse of discretion. U.S. Const. Amend. 6.

35. Criminal Law ⚿662.7

A defendant arguing on appeal that district court violated his right to cross-examine witness under Confrontation Clause must show that the limitations on cross-examination were clearly prejudicial to establish an abuse of discretion. U.S. Const. Amend. 6.

36. Criminal Law ⚿662.7

Ultimate question as to whether a district court abused its discretion in limiting a defendant's cross-examination of witness under Sixth Amendment is whether the jury was provided with sufficient information to make a discriminating appraisal of witness's motives and bias. U.S. Const. Amend. 6.

37. Criminal Law ⚿662.7

Even assuming that cross-examination of sergeant regarding disciplinary incident involving subordinate officer would be probative of sergeant's character for truthfulness or bias, district court's preclusion of cross-examination was not clearly prejudicial to defendant, as would violate his rights under Confrontation Clause, in prosecution for possession of heroin and cocaine with intent to distribute, possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm with an obliterated serial number; defense counsel was able to impeach sergeant's character for truthfulness and bias by questioning him about inconsistencies between his testimony and his incident report. U.S. Const. Amend. 6; Fed. R. Evid. 608(b).

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO [Hon. Pedro A. Delgado-Hernández, U.S. District Judge]

Kevin E. Lerman, with whom Eric Alexander Vos, Federal Public Defender, and Franco L. Pérez-Redondo, Assistant Federal Public Defender, Supervisor, Appeals Division, were on brief, for appellant.

Francisco A. Besosa-Martínez, with whom W. Stephen Muldrow, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

Before BARRON, Chief Judge, SELYA and LIPEZ, Circuit Judges.

LIPEZ, Circuit Judge.

On January 29, 2017, Luis Miguel Sierra-Ayala was standing near his parents' house in Loíza, Puerto Rico, holding a

black Adidas bag, when officers from the Puerto Rico Police Department arrived and gave chase to several other individuals who had been standing nearby. One of the officers approached Sierra-Ayala and discovered drugs within the bag. After arresting him, the officer discovered a handgun with an obliterated serial number on Sierra-Ayala's person. Sierra-Ayala filed a motion to suppress the evidence recovered during his arrest, arguing that he was seized in violation of the Fourth Amendment and that he was coerced into handing over the bag, which he claimed to be safeguarding for his cousin. After the district court denied the motion to suppress, Sierra-Ayala was convicted of four offenses relating to the possession of the weapon and the drugs. Sierra-Ayala appeals from this conviction, seeking review of the district court's denial of the motion to suppress and of limitations on cross-examination imposed during the trial. We affirm.

I.

A. Factual Background

We recite the "facts in the light most favorable to the district court's ruling" on Sierra-Ayala's motion to suppress, "noting where relevant [Sierra-Ayala]'s contrary view of the testimony presented at the suppression hearing." United States v. Rodríguez-Pacheco, 948 F.3d 1, 3 (1st Cir. 2020) (first quoting United States v. Camacho, 661 F.3d 718, 723 (1st Cir. 2011); and then quoting United States v. Young, 835 F.3d 13, 15 (1st Cir. 2016)).

1. The January 29, 2017 Operation

On January 29, 2017, officers from the Puerto Rico Police Department ("PRPD") deployed to a "known drug point" on Melilla Street in Loíza, Puerto Rico. The operational plan was to conduct surveillance and to act if the officers observed criminal activity. Melilla Street is a residential street, with houses on both sides. The drug point targeted by the PRPD operational plan was in a wooded area of Melilla Street, near a vacant lot.

At about 8:50 a.m., PRPD officers arrived at the drug point in six or seven vehicles. Two vehicles were marked with the PRPD emblem and the rest were unmarked. Sergeant Jesús López-Maysonet was dressed in plainclothes and traveled with two fellow officers, Hector Garcia Nieves and Daniel López Garcia, in an unmarked car. As he arrived at the drug point, the sergeant observed seven or eight individuals with messenger-style bags. He testified that, based on his training and experience, this type of bag is frequently used to carry drugs and weapons. Sergeant López-Maysonet parked the car he was driving in a yard next to a house. The three officers then exited the vehicle and identified themselves as police officers by shouting "police." All but one of the individuals fled into the adjacent wooded area. As Officers Garcia Nieves and López Garcia chased the fleeing individuals, other officers were arriving at the site.

Sierra-Ayala was the man who did not flee; he remained sitting in a plastic chair as Sergeant López-Maysonet approached. The sergeant testified that Sierra-Ayala was wearing a black messenger-style bag across his chest. At the initial suppression hearing before the magistrate judge, López-Maysonet testified that after he identified himself to Sierra-Ayala as a police officer, Sierra-Ayala stood up, turned to the right, and showed him the contents of the bag. Sierra-Ayala testified differently. He claimed that he was concerned for his safety when Sergeant López-Maysonet approached him, and that the sergeant directed him to turn over the bag, which he had been holding in his hands. Sierra-Ayala testified that he complied with Sergeant López-Maysonet's request because

he did not feel free to disobey the officer's direction. Ultimately, the magistrate judge credited Sergeant López-Maysonet's version of the interaction.

When the sergeant looked inside the bag, he saw "a transparent plastic bag" containing "purple packages that are used to pack heroin." Upon seeing the packaging, he informed Sierra-Ayala that he was under arrest, directed him to stand up, and read him his Miranda rights. Because Sergeant López-Maysonet did not have handcuffs on his person, he radioed for backup. After Sierra-Ayala was handcuffed, he patted him down and identified a gun in a holster on the left side of Sierra-Ayala's belt. López-Maysonet also testified that he retrieved $94 in cash from Sierra-Ayala's pockets. Sierra-Ayala testified that only $10 belonged to him and that the remainder of the cash was recovered from the bag belonging to his cousin.

2. Sierra-Ayala's Involvement

Sierra-Ayala testified at the two suppression hearings about how he came to be at the drug point on Melilla Street on January 29, 2017. Because this testimony is relevant to Sierra-Ayala's motion to suppress, we summarize it here.

Sierra-Ayala grew up in a house on Melilla Street about five or six houses away from the site of his arrest. Although he now lives with his wife and two children in a different area of Loíza, Sierra-Ayala returned to his parents' house on Melilla Street between 6:00 and 7:00 a.m. on January 29, 2017 to work on a Nissan Pathfinder that he was keeping and repairing there. On the morning of his arrest, Sierra-Ayala was waiting for his friend Jose Carlos, who was going to help him remove the radiator from the Pathfinder and take him to purchase a replacement.

At about 8:30 a.m., Sierra-Ayala stopped working on his car and went to buy a soda and cigarettes from his cousin, who sells refreshments from his grandmother's house. This house is across the street from Sierra-Ayala's parents' house. Because the items Sierra-Ayala wished to purchase cost around $3 and his cousin did not have change for Sierra-Ayala's $10 bill, Sierra-Ayala went off in search of change. He walked toward a group of individuals further down Melilla Street -- which included another one of Sierra-Ayala's cousins, Jean Carlos Sirino -- and attempted to get change from Jean Carlos. While Jean Carlos searched for change, he passed the bag he was holding to Sierra-Ayala. Sierra-Ayala testified that the zipper of the bag was closed, and that he had been holding the bag for "[a]round five seconds" when the PRPD officers arrived. As discussed above, Sierra-Ayala testified that the officers' arrival and Sergeant López-Maysonet's approach and alleged order made him feel that he had no choice but to hand over the bag.

B. Procedural History

Sierra-Ayala pled not guilty to four charged offenses. He filed a motion to suppress the gun and drugs discovered by Sergeant López-Maysonet, arguing that the sergeant lacked reasonable suspicion to support the initial seizure and that the discovery of contraband in the bag was coerced.[1] Sierra-Ayala argued that his presence on Melilla Street was not unusual and that he was not engaged in any suspicious activity when the officers arrived in their vehicles. In response, the government argued that Sierra-Ayala was not

1. Sierra-Ayala also sought to suppress his post-arrest statements, on the basis that they were the fruit of an illegal arrest.

seized at the time Sergeant López-Maysonet approached him, and that López-Maysonet acquired probable cause to arrest Sierra-Ayala after Sierra-Ayala voluntarily displayed the contents of his bag.

1. Initial Suppression Hearing Before the Magistrate Judge

The magistrate judge held a hearing on Sierra-Ayala's motion to suppress. Sergeant López-Maysonet and Sierra-Ayala were the only witnesses, and they testified to the facts as outlined above. During cross-examination, the sergeant testified that he had forgotten to identify the holster seized from Sierra-Ayala in two separate reports filed after the arrest.

Prior to defense counsel's cross-examination of Sergeant López-Maysonet, the government provided the court with information on four administrative complaints that had been filed against the sergeant. The magistrate judge determined that only one incident had the potential to be Giglio material,[2] and permitted defense counsel to cross-examine López-Maysonet about the incident. The following exchange occurred:

> [Defense Counsel]: Sergeant [López-]Maysonet, there was an administrative complaint against you as a result of a theft or loss of monies during a warrant –- execution of a warrant. Is that correct?
>
> [López-Maysonet]: That's not right.

After Sergeant López-Maysonet reviewed the administrative complaint, he explained:

> [López-Maysonet]: Like I was telling you, I was the supervisor and I did the writ for the Lieutenant [Daniel López García].
>
> [Defense]: Is that administrative complaint as against you or is it as against someone else, the [complaint] in front of you?
>
> [López-Maysonet]: It's against Officer Daniel Lopez [García].
>
> [Defense]: It's not against you?
>
> [López-Maysonet]: No.
>
> [Defense]: Does your name appear in that document?
>
> [López-Maysonet]: It only shows my last name, Lopez Maysonet.
>
> . . .
>
> [Defense]: What is the nature of the allegation?
>
> [López-Maysonet]: The nature of the allegation was that when I was supervising a search and arrest, the person that was subject of the warrant, Mr. Abner Arroyo, . . . gave me some money, I counted the money and then an amount of money went missing. We went to the video, we saw the video again and then there was some money missing when I was counting it and then Officer Lopez Garcia said that he had taken it as a joke in order for us to see what happens when someone else from outside gets involved.

Officer López García was involved in the operation that led to Sierra-Ayala's arrest. According to Sergeant López-Maysonet, Officer López García "was in the vehicle but was not present at the arrest. He was in the wooded area while [Sergeant López-Maysonet] was arresting" Sierra-Ayala.

At the end of the hearing, the magistrate judge directed the parties to file simultaneous supplemental briefs addressing whether Sierra-Ayala had a reasonable expectation of privacy in the contents of the bag.

2. See Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (holding that evidence relevant to the credibility of a government witness must be disclosed); Roe v. Lynch, 997 F.3d 80, 82 (1st Cir. 2021) (reciting the holding of Giglio).

2. The Magistrate Judge's Report and Recommendation

[1] In its supplemental brief, the government argued that Sierra-Ayala lacked standing to challenge a Fourth Amendment violation because he had no privacy interest in the bag.[3] The government noted that Sierra-Ayala testified that his cousin had passed him the bag and that he had held it for only five to thirty seconds before the officers arrived. The government also argued that the court should credit Sergeant López-Maysonet's hearing testimony rather than Sierra-Ayala's because Sierra-Ayala's narrative contained several implausibilities.

Sierra-Ayala's supplemental brief argued for the opposite conclusion. In particular, Sierra-Ayala argued that he had a possessory interest in the bag in the form of a bailment, giving rise to a reasonable expectation of privacy, and that Sergeant López-Maysonet's testimony was incredible and embellished. Sierra-Ayala also reiterated his argument that the encounter with Sergeant López-Maysonet was a seizure rather than a consensual encounter, and that López-Maysonet lacked reasonable suspicion for the stop.

In a Report and Recommendation, the magistrate judge credited Sergeant López-Maysonet's testimony about how the incident on January 29 unfolded. The magistrate judge described López-Maysonet's demeanor and tone as convincing, and his version of the events as plausible and logical. The judge found Sierra-Ayala's testimony facially less plausible for several reasons. First, the magistrate judge expressed skepticism about the reported price of Sierra-Ayala's intended purchases and the lack of change for a relatively small bill in a home business selling inexpensive items. The judge also found the suggestion that Sierra-Ayala had only been holding the bag for five seconds before the PRPD officers arrived not credible. The magistrate judge credited López-Maysonet's testimony that "he said nothing other than that he was a police officer. Sierra-Ayala then stood up and showed Lopez the contents of the shoulder bag without any other prompting."

Finding that Sierra-Ayala voluntarily displayed the contents of the bag to López-Maysonet, and that the officers' show of force upon arriving to Melilla Street would not have caused a reasonable person to believe he was not free to leave, the magistrate judge recommended that the district court find that Sierra-Ayala was not seized. The Report and Recommendation also concluded that Sierra-Ayala lacked standing to challenge the search and seizure of the bag because he lacked a reasonable expectation of privacy in the bag. The magistrate judge recommended that the court deny Sierra-Ayala's motion to suppress for both of these reasons.

[2] Sierra-Ayala objected to the Report and Recommendation and requested a de novo hearing before the district court.[4] Specifically, Sierra-Ayala objected to the magistrate judge's favorable assessment of Sergeant López-Maysonet's credibility and to the magistrate judge's conclusions that no Fourth Amendment seizure occurred

3. As the magistrate judge noted, "standing" for Fourth Amendment purposes is distinct from Article III standing. Byrd v. United States, —— U.S. ——, 138 S. Ct. 1518, 1530, 200 L.Ed.2d 805 (2018); see also infra Section II.C.

4. Under 28 U.S.C. § 636(b)(1), the district court "shall make a de novo determination of those portions of the [Report and Recommendation] to which objection is made." In doing so, the court "may ... receive further evidence" on the matter, id., including via an evidentiary hearing, see United States v. Lawlor, 406 F.3d 37, 40 (1st Cir. 2005).

and that Sierra-Ayala lacked standing to challenge the search of the bag.

3. De Novo Hearing Before the District Court

The district court scheduled a de novo hearing in response to Sierra-Ayala's objection to the Report and Recommendation. The government subsequently filed a motion to vacate the de novo hearing, which the district court denied. The government then filed a motion to limit the scope of the de novo hearing to the question of standing, arguing that it presented a threshold issue because "the legality of the seizure is not properly before the Court" until Sierra-Ayala establishes standing. The district court granted that motion two days later, without waiting for a response from Sierra-Ayala.

At the de novo hearing, Sierra-Ayala and Sergeant López-Maysonet reiterated much of their testimony from the initial suppression hearing before the magistrate judge. Sierra-Ayala testified that when his cousin handed him the bag, it was his understanding that he "w[as] to hold th[e] bag until [Jean Carlos] got change for [Sierra-Ayala]," he was "responsible for th[e] bag," and it was his understanding that he "could not give it to anyone else." Sierra-Ayala explained that he "turned [the bag] over to the police[ ] because [Sergeant López-Maysonet] told [him] to turn it over." Sierra-Ayala also testified that he was at the site for only about five seconds before police arrived, and that his cousin had never asked him to watch anything in the past. He explained that the site of his arrest was "[f]our or five houses" away from his mother's house. Sergeant López-Maysonet reiterated his prior testimony that Sierra-Ayala had displayed the contents of the bag to him voluntarily.

After the de novo hearing, the district court subsequently issued an opinion and order "adopt[ing] the R&R's recommendation as it relates to the issue of standing, and den[ying] Sierra-Ayala's motion on such basis." The court assumed, "[f]or purposes of this Opinion and Order, . . . that the interaction between Sierra-Ayala and Sergeant López[-Maysonet] occurred the way Sierra-Ayala described it." In other words, the court assumed that Sergeant López-Maysonet ordered Sierra-Ayala to display the contents of the bag to him, but nevertheless concluded that Sierra-Ayala lacked standing to challenge the search.[5]

[3, 4] In finding that Sierra-Ayala lacked standing, the district court concluded that Sierra-Ayala was authorized to possess the bag but that the evidence was insufficient to support a depositor-depository relationship between Sierra-Ayala and his cousin.[6] Moreover, even if such a relationship existed, the court concluded that a bailment was not necessarily sufficient to establish a reasonable expectation of privacy. Instead, the court found that Sierra-Ayala "undertook no affirmative precautions to maintain privacy" even though the court assumed, for purposes of the order, that Sierra-Ayala's version of the events was accurate.[7] The court observed that

5. As discussed infra, the district court subsequently abandoned this assumption and expressly found that Sierra-Ayala voluntarily displayed the contents of the bag to Sergeant López-Maysonet.

6. "The depositum contract is a civil law concept, existing in Louisiana as well as Puerto Rico, that has some relationship with the common law concept of bailment." Jewelers Mut. Ins. Co. v. N. Barquet, Inc., 410 F.3d 2, 12 (1st Cir. 2005). A depository assumes a duty of care to the depositor to safeguard the object. Id. at 14.

7. Again, according to Sierra-Ayala, he only turned the bag over to Sergeant López-Maysonet after being ordered to do so.

"[t]he record is silent on whether [Sierra-Ayala] had a subjective expectation that the bag was to remain free from governmental intrusion." Because the court found that Sierra-Ayala lacked standing to challenge the discovery of the drugs, it did not make a credibility determination beyond its assumption, for purposes of resolving the question of standing, that Sierra-Ayala's testimony accurately described the situation.

4. The District Court's Supplemental Order

After the district court issued its order adopting the Report and Recommendation with respect to Sierra-Ayala's standing to challenge the search of the bag, defense counsel sought a supplemental order on Sierra-Ayala's standing to suppress the gun, which Sergeant López-Maysonet testified to finding on Sierra-Ayala's person. The court allowed the parties to address the issue at a pre-trial status conference. At the conference, defense counsel argued that Sierra-Ayala's lack of standing to suppress the contents of the bag was irrelevant to whether he had standing to challenge the discovery of the gun on his person. Defense counsel also argued that, even if the court credited Sergeant López-Maysonet's version of the events, Sierra-Ayala's display of the bag could not be voluntary under the fruit-of-the-poisonous-tree doctrine because Sierra-Ayala was illegally seized when Sergeant López-Maysonet approached.

During the status conference, the district court indicated on multiple occasions that it was crediting Sergeant López-Maysonet's testimony, rather than Sierra-Ayala's, about how the encounter unfolded.[8] After the status conference, the district court issued a supplemental order, which summarized the factual findings the district court had adopted at the status conference:

> [T]he defendant was with a group of individuals who ran away when police officers arrived in the area. The defendant, however, stayed in place. One of the officers (Sergeant López[-Maysonet]) approached the defendant, identifying himself as a police officer. The defendant held open and showed the contents of the bag to the officer, who saw a clear plastic bag that had purple packages in it, which the officer knew was the type of packaging used for heroin. The officer placed the defendant under arrest and frisked him, finding the gun.[9]

The court rejected Sierra-Ayala's argument that he was seized at the time Sergeant López-Maysonet approached, and concluded that, because Sierra-Ayala voluntarily displayed the contents of the bag, the sergeant had probable cause to arrest him. The court concluded that the discovery of the gun on Sierra-Ayala's person was therefore a permissible consequence of a constitutional search incident to arrest.

5. Trial

At the start of the trial, the government sought to preclude the defense from questioning Sergeant López-Maysonet about the 2015 incident in which he failed to file a timely report about the misconduct of his supervisee, Officer Daniel López García. The government argued that the incident was not relevant under Giglio. Defense counsel countered that the incident was

8. Defense counsel objected to the court's finding that Sergeant López-Maysonet's approach to Sierra-Ayala was constitutional.

9. In the same order, the district court also indicated that it "[wa]s in agreement with the Magistrate Judge's factual analysis."

relevant to Sergeant López-Maysonet's truthfulness under Federal Rule of Evidence 608 and his potential bias. Defense counsel also sought to introduce the sergeant's statements from the suppression hearing as a prior inconsistent statement.

The district court ruled that defense counsel could not cross-examine Sergeant López-Maysonet about the incident, noting that "[López-Maysonet] submitted the report. He did it late. That's not ... [Rule] 608 material." The court also precluded defense counsel from introducing Sergeant López-Maysonet's testimony at the initial suppression hearing as a prior inconsistent statement. The court explained that whether López-Maysonet was "under investigation at the time of the arrest of Mr. Sierra-Ayala" was "not what was asked of [López-Maysonet] .... Defense counsel was very specific, and they were referring to a complaint as a result of a theft or loss of monies during [the] execution of a warrant."

The trial commenced after the resolution of these threshold issues. Sergeant López-Maysonet reiterated his prior testimony that Sierra-Ayala voluntarily displayed the contents of the bag to him. Sergeant López-Maysonet also testified to recovering the holster from Sierra-Ayala's person but acknowledged that he failed to document it in the investigatory report filed after the incident. The jury convicted Sierra-Ayala of the four charged offenses.[10] He was sentenced to a term of seventy-two months of imprisonment. This appeal followed.

C. Claims on Appeal

Appellant seeks review of the district court's denial of his motion to suppress the drugs and firearm. He argues that the fruit-of-the-poisonous-tree doctrine applies to the evidence seized during his encounter with Sergeant López-Maysonet because the encounter was an unconstitutional seizure. The government responds that Sierra-Ayala was not seized when Sergeant López-Maysonet approached and that he voluntarily displayed the contents of the bag to the sergeant. Alternatively, the government suggests that the interactions between Sierra-Ayala and Sergeant López-Maysonet constitute a constitutionally permissible investigatory stop under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Moreover, even if the initial stop of Sierra-Ayala was unconstitutional, the government contends that the fruit-of-the-poisonous-tree doctrine does not apply to the items seized because their discovery comported with Fourth Amendment principles.

Appellant also appeals the district court's decision, during his trial, to preclude cross-examination of Sergeant López-Maysonet on certain issues relating to the administrative complaint in which Sergeant López-Maysonet was named. Appellant suggests that cross-examination on this issue is relevant to truthfulness -- i.e., Sergeant López-Maysonet's 'dishonest[ ]' conduct in belatedly filing a report about the incident -- and bias -- i.e., that Sergeant López-Maysonet had an incentive to testify favorably for the government because he was under investigation. Appellant contends that the district court abused its discretion in denying cross-examination and that his inability to adequately impeach Sergeant López-Maysonet's bias and truthfulness caused his trial to be fundamentally unfair.

10. The offenses of conviction were: possession of a firearm in furtherance of a drug trafficking crime; possession with intent to distribute a controlled substance (heroin); possession with intent to distribute a controlled substance (crack cocaine); and possession of a firearm with an obliterated serial number.

II

We address appellant's suppression arguments first.

A. Standard of Review

[5–7] We review the district court's factual findings at the suppression hearing for clear error and its legal conclusions de novo. Rodríguez-Pacheco, 948 F.3d at 6. We are "especially deferential" to the district court's evaluation of witnesses' credibility, which we will overturn "only if, after reviewing all of the evidence, we have a 'definite and firm conviction that a mistake has been committed.' " United States v. Jones, 187 F.3d 210, 214 (1st Cir. 1999) (quoting United States v. Rostoff, 164 F.3d 63, 71 (1st Cir. 1999)). "Indeed, absent objective evidence that contradicts a witness's story or a situation where the story itself is so internally inconsistent or implausible that no reasonable factfinder would credit it, 'the ball game is virtually over' once a district court determines that a key witness is credible." United States v. Guzmán-Batista, 783 F.3d 930, 937 (1st Cir. 2015) (citation omitted) (quoting Rivera-Gómez v. de Castro, 900 F.2d 1, 4 (1st Cir. 1990)).

B. The Seizure

[8–11] The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Evidence acquired in violation of the Fourth Amendment is subject to the exclusionary rule. Camacho, 661 F.3d at 724. But "[n]ot every interaction between a police officer and a citizen constitutes a seizure triggering Fourth Amendment protections." United States v. Ford, 548 F.3d 1, 4 (1st Cir. 2008); see also Florida v. Royer, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion). Instead, a seizure occurs where the "totality of the circumstances" shows that officers have " 'restrained the liberty of a citizen' through 'physical force or [a] show of authority.' " Camacho, 661 F.3d at 725 (quoting Terry, 392 U.S. at 19 n.16, 88 S.Ct. 1868). Courts evaluate the " 'coercive effect of [an] encounter' by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.' " Id. (quoting Brendlin v. California, 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)).

[12] Here, appellant was clearly seized when Sergeant López-Maysonet approached him at the site on Melilla Street. Immediately preceding Sergeant López-Maysonet's approach, an unmarked vehicle had pulled up in a yard beside a house. Three officers exited the vehicle, yelling "police." The officers chased after six or seven fleeing individuals -- individuals who had not been observed engaging in criminal activity prior to the officers' pursuit. Additional police officers and vehicles arrived at the site as the two pursuing officers ran into the woods. A reasonable person, observing this show of police authority, would not feel free to leave. The heavy police presence and rapidity with which officers pursued the fleeing individuals "objectively communicate[d] that [law enforcement] [wa]s exercising [its] official authority to restrain the individual[s'] liberty of movement." United States v. Fields, 823 F.3d 20, 25 (1st Cir. 2016) (second and fourth alterations in original) (emphasis omitted) (quoting United States v. Cardoza, 129 F.3d 6, 16 (1st Cir. 1997)).

[13–15] Even where an encounter with law enforcement rises to the level of a seizure, however, the Supreme Court has recognized certain exceptions to the protections of the Fourth Amendment. The government argues that even if Sierra-Ayala was seized when Sergeant López-Maysonet approached him, the Terry ex-

ception applies. See 392 U.S. at 30-31, 88 S.Ct. 1868. Under Terry, "a police officer may briefly detain an individual for questioning if the officer 'reasonably suspects that the person apprehended is committing or has committed a crime.' " Camacho, 661 F.3d at 726 (quoting Arizona v. Johnson, 555 U.S. 323, 326, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009)). The reasonable suspicion standard requires "a 'particularized and objective basis' for suspecting the person stopped of criminal activity," id. (quoting Ornelas v. United States, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)), that is "both objectively reasonable and 'grounded in specific and articulable facts,' " id. (quoting United States v. Hensley, 469 U.S. 221, 229, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985)). Critically, "the individual facts, taken in the aggregate," must be "sufficient to trigger a reasonable suspicion that some criminal activity was afoot -- and that the defendant was involved." United States v. Ruidíaz, 529 F.3d 25, 30 (1st Cir. 2008) (emphasis added).

In arguing that Sergeant López-Maysonet possessed reasonable suspicion to justify a Terry stop of Sierra-Ayala, the government points to three facts: (1) the location of the stop, which Sergeant López-Maysonet described as a "known drug point" based on his training and experience; (2) the fact that several individuals were carrying messenger-style bags, which Sergeant López-Maysonet testified were "used to carry controlled substances and weapons"; and (3) the flight of several individuals upon the arrival of police.

[16–18] The location of a stop in a "high crime area" may be one factor relevant to the Terry analysis. Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); United States v. Wright, 485 F.3d 45, 54 (1st Cir. 2007). But the Supreme Court has made clear that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." Wardlow, 528 U.S. at 124, 120 S.Ct. 673 (emphasis added). Although "unprovoked flight" or "nervous, evasive behavior" may provide reasonable suspicion justifying an investigatory stop, id. at 124, 120 S.Ct. 673; see also United States v. Aitoro, 446 F.3d 246, 252 (1st Cir. 2006), Sierra-Ayala -- unlike the other individuals present -- neither fled nor acted evasively as Sergeant López-Maysonet approached, see Camacho, 661 F.3d at 726. Nor is Sierra-Ayala's possession of a black messenger-style bag enough to tip the scale toward reasonable suspicion. Even if messenger-style bags are commonly used in drug transactions, as Sergeant López-Maysonet testified, they are also useful for any number of legitimate purposes. Sergeant López-Maysonet did not observe individuals using the bags in a way that a "reasonably prudent and experienced police officer would have recognized ... as consistent with the consummation of a drug deal." United States v. Rabbia, 699 F.3d 85, 90 (1st Cir. 2012).

The totality of the circumstances here does not provide an "objectively reasonable, particularized basis for suspecting [Sierra-Ayala] of criminal activity." Camacho, 661 F.3d at 726 (emphasis added); see also United States v. Wright, 582 F.3d 199, 220 (1st Cir. 2009) (Lipez, J., dissenting) ("[T]he reasonable suspicion justifying a Terry stop must be more than an 'inchoate and unparticularized suspicion or "hunch," ' and it must be specifically focused on the individual under scrutiny." (citation omitted) (quoting Terry, 392 U.S. at 27, 88 S.Ct. 1868)). The most that can be said is that Sierra-Ayala was standing near a known drug point -close to his parents' home -- while holding a bag that can be used to transport drugs, weapons, gym

clothes, or any number of other objects. See Camacho, 661 F.3d at 726 (" 'The men were walking normally on a residential sidewalk and displayed no apprehension or nervousness when the officers approached,' and Camacho's responses to [the officer]'s questions 'were direct and non-evasive.' " (quoting the district court)). He did nothing reasonably suggestive of criminal activity.

C. The Search and Arrest

[19] Our conclusion that Sergeant López-Maysonet lacked reasonable suspicion to justify the initial seizure of Sierra-Ayala does not end the inquiry. The government argues that an intervening voluntary act -- Sierra-Ayala's display of the contents of the bag to Sergeant López-Maysonet -- provided independent probable cause to arrest Sierra-Ayala, rendering any lack of reasonable suspicion prior to the voluntary act irrelevant to suppression.[11]

Appellant offers two arguments in response. First, appellant contends that the district court clearly erred in concluding that he spontaneously and voluntarily displayed the contents of the bag to Sergeant López-Maysonet, thereby obviating the need for probable cause for a search. Second, appellant argues that even if the district court properly concluded that he acted "voluntarily," suppression of the drugs and the firearm is nevertheless appropriate under the fruit-of-the-poisonous-tree doctrine. We consider these arguments in turn.

1. A Voluntary Act

At the suppression hearings, the parties presented opposing testimony on the issue of voluntariness. Sierra-Ayala testified that Sergeant López-Maysonet observed the contents of the bag only because he ordered Sierra-Ayala to turn the bag over. Sierra-Ayala argued then, and argues again on appeal, that Sergeant López-Maysonet's coercive inspection of the bag was a search within the meaning of the Fourth Amendment, to which Sierra-Ayala did not consent. See Royer, 460 U.S. at 497, 103 S.Ct. 1319 ("[W]ithout a warrant to search Royer's luggage and in the absence of probable cause and exigent circumstances, the validity of the search depended on Royer's purported consent."). The government, on the other hand, argues that Sierra-Ayala voluntarily showed Sergeant López-Maysonet the contents of the bag, such that López-Maysonet's observation of the bag's contents was not an illegal search under the Fourth Amendment.

[20] Where the government defends the validity of a search based on an individual's consent, the government "has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." Royer, 460 U.S. at 497, 103 S.Ct. 1319. Sergeant Ló-

11. The government also argues that we need not reach the merits of Sierra-Ayala's suppression arguments because Sierra-Ayala lacks standing to challenge the search of the bag. We do not address the standing issue. Unlike Article III standing, Fourth Amendment "standing" is not jurisdictional, and courts may address whether a seizure or search was adequately supported -- by reasonable suspicion or probable cause and exigent circumstances -- before resolving whether a defendant has standing to challenge the search or seizure. Byrd, 138 S. Ct. at 1530-31. The district court's written order concluded that Sierra-Ayala lacked standing to challenge the discovery of the drugs, and denied the motion to suppress on that basis. Subsequently, the district court also made the factual finding that Sierra-Ayala acted voluntarily in displaying the contents of the bag to Sergeant López-Maysonet.

pez-Maysonet testified that Sierra-Ayala "freely and voluntarily" showed him the bag, without any prompting. After hearing Sierra-Ayala's competing testimony, the magistrate judge made the factual finding that Sierra-Ayala voluntarily displayed the bag's contents to Sergeant López-Maysonet. The Report and Recommendation identified several factors supporting the magistrate judge's determination that López-Maysonet's testimony on this point was credible.[12] The district court adopted this factual finding in a written order, after a de novo suppression hearing and subsequent status conference that addressed the voluntariness issue.

[21] Although appellant offers several arguments for why the lower court's credibility assessment of the competing testimony on voluntariness was wrong,[13] he does not identify "objective evidence that contradicts [Sergeant López-Maysonet's] story." Guzmán-Batista, 783 F.3d at 937. Nor was Sergeant López-Maysonet's testimony "so internally inconsistent or implausible that no reasonable factfinder would credit it." Id. Because appellant's evidentiary arguments do not leave us with a "definite and firm conviction" that the district court erred in crediting Sergeant López-Maysonet's testimony, Jones, 187 F.3d at 214 (quoting Rostoff, 164 F.3d at 71), the district court did not clearly err in concluding that Sierra-Ayala displayed the drugs to Sergeant López-Maysonet without prompting from the sergeant. See United States v. Casellas-Toro, 807 F.3d 380, 390 (1st Cir. 2015) (noting that the voluntariness of a consent search is a factual determination for the district court); accord United States v. Coraine, 198 F.3d 306, 308 (1st. Cir. 1999). Upon observing the drugs in the bag due to this voluntary act, Sergeant López-Maysonet acquired probable cause to arrest Sierra-Ayala and to conduct a search of him incident to arrest.

Ordinarily, this conclusion would end our inquiry and warrant affirmance of the district court's order denying Sierra-Ayala's motion to suppress. But because appellant also argues that his "voluntary" act is inextricably linked to the initial unconstitutional seizure that precipitated his display of the bag, we next address whether suppression is warranted under the fruit-of-the-poisonous-tree doctrine.

2. Fruit of the Poisonous Tree

[22–25] The fruit-of-the-poisonous-tree doctrine is an extension of the Fourth Amendment exclusionary rule that requires "indirect fruits" recovered after an initial Fourth Amendment violation to be suppressed if they "bear a sufficiently close relationship to the underlying illegality." Camacho, 661 F.3d at 729 (quoting New York v. Harris, 495 U.S. 14, 19, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990)). Because the exclusionary rule "is a 'prudential' doctrine" whose "sole purpose . . . is to deter future Fourth Amendment violations," Davis v. United States, 564 U.S. 229, 236-37, 131 S.Ct. 2419, 180 L.Ed.2d

12. These factors include López-Maysonet's tone and demeanor and the logic and plausibility of his version of the events, as compared to the inconsistencies and implausibilities of Sierra-Ayala's version of events. The magistrate judge specifically found implausible Sierra-Ayala's testimony regarding the prices of the goods he sought to purchase and the "story . . . that he was literally caught holding the bag."

13. Specifically, Sierra-Ayala argues that the district court overlooked the generally implausible nature of Sergeant López-Maysonet's testimony, the nonsensical logic of Sierra-Ayala's supposedly voluntary action, Sergeant López-Maysonet's evasiveness during testimony, and Sergeant López-Maysonet's disciplinary history.

285 (2011) (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998)),[14] suppression as fruit of the poisonous tree is not appropriate where "the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint,' " Camacho, 661 F.3d at 729 (quoting Segura v. United States, 468 U.S. 796, 805, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)). "The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." United States v. Cordero-Rosario, 786 F.3d 64, 75 (1st Cir. 2015) (quoting Brown v. Illinois, 422 U.S. 590, 609, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring)).

[26–29] In the context of a "voluntary" confession after an illegal arrest, to which appellant analogizes his situation, courts examine "[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" to determine whether suppression of the statements is warranted under the fruit-of-the-poisonous tree doctrine. Brown, 422 U.S. at 603-04, 95 S.Ct. 2254 (citations and footnote omitted). And, of closer relevance to the situation here, we have held that the fruit-of-the-poisonous-tree doctrine may be implicated where an individual's "voluntary" consent to a search of his belongings followed an initial Fourth Amendment violation that "significantly influenced his decision to consent." United States v. Navedo-Colón, 996 F.2d 1337, 1339 (1st Cir. 1993).[15] The "key inquiry" is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Cordero- Rosario, 786 F.3d at 75-76 (emphasis added) (quoting Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)); accord United States v. Delgado-Pérez, 867 F.3d 244, 257-58 (1st Cir. 2017).[16]

Applying these principles, we conclude that the circumstances of this case do not warrant suppression of the evidence recovered from Sierra-Ayala as fruits of the poisonous tree. To start, we recognize that this case differs from the consented-to search at issue in Navedo-Colón, where the district court assumed without deciding that the initial alleged illegality (an illegal x-ray) was unlawful. 996 F.2d at 1338. Here, in contrast, the district court concluded that Sierra-Ayala was not seized, and thus it did not consider the

14. As the Court emphasized in Davis, "[e]xclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." 564 U.S. at 236, 131 S.Ct. 2419 (quoting Stone v. Powell, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)).

15. Whether the initial illegality "play[ed] a significant role in obtaining appellant's consent" is a factual question for the district court. Navedo-Colón, 996 F.2d at 1339; see also Cordero-Rosario, 786 F.3d at 73, 78 (remanding for the district court to make the factual finding after reversing the holding "that the searches ... did not violate the Fourth Amendment").

16. Although "[h]ow appellant's mind worked at the time -whether or not the [initial illegality] significantly influenced" his action -- is a factual determination for the district court that we review for clear error, Navedo-Colón, 996 F.2d at 1339, "[i]n determining the outcome under the attenuation doctrine, the court of appeals does not defer to the district court." United States v. Paradis, 351 F.3d 21, 32 (1st Cir. 2003). In other words, our review is de novo.

fruit-of-the-poisonous-tree issue. Nevertheless, the district court made factual findings that give us sufficient information to determine whether Sierra-Ayala's display of the bag was "obtained by exploitation of the underlying illegality." See Cordero-Rosario, 786 F.3d at 78 (remanding where "we lack[ed] sufficient information to determine whether [the] consent was obtained by exploitation of the underlying illegality"); Navedo-Colón, 996 F.2d at 1338-39 (holding that although the district court did not "explicitly deny a causal connection between the x-ray and appellant's consent," a "[f]air[ ] read[ing]" of its opinion "indicates that the court asked, and answered, the correct causal question in deciding whether to suppress evidence of consent").

[30] Even assuming a causal connection between the voluntary display of the bag and the initial illegal seizure effected by the arriving officers' show of authority due to their temporal proximity, the facts found by the district court do not support the conclusion that "the causal link ... is so tight that the evidence acquired pursuant to that [voluntary act] must be suppressed." Delgado-Pérez, 867 F.3d at 257 (quoting Cordero-Rosario, 786 F.3d at 76); see also United States v. Serrano-Acevedo, 892 F.3d 454, 460 (1st Cir. 2018) (indicating that suppression is not warranted where the causal link between an initial illegality and subsequent consent is "sufficiently attenuated"). Nothing about the behavior of the officers at the scene generally, or Sergeant López-Maysonet's particular actions towards Sierra-Ayala, can be read as "exploit[ing]" the primary illegality, Cordero-Rosario, 786 F.3d at 78, to induce Sierra-Ayala to display the contents of the bag. See United States v. Smith, 919 F.3d 1, 12 (1st Cir. 2019) (" '[T]he purpose and flagrancy of the official misconduct' ... 'is the most important part of the analysis "because it is tied directly to the rationale underlying the exclusionary rule, deterrence of police misconduct." ' " (first quoting Cordero-Rosario, 786 F.3d at 76; and then quoting United States v. Stark, 499 F.3d 72, 77 (1st Cir. 2007))).

According to Sergeant López-Maysonet's testimony, which the district court credited, Officers Lopez Garcia and Garcia Nieves, upon arriving at the site, exiting their vehicle, and announcing themselves as law enforcement, chased several individuals into the woods as other officers arrived. Sergeant López-Maysonet "was behind Officer [Garcia Nieves] when [he] noticed an individual that remained sitting down on a plastic chair, so [Sergeant López-Maysonet] turned and ... identified [him]self as a police officer and the individual stood up facing [him], ... turned to the right and ... opened [the bag he was holding] and showed [López-Maysonet] the contents." To be sure, the officers' cumulative show of force as they pursued the fleeing individuals contributed to the seizure of Sierra-Ayala. But chasing other fleeing individuals cannot be interpreted as exploiting the illegal seizure to induce the seized individual to surrender evidence. Cf. Wardlow, 528 U.S. at 124, 120 S.Ct. 673 (unprovoked flight may provide reasonable suspicion to investigate fleeing individuals). Nor was turning towards Sierra-Ayala and identifying himself as a police officer while the other officers pursued those in flight flagrant misconduct by Sergeant López- Maysonet. See Smith, 919 F.3d at 12 (distinguishing the "professional and polite" interactions at issue from the "extreme tactics the Supreme Court [has] deemed coercive").

Any number of scenarios could have followed Sergeant López-Maysonet's identification of himself as law enforcement, including an order from the sergeant to

hand over the bag -- which likely would have been deemed to exploit the initial seizure -but also a notification that Sierra-Ayala was free to go -- which clearly would not. But, as the district court found, nothing exploitative happened: Sergeant López-Maysonet "just identified himself, and [Sierra-Ayala] gave him the bag." These facts render this case quite unlike Camacho, where we suppressed evidence under the fruit-of-the-poisonous-tree doctrine after police officers engaged in aggressive questioning of Camacho after an illegal stop and "[t]he only intervening action by Camacho between the illegal stop and the frisk [that precipitated the discovery of evidence] was removing his hands from his pockets at [an officer]'s direction." 661 F.3d at 729-30. Sierra-Ayala's intervening volitional act, in the absence of exploitative behavior by López-Maysonet, renders the discovery of the drugs sufficiently attenuated so as to dissipate the taint of the initial unlawful seizure. Hence, we affirm the district court's denial of Sierra-Ayala's motion to suppress. See United States v. Rivera, 825 F.3d 59, 64 (1st Cir. 2016) ('[B]ecause of the de novo component to our review, we can affirm on any ground appearing in the record . . . .').

III.

We now turn to appellant's appeal of the limitations the district court imposed on the cross-examination of Sergeant López-Maysonet.

A. Standard of Review

[31–34] The Confrontation Clause of the Sixth Amendment "guarantees criminal defendants the right to cross-examine those who testify against them." United States v. Jiménez-Bencevi, 788 F.3d 7, 20 (1st Cir. 2015) (quoting United States v. Vega Molina, 407 F.3d 511, 522 (1st Cir. 2005)). But this right is not unlimited. Although it encompasses "the right to cross-examine the government's witness about his bias against the defendant and his motive for testifying," id. at 21 (quoting United States v. Ofray–Campos, 534 F.3d 1, 36 (1st Cir. 2008)), trial judges may circumscribe the extent of cross-examination, within "reasonable limits[,] . . . based on concerns about . . . harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant," id. (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). Consequently, we review de novo properly preserved challenges to a district court's decision as to whether a defendant had "sufficient leeway to establish a reasonably complete picture of the witness'[s] veracity, bias, and motivation" despite the limitations on cross-examination. United States v. Sandoval, 6 F.4th 63, 88 (1st Cir. 2021) (quoting Jiménez-Bencevi, 788 F.3d at 21). Provided this initial threshold is met, we review the specific limitations imposed by the district court for abuse of discretion. Jiménez-Bencevi, 788 F.3d at 21.

B. Discussion

[35, 36] Appellant does not contend that he was denied a reasonable opportunity to impeach Sergeant López-Maysonet. Instead, appellant argues that the district court abused its discretion by preventing defense counsel from questioning Sergeant López-Maysonet about the disciplinary incident involving Officer López García, and about Sergeant López-Maysonet's testimony about the incident at the suppression hearing. Because appellant objects to a restriction on the manner or scope of cross-examination, our review begins at the second stage of the Confrontation Clause inquiry and we review the restrictions imposed by the court for abuse of discretion. Appellant must show that the limitations on cross-examination were

"clearly prejudicial" to establish an abuse of discretion. United States v. Rosario-Pérez, 957 F.3d 277, 297 (1st Cir. 2020) (quoting Ofray-Campos, 534 F.3d at 37). "The ultimate question is whether 'the jury is provided with sufficient information . . . to make a discriminating appraisal of a witness's motives and bias.' " Id. (quoting United States v. Landrón-Class, 696 F.3d 62, 72 (1st Cir. 2012)).

[37] Under Federal Rule of Evidence 608(b), "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness," but the district court "may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness." The district court precluded questioning about the administrative complaint against Sergeant López-Maysonet because it found neither the fact of the complaint nor López-Maysonet's answers at the suppression hearing probative of his character for truthfulness or for his bias. Even assuming that cross-examination on these issues would be probative of Sergeant López-Maysonet's character for truthfulness or bias, however, the district court's preclusion of questioning was not clearly prejudicial to appellant because defense counsel was able to impeach López-Maysonet's character for truthfulness and bias [17] by questioning him about inconsistencies between his testimony and his incident report.[18] See United States v. Fortes, 619 F.2d 108, 118 (1st Cir. 1980) ("The court need not permit unending excursions into each and every matter touching upon veracity if a reasonably complete picture has already been developed."). Because appellant has not established that the limits on cross-examination were clearly prejudicial, we conclude that the district court did not abuse its discretion.

Affirmed.

John DOES 1-3; Jack Does 1-1000; Jane Does 1-6; Joan Does 1-1000, Plaintiffs, Appellants,

v.

Janet T. MILLS, in her official capacity as Governor of the State of Maine; Jeanne M. Lambrew, in her official capacity as Commissioner of the Maine Department of Health and Human Services; Nirav D. Shah, in his official capacity as Director of the Maine Center for Disease Control and Prevention; MaineHealth; Genesis Healthcare of Maine LLC; Genesis Healthcare LLC; Mainegeneral Health; Northern Light Eastern Maine Medical Center, Defendants, Appellees,

17. Appellant's theory of Sergeant López-Maysonet's bias is that the existence of the administrative complaint about the late filing of a report gave him an incentive to lie during his testimony so as not to jeopardize his career. But, beyond this speculative assertion, appellant does not identify a connection between the administrative complaint and the sergeant's testimony in this case to support this theory of bias.

18. Specifically, defense counsel questioned Sergeant López- Maysonet about why he did not list a holster among the items seized from Sierra-Ayala in the post-arrest inventory report. Defense counsel also asked Sergeant López-Maysonet about his failure to identify a twenty-five-cent coin in the inventory report.

Appendix B

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA
v.
Luis Miguel Sierra-Ayala (1)

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:17-CR-00063-01(PAD)

USM Number: 49997-069

AFPD Jesus Hernandez
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. ALL COUNTS (1-4) on 9/18/2019.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:924(c)(1)(A)	Possession of a firearm in furtherance of a drug trafficking offense.	1/29/2017	1
21:841(a)(1) and 841(b)(1)(C)	Possession with intent to distribute heroin and cocaine base.	1/29/2017	2 and 3
18:922(k) and 924(a)(1)(B)	Possession of a firearm with an obliterated serial number.	1/29/2017	4

The defendant is sentenced as provided in pages 2 through 1 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

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

1/16/2020
Date of Imposition of Judgment

s/Pedro A. Delgado-Hernandez
Signature of Judge

Pedro A. Delgado-Hernandez, U.S. District Judge
Name and Title of Judge

1/16/2020
Date

Appendix B

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Luis Miguel Sierra-Ayala (1)
CASE NUMBER: 3:17-CR-00063-01(PAD)

IMPRISONMENT

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

Sixty (60) months as to Count One, and twelve months (12) as to Counts Two through Four, to be served concurrently with each other, but consecutively to the sentence imposed in Count One for a total imprisonment term of seventy-two (72) months.

☑ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be allowed to participate in vocational courses/training and English as a second language courses.
That the defendant be allowed to serve his term of imprisonment in an institution located in Pensacola, FL.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Luis Miguel Sierra-Ayala (1)
CASE NUMBER: 3:17-CR-00063-01(PAD)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Five (5) years, as to Count One and three (3) years as to Counts Two through Four to run concurrently with each other.

MANDATORY CONDITIONS

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

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

DEFENDANT: Luis Miguel Sierra-Ayala (1)
CASE NUMBER: 3:17-CR-00063-01(PAD)

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: Luis Miguel Sierra-Ayala (1)
CASE NUMBER: 3:17-CR-00063-01(PAD)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not commit another Federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.

2. The defendant shall not unlawfully possess or use controlled substances.

3. The defendant shall participate in an approved substance abuse monitoring and/or treatment services program. The defendant shall refrain from the unlawful use of controlled substances and submit to a drug test within fifteen (15) days of release; thereafter, submit to random drug testing, no less than three (3) samples during the supervision period and not to exceed 104 samples per year in accordance with the Drug Aftercare Program Policy of the U.S. Probation Office approved by this Court. If deemed necessary, the treatment will be arranged by the officer in consultation with the treatment provider. The defendant is required to contribute to the cost of services rendered (co-payment) in an amount arranged by the Probation Officer based on the ability to pay or availability of third party payment.

4. The defendant shall refrain from possessing firearms, destructive devices, and other dangerous weapons.

5. The defendant shall submit his person, property, house, vehicle, papers, computers (as defined in 18 U.S.C. Section 1030(e)(1)), other electronic communication or data storage devices, and media, to a search conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

6. The defendant shall participate in transitional and reentry support services, including cognitive behavioral treatment services, under the guidance and supervision of the Probation Officer. The defendant shall remain in the services until satisfactorily discharged by the service provider with the approval of the Probation Officer.

7. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

8. The defendant shall cooperate in the collection of a DNA sample as directed by the Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code Section 3563(a)(9).

FORFEITURE
The defendant shall forfeit to the United States pursuant to 18 U.S.C.§924(d)(1) and 28 U.S.C. §2461(c), any firearms and ammunition involved or used in the commission of the offense, including, but not limited to: one (1) Smith & Wesson, model 5906, 9mm caliber, with an obliterated serial number, fifteen (15) rounds of 9mm caliber ammunition and one (1) ammunition magazine.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Luis Miguel Sierra-Ayala (1)
CASE NUMBER: 3:17-CR-00063-01(PAD)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 400.00	$	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Luis Miguel Sierra-Ayala (1)
CASE NUMBER: 3:17-CR-00063-01(PAD)

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 400.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

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

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
Any firearms and ammunition involved or used in the commission of the offense, including, but not limited to: one (1) Smith & Wesson, model 5906, 9mm caliber, with an obliterated serial number, fifteen (15) rounds of 9mm caliber ammunition and one (1) ammunition magazine.

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

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, v. **LUIS MIGUEL SIERRA-AYALA**, Defendant.	Criminal No. 17-063 (PAD/BJM)

REPORT AND RECOMMENDATION

In January 2017, Puerto Rico Police Department ("PRPD") agents conducted an operation targeting a known drug point on Melilla Street in Loiza, which led to the arrest of Luis Miguel Sierra-Ayala ("Sierra-Ayala"). Prior to arresting Sierra-Ayala, Sergeant Jesus Lopez-Maysonet ("Lopez"), approached Sierra-Ayala and searched a bag that Sierra-Ayala was holding. Sierra-Ayala stands charged with possession of heroin and cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i), and possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). Docket No. 1. Contending that Lopez had no reasonable suspicion of criminal activity such as to justify seizing Sierra-Ayala and searching the bag prior to his arrest, Sierra-Ayala moved for suppression of the contraband seized from him as well as his post-arrest statements, Docket Nos. 38, 79. The government opposed. Docket Nos. 43, 77. This matter was referred to me for a hearing and report and recommendation. Docket No. 44. I held an evidentiary hearing on February 20, 2018. Docket No. 69. For the reasons set forth below, the motion to suppress should be **DENIED**.

BACKGROUND

At the evidentiary hearing, the court heard testimony from Lopez and Sierra-Ayala.

Lopez's Testimony

Lopez has been an officer with PRPD for fifteen years and currently holds the position of sergeant. Since starting with the Division of Drugs, Narcotics, Vice and Weapon Control in Carolina in 2014, Lopez has patrolled the area of Melilla Street and made fifteen or more arrests.

From his experience, he knew that, as of January 2017, there were two drug points on Melilla Street, one at the beginning of the street and one at the end of the street next to a barber shop.

On the morning of January 29, 2017, Lopez was part of a PRPD team that sought to execute an operational plan where a team of PRPD officers in marked and unmarked vehicles would get as close as they could to the sellers at the drug point at the beginning of Melilla Street. Lopez was one of three officers in the first vehicle, an unmarked Toyota Corolla, that entered Melilla Street at 8:45 a.m. He was wearing civilian clothes and had his police identification in plain view. As the officers drove onto Melilla Street, Lopez saw six to seven individuals with shoulder bags[1] gathered in front of a house adjacent to the wooded area. After parking the Toyota Corolla six to ten feet away from where the individuals were gathered, the officers exited the vehicle within seconds of each other and identified themselves as police. At this point, Lopez had not seen any criminal activity including guns or drugs; he had only seen people wearing shoulder bags, which he knew was often how people carried drugs. Once the officers identified themselves, the gathered individuals ran away: some toward the woods, some toward the house, and some down the street. While two other officers ran after the fleeing individuals, Lopez walked around the back of the vehicle and saw Sierra-Ayala still sitting in a plastic chair, facing Lopez. Sierra-Ayala was dressed in basketball shorts and a shirt.

After Lopez identified himself again as a police officer, Sierra-Ayala stood up, turned to the right, and then held open and showed Lopez the contents of an already open shoulder bag that was slung across Sierra-Ayala's chest from left to right. In the shoulder bag, Lopez saw a clear plastic bag that had purple packages in it, which Lopez knew was the type of packaging used for heroin. Lopez told Sierra-Ayala that he was under arrest and read him his Miranda rights. Because Lopez did not have handcuffs on him at the time, he held the back of Sierra-Ayala's shirt with his left hand and radioed his fellow officers for handcuffs. In less than a minute, Lieutenant Daniel

[1] Sierra-Ayala notes that the term "fanny pack" is incorrect because the particular bag in question is worn on one's shoulder rather than around one's waist. *See* Docket No. 79 at 4 n. 2. Having seen a photo of the receptacle in question during the suppression hearing, I will refer to it as a "shoulder bag." *See* Government's Exhibit 1.

Sanchez Mejia brought Lopez handcuffs, and he placed them on Sierra-Ayala. Lopez frisked Sierra-Ayala and found a gun in a holster on the left side of Sierra-Ayala's belt. Lopez also inspected the shoulder bag and found packages that field tested positive for crack cocaine and heroin. Throughout this interaction, Lopez never drew his firearm. The officers took Sierra-Ayala to the station in a van and read him his rights.

Sierra-Ayala was not a specific target of the operational plan nor had Lopez seen Sierra-Ayala in his prior patrols of Melilla Street.

Sierra-Ayala's Testimony

Sierra-Ayala graduated from high school in 2010 and was a nursing student at MBTI Business Training Institute before it closed. Although he now lives with his father-in-law, wife, and two children, he grew up on Melilla Street where his parents still live. Early in the morning of January 29, 2017, he went to his parents' house—about five or six houses down from where he was eventually arrested—to repair a Nissan Pathfinder that he had parked there. He began repairing the Nissan Pathfinder with the plan of replacing the radiator. Once his friend arrived, they were going to go to Rio Grande Advance Auto Parts to purchase a new radiator. Around 8:30 a.m., Sierra-Ayala took a break and went to his cousin's store to buy soda and some cigarettes. The purchases cost three dollars. Neither Sierra-Ayala nor his cousin had change for Sierra-Ayala's ten-dollar bill, though, so Sierra-Ayala walked over to another cousin who was standing in a group of people to ask for change. While looking for change in his pocket, the cousin handed Sierra-Ayala a shoulder bag. Sierra-Ayala held the shoulder bag in his right hand with the zipper closed; he did not know what was in it. Less than thirty seconds, and more like five seconds, after his cousin handed him the shoulder bag, the police arrived.

Once the police arrived, everyone in the group his cousin was with started running. There was the one vehicle on the street and several in the wooded area. Sierra-Ayala was scared for his safety and did not know what was going on. He felt that he did not need to run because he did not have anything to hide. A police officer, Lopez, exited the vehicle on the street, walked around the back of the vehicle, and approached Sierra-Ayala. Lopez told Sierra-Ayala to turn over the shoulder

bag to him. Lopez took it, opened it, and told Sierra-Ayala to go stand against the fence. Sierra-Ayala did not know about what was in the shoulder bag until the officers showed him the narcotics and told him about the firearm before placing him in the police van.

Sierra-Ayala had heard that the area was a drug point. He had seen people congregating there before including his cousin. The people he saw gathered there that morning did have shoulder bags on them, but he did not see any firearms.

In Sierra-Ayala's subsequent interview with Alcohol, Tobacco, and Firearms agents, he lied to protect himself by instinctively imagining what could have been in the shoulder bag he was holding.

DISCUSSION

The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Const. amend. IV. "[S]earches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (internal quotations omitted). In general, an affront to this guarantee calls for application of the exclusionary rule: evidence that the government obtains by violating a defendant's Fourth Amendment rights may not be introduced against that defendant at trial. *See Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978); *United States v. Camacho*, 661 F.3d 718, 724 (1st Cir. 2011) (citing *Terry v. Ohio*, 392 U.S. 1, 12 (1968)).

Sierra-Ayala contends that his Fourth Amendment rights were violated because Lopez seized him and searched the shoulder bag without the requisite reasonable suspicion. *See* Docket No. 79. He also argues that the court should suppress the evidence from the shoulder bag as well as the statements he made post-arrest because they were the fruit of an unconstitutional *Terry* stop. *See* Docket 79 at 27–30; *Terry*, 392 U.S. at 12. The government responds that Lopez did not seize Sierra-Ayala in an investigatory stop prior to seizing him in a legitimate arrest. *See* Docket No. 43 at 4. The government further responds that Sierra-Ayala does not have standing to challenge the

search of the shoulder bag because he did not have a reasonable expectation of privacy in the shoulder bag when he was approached by Lopez. *See* Docket No. 77.

I. Seizure of Sierra-Ayala

Sierra-Ayala alleges that his person was seized in violation of the Fourth Amendment. Brief investigatory stops of persons, or *Terry* stops, such as in this case, are covered by the protections offered by the Fourth Amendment. *See United States v. Tiru-Plaza*, 766 F.3d 111, 115 (1st Cir. 2014); *United States v. Chaney*, 647 F.3d 401, 408 (1st Cir. 2011) ("Any detention of an individual by a police officer constitutes a seizure and, to be lawful, must be adequately justified under the Fourth Amendment."). However, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 U.S. at 22. "The oversight of brief investigatory stops has two aspects. First, a police officer must have a reasonable, articulable suspicion of an individual's involvement in some criminal activity in order to make the initial stop. Second, actions undertaken pursuant to that stop must be reasonably related in scope to the stop itself 'unless the police have a basis for expanding their investigation.'" *United States v. Ruidiaz*, 529 F.3d 25, 28–29 (1st Cir. 2008) (internal citations omitted) (quoting *United States v. Henderson*, 463 F.3d 27, 45 (1st Cir. 2006)).

First, a person is seized for the purposes of the Fourth Amendment "when a police officer 'has in some way restrained the liberty of a citizen'" through 'physical force or show of authority.'" *United States v. Camacho*, 661 F.3d 718, 725 (1st Cir. 2011) (quoting *Terry*, 392 U.S. at 19 n. 16). "To determine whether an officer has restricted an individual's freedom of movement, courts determine the 'coercive effect of the encounter' by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" *Id*. (quoting *Brendlin v. California*, 551 U.S. 249, 255 (2007)). An officer restrains the liberty of someone through a show of authority only when, under the totality of the circumstances, a reasonable person would not feel that she could leave. *See United States v. Cruz-Montanez*, No. CR 16-467 (ADC), 2017 WL 2670736, at *5 (D.P.R. June 21, 2017). In assessing the totality of the circumstances, courts

consider "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id*. (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Courts have found that there was a show of authority when officers in a marked police car park in such a way as to block the defendant from moving and then exit the police car with weapons drawn, demanding that the defendant do something such as put his hands up or show the officers his license and registration. *See Gentry v. Sevier*, 597 F.3d 838, 844–45 (7th Cir. 2010) ("A reasonable person in Gentry's position, who saw a marked police car pull up and who was told by a police officer to keep his hands up, would not believe that he was free to leave."); *United States v. Brown*, 448 F.3d 239, 245–46 (3d Cir. 2006), (officer seized defendant when he told the defendant that he was a suspect for a robbery and ordered him to place his hands on the police car); *Cruz-Montanez*, No. CR 16-467, at *5 (seizure occurred when officers "drove up with their sirens on and screeched to a halt about three feet away from Cruz's vehicle and trailer"; blocked Cruz's vehicle; "exited their vehicle with weapons drawn, and asked Cruz for his driver's licence and vehicle registration").

Conversely, courts have found that the officers and defendant had a consensual encounter such that the Fourth Amendment was not triggered when the officers ask the defendant questions rather than make demands because "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200 (2002); *see United States v. Preston*, No. 13-20061, 2013 WL 2319340, at *3–4 (E.D. Mich. May 28, 2013), aff'd, 579 F. App'x 495 (6th Cir. 2014) (encounter was consensual when defendant "was not hemmed in, pressed, commanded, or signaled to do anything" and "was hailed in the same kind of conversational tone and manner heard thousands of times an hour on the streets of every city in the nation, large and small: 'Hey! What's up?'"); *United States v. Moede*, No. 12-CR-40, 2012 WL 1910082, at *3 (E.D. Wis. Apr. 5, 2012), report

and recommendation adopted, No. 12-CR-40-JPS, 2012 WL 1910081 (E.D. Wis. May 25, 2012) (officer "asked rather than commanded" the group to stop, so the encounter was not a seizure).

The narratives provided by Sierra-Ayala and Lopez have several significant deviations, so it is important to first address the credibility of the witnesses' testimony before assessing whether the government has proven that there was no seizure of Sierra-Ayala prior to his arrest. "The weighing of the various witnesses' testimony and other conceivably conflicting evidence . . . is entirely within the province of the trier of fact." *See Colon* v. *Casco, Inc.*, 716 F. Supp. 688, 694 (D. Mass. 1989) (citing *Scarpa* v. *Murphy*, 806 F.2d 326, 328 (1st Cir. 1986) ("Findings based on witness credibility are lodged firmly in the province of the trial court, and we are loathe to disturb them absent a compelling showing of error.") (citations omitted)). When making the relevant findings, the trier of fact may choose "between two plausible competing interpretations of the facts." *See United States* v. *Weidul*, 325 F.3d 50, 53 (1st Cir. 2003). In choosing whether to believe a witness, the trier of fact may "judge a witness's demeanor or tone of voice." *United States* v. *Forbes*, 181 F.3d 1, 7 (1st Cir. 1999). But "factors other than demeanor and inflection go into the decision whether or not to believe a witness"—"[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

After carefully considering the conflicting evidence, I find credible—in all material respects—the testimony of Lopez. Not only were Lopez's demeanor and tone convincing, but his version of the events was plausible and logical.

Sierra-Ayala attacked the credibility of Lopez's testimony largely through a demonstration in court. Sierra-Ayala donned basketball shorts and a tank top that he said were similar to those he wore the day he was arrested—the Metropolitan Detention Facility took his original clothes and would not return them—to show the court that the weight of a gun on the waistband of his shorts would have made the shorts sag so much that Lopez's contention that he only noticed the gun after arresting Sierra-Ayala could not be considered credible. Sierra-Ayala's shorts did sag quite a bit

when he placed the gun holster and toy gun on the waistband. However, while sympathetic to the fact that Sierra-Ayala could not proffer the actual clothing he wore on the day he was arrested through no fault of his own, I also do not believe that the shorts used in the demonstration were plausibly sized and that Sierra-Ayala was not wearing a pair of shorts with a tighter waistband on the day in question. Therefore, the demonstration did not affect my assessment of Lopez's credibility. Sierra-Ayala also points out that Lopez did not mention a holster in his post-arrest reports although he testified that Sierra-Ayala was using one when he was arrested. *See* Docket No. 79 at 17. However, a failure to note a single piece of evidence in his reports does not outweigh the other factors that make Lopez's testimony credible.

At the same time, Sierra-Ayala's story had several facts that made it facially less plausible. First, as the government points out, a soda and cigarettes usually cost more than three dollars. Docket No. 77 at 5. More notably, though, Sierra-Ayala testified that his cousin, who ran a store where he sold items such as soda and cigarettes, did not have change for a ten-dollar bill. As such a store would likely be regularly selling smaller items, it seems inconsistent that the cousin proprietor would not have seven dollars in the till. Finally, Sierra-Ayala's story is that he was literally caught holding the bag. While it is certainly possible that the police pulled up a mere five seconds after Sierra-Ayala took possession of the shoulder bag, it is yet another stretch of the imagination that Sierra-Ayala is asking the court to make. Sierra-Ayala's story makes the rest of his testimony—specifically in regard to his initial interaction with Lopez—less credible than Lopez's account.

Sierra-Ayala argues that he was subject to a seizure by the police when he was approached by Lopez. Docket No. 79 at 19. The uncontested facts are that Lopez and two other officers parked their unmarked Toyota Corolla six to ten feet away from Sierra-Ayala, quickly and simultaneously exited the vehicle, and said, "Police!". Lopez, who was in plain clothes but had his police identification in clear view, then walked around the back of the vehicle and towards Sierra-Ayala. Meanwhile, the group Sierra-Ayala was with fled on foot and at least some of them were pursued by the other two officers who had been in the Toyota Corolla. Sierra-Ayala could see other police

vehicles in the wooded area, and Lopez testified that he was in one car of six or seven that were meeting at the drug point.

Considering the totality of the circumstances, Sierra-Ayala was approached by an officer repeatedly identifying himself as a police officer while other officers ran after everyone who had chosen to leave when the officers arrived. Moreover, Sierra-Ayala could see other police vehicles in the surrounding area. These circumstances all point towards a seizure through a show of authority. Conversely, Lopez was the only officer near Sierra-Ayala at the time and Lopez did not block Sierra-Ayala such that he could not move, both of which are facts that differentiate the interaction from other cases where the courts have found that the defendant was seized. *Cf. Gentry*, 597 F.3d at 844–45; *Brown*, 448 F.3d at 245–46. Importantly, Lopez never drew his gun or touched Sierra-Ayala. The fact that Lopez arrived in an unmarked Toyota Corolla and was in plain clothes, which would normally make the encounter less threatening, was mitigated by his and his fellow officers' multiple announcements of themselves as police officers as well as the presence of the marked police cars that were in the surrounding area.

If, as Sierra-Ayala testified, Lopez approached him and told him to turn over the shoulder bag, then that command would clearly turn the situation into a seizure. *See United States v. Lowe*, 791 F.3d 424, 431–32 (3d Cir. 2015) (seizure occurred when "three marked police cars nearly simultaneously arrived at Ms. Witherspoon's residence at 4 o'clock in the morning" and "[f]our uniformed police officers immediately got out of their patrol cars and approached Lowe and Witherspoon, commanding them to show their hands"). However, I credit Lopez's testimony that he said nothing other than that he was a police officer. Sierra-Ayala then stood up and showed Lopez the contents of the shoulder bag without any other prompting. If anything, this is similar to the situations where courts have found that there was a consensual interaction when the officer only asked questions rather than issuing commands. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions.").

Sierra-Ayala cites to *United States v. Fermin* to support the argument that the sheer number of officers at the scene created a show of authority. *See* Docket No. 79 at 21 (citing *United States v. Fermin*, 771 F.3d 71, 77 (1st Cir. 2014)). In *Fermin*, four to five officers were "present in some formation around [Fermin] in a very short period of time after he was confronted, and that police told Fermin that they wanted to speak with him about the contents of the suitcase." 771 F.3d at 77. The court noted, without deciding the issue, that it was "not clear that a reasonable person, surrounded by five police officers, would believe that he was free to leave." *Id*. However, in *Fermin*, the officers were directly surrounding the defendant, and they made a demand of him. Here, Lopez was the only officer in the vicinity and said nothing to Sierra-Ayala other than that he was a police officer. Without more, *Fermin* is easily distinguishable. Instead, this case is far more similar to *United States v. Williams*, 413 F.3d 347 (3d Cir. 2005) where four police officers got out of a marked police car and started walking towards the defendant who was sitting in the back of a van. The Third Circuit held that the officers approaching the defendant, without doing more, did not seize the defendant for the purposes of the Fourth Amendment. *Id*. at 352; *see Drayton*, 536 U.S. at 200 ("Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places."). Under the totality of the circumstances, the court should find that Sierra-Ayala was not seized under the Fourth Amendment.[2]

II. Search and Seizure of Shoulder Bag

Sierra-Ayala also argues that the police searched the shoulder bag in violation of the Fourth Amendment. *See* Docket No. 79 at 13. The government contends that Sierra-Ayala lacks standing

[2] Sierra-Ayala argues that he "yielded to the show of authority" by Lopez when he did not run away. Docket No. 79 at 21. Here, it is uncontested that Lopez never told Sierra-Ayala not to move: Lopez testified that he did not say anything other than identifying himself as the police, and Sierra-Ayala testified that Lopez told him to turn over the shoulder bag. However, the Supreme Court has held that "a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." *Brendlin v. California*, 551 U.S. 249, 262 (2007); *see United States v. Lowe*, 791 F.3d 424, 433 (3d Cir. 2015) (the fact that defendant stayed still when approached, even though he did not show his hands as ordered, constituted yielding to the show of authority because "[w]hen an officer effectuates a Terry stop, his or her 'show of authority' is an implicit or explicit command that the person stop"). Because Lopez did not seize Sierra-Ayala, though, the fact that Sierra-Ayala submitted is irrelevant.

to request the suppression of evidence seized from the shoulder bag because he had no expectation of privacy in the shoulder bag. *See* Docket No. 77. The Fourth Amendment guards against unreasonable seizures of property in which the person has a legitimate privacy interest. *United States v. Place*, 462 U.S. 696, 706–07 (1983). Therefore, to qualify as a person aggrieved by an unlawful search and seizure—and one who may invoke the exclusionary rule to suppress evidence—an individual must show he or she was "'the victim of an invasion of privacy.'" *United States* v. *Salvucci*, 448 U.S. 83, 86 (1980) (quoting *Jones* v. *United States*, 362 U.S. 257, 261 (1960)). By contrast, a person who is aggrieved by an illegal search and seizure "only through the introduction of damaging evidence secured by a search of a third person's premises or property" has not had any of his Fourth Amendment rights infringed and consequently may not invoke the exclusionary rule. *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978).

Thus, as a "threshold matter," Sierra-Ayala must prove "that he had a legitimate expectation of privacy" in the shoulder bag by meeting a two-part test: "first, whether the defendant had an actual, subjective, expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as objectively reasonable." *United States v. Battle*, 637 F.3d 44, 48–49 (1st Cir. 2011) (internal quotations omitted); *see United States v. Rodriguez-Ramos*, 704 F.2d 17, 21 (1st Cir. 1983) (defendant "bears the burden of showing that he had an expectation of privacy in the travel bag and thus standing to challenge the legality of its search"). Courts in the First Circuit look to several factors to assess whether a defendant had a legitimate expectation of privacy: "ownership, possession, and/or control; historical use of the property searched or the thing seized; ability to regulate access; the totality of the circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case." *United States v. Aguirre*, 839 F.2d 854, 856–57 (1st Cir. 1988); *see Oliver v. United States*, 466 U.S. 170, 177 (1984) ("No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant."). "The Court looks to whether the defendant

thought of the article that was searched 'as a private one, and treated it as such.'" *United States v. Bates*, 100 F. Supp. 3d 77, 83 (D. Mass. 2015) (quoting *Aguirre*, 839 F.2d at 857).

According to Defendant's own testimony, the factors in favor of finding that Sierra-Ayala had a reasonable expectation of privacy are that he had possession of the shoulder bag and knew its origins in that his cousin had possession of it prior to him. However, Sierra-Ayala only had "casual possession" because he did not own the shoulder bag or its contents, had not used or possessed the shoulder bag on previous occasions, and was only holding the shoulder bag for five seconds as his cousin looked for change. *United States v. Sanchez*, 943 F.2d 110, 113–14 (1st Cir. 1991); *see United States v. Collins*, 811 F.3d 63, 65 (1st Cir. 2016), *cert. denied*, No. 15-9037, 2016 WL 1615540 (U.S. May 31, 2016) (because defendant "did not claim the bag was his, he cannot show he had an expectation of privacy in the bag"); *United States v. Rodriguez-Ramos*, 704 F.2d 17, 21 (1st Cir. 1983) (emphasizing that there was no expectation of privacy in a bag that belonged to appellant's traveling companion [that she was using] at the time to carry her personal belongings"); *United States v. Bartz*, No. 04-20051-BC, 2005 WL 2769012, at *5 (E.D. Mich. Oct. 25, 2005) ("Other courts have held that a defendant can claim no legitimate expectation of privacy in his companion's personal containers, such as purses or pocketbooks." (citing cases)). Sierra-Ayala also did not know what was in the shoulder bag until the police informed him. *Cf. Sanchez*, 943 F.2d at 114 (a factor against finding an expectation of privacy was that the defendant "claimed no interest in the drugs contained within the car"). Moreover, he did not show that he could exclude others from the shoulder bag, and he never testified or even alluded to the fact that he had a subjective expectation of privacy in the shoulder bag. *See* Docket No. 74 at 152 (when asked how he felt when Lopez said to show him the shoulder bag, Sierra-Ayala simply stated that he was "scared"); *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (no expectation of privacy when defendant did not have "any right to exclude other persons from access to Cox's purse").

In *United States v. Lochan*, the First Circuit found that the defendant did not have a reasonable expectation of privacy in the vehicle he was driving when arrested. 674 F.2d 960, 965 (1st Cir. 1982). While the fact that he was driving the vehicle and that it was a long trip enhanced

his expectation of privacy, the factors against the defendant's privacy interest outweighed his possession of the vehicle: the defendant did not own the car; there was no evidence that he had used the car on other occasions; there was no evidence "as to the responsibility or control [he] had over the automobile other than the fact that he was driving it;" he had none of his own personal belongings in the car; he did not claim a subjective expectation of privacy in the vehicle; and he did not claim "any interest in the hashish seized" from the vehicle during the suppression hearing where it could not have been used against him as direct evidence in trial. *Id*. at 965, 965 n. 6. When compared to Sierra-Ayala's case, there are a number of important parallels. Sierra-Ayala's possession of the shoulder bag was also limited: he was merely holding it as its true owner stood next to him. In addition, Sierra-Ayala presented no evidence of his responsibility or control over the shoulder bag in the past other than his momentary possession of it that is at issue here. Sierra-Ayala also had not stored any of his own belongings in the shoulder bag. Furthermore, Sierra-Ayala did not claim any interest in the contents of the pack, instead testifying that he did not even know what was in it. Lastly, unlike the defendant in *Lochan*, Sierra-Ayala did not have possession of the shoulder bag for a long time, which weighs against Sierra-Ayala having a privacy interest.

Sierra-Ayala's case is probably most similar, though, to *United States v. Carlisle*, where the court found that the defendant, Carlisle, did not have a reasonable expectation of privacy over a bag that he was in legitimate possession of when the police seized and searched it. 614 F.3d 750, 759–60 (7th Cir. 2010). Both men, Carlisle and Sierra-Ayala, had the bag on their person when the police arrived but disclaimed ownership of the same. *Id*. at 759. Despite Carlisle's clear possession of the bag, the Seventh Circuit found that Carlisle did not have a reasonable expectation of privacy over it in large part because of Carlisle's testimony that he did not know what was in the bag or who was using it prior to his taking it, which undercut any claim of "exclusive control," and the "complete lack of testimony that Carlisle had any subjective expectation that the bag would remain free from governmental invasion." *Id.* Sierra-Ayala also clearly stated that he did not know what was in the shoulder bag—although he did know that his cousin had it previously—and never testified that he believed that he personally had a privacy interest in the shoulder bag. Furthermore,

unlike in *Carlisle* where the testimony showed that the defendant had the right to "exclude all others from the bag except" its owner, there is no evidence that Sierra-Ayala had the right to exclude anyone from the shoulder bag, especially as he was only holding it while his cousin was looking in his pocket for change.

The court should find that Sierra-Ayala did not meet his burden to establish a reasonable expectation of privacy in the shoulder bag such that he has standing to challenge the police's seizure and search of the bag. Because the court should find that Sierra-Ayala "cannot validly assert a Fourth Amendment challenge to the search of the backpack, we do not reach the merits of whether the search was proper." *Carlisle*, 614 F.3d at 760.

CONCLUSION

The court should find that Sierra-Ayala did not have a reasonable expectation of privacy in the shoulder bag such that he could challenge the constitutionality of its seizure. The court should also find that Sierra-Ayala was not seized in an investigatory stop for purposes of the Fourth Amendment. For the foregoing reasons, the motion to suppress should be **DENIED**.

This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(d) of the Local Rules of this Court. Any objections to the same must be specific and must be filed with the Clerk of Court **within fourteen days** of its receipt. Failure to file timely and specific objections to the report and recommendation is a waiver of the right to appellate review. *See Thomas* v. *Arn*, 474 U.S. 140, 155 (1985); *Davet* v. *Maccorone*, 973 F.2d 22, 30–31 (1st Cir. 1992); *Paterson-Leitch Co.* v. *Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 991 (1st Cir. 1988); *Borden* v. *Sec'y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987).

IT IS SO RECOMMENDED.
In San Juan, Puerto Rico, this 21st day of May 2018.

S/ Bruce J. McGiverin
BRUCE J. MCGIVERIN
United States Magistrate Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **LUIS MIGUEL SIERRA-AYALA,** **Defendant.**	**CRIM. NO. 17-063 (PAD)**

OPINION AND ORDER

Delgado-Hernández, District Judge.

Luis Miguel Sierra-Ayala was indicted for possession of heroin and cocaine with intent to distribute in violation of 18 U.S.C. § 841(a)(1), possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i) and possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k) (Docket No. 8). Claiming that the arresting officer violated the Fourth Amendment, he has moved to suppress contraband seized at the time of the arrest and post-arrest statements (Docket No. 38). The government opposed (Docket No. 43).

The court referred the matter to Magistrate Judge Bruce McGiverin (Docket No. 44), who after a hearing, issued a well written Report and Recommendation ("R&R"), recommending that the motion be denied (Docket No. 83, p. 14).[1] Sierra-Ayala objected to the R&R and requested a *de novo* hearing (Docket No. 87), which the court granted (Docket No. 88). At the government's request, the court limited the hearing to the issue of standing (Docket No. 94). Only Sierra-Ayala and the arresting officer testified during the hearing. The parties filed post-hearing briefs (Docket

[1] The transcript of the hearing before the Magistrate Judge was entered at Docket No. 74. It will be referred to as "THMJ."

Nos. 101 and 103). Having carefully reviewed the record in light of applicable law, the court adopts the R&R's recommendation as it relates to the issue of standing, and denies Sierra-Ayala's motion on such basis.

I. FACTUAL BACKGROUND

From Sierra-Ayala's testimony and description of events, he was on his way to repair his car at his mother's house in Loíza, Puerto Rico, when he stopped to buy a soda and cigarettes from a cousin, who operated a small business – a mini-mart – near the house of Sierra-Ayala's mother (Transcript of *De Novo* Hearing, "TDNH," Docket No. 99, pp. 13-14, 21). Because the cousin did not have enough change, Sierra-Ayala walked to a close-by area to ask another cousin, who was with group of people, for change. Id. at 15. That cousin asked Sierra-Ayala to hold an Adidas bag for a moment, so he could give him change, which the cousin had in his pocket (TDNH, Docket No. 99, pp. 15-17; THMJ, Docket No. 99, p. 16).[2] Sierra-Ayala held the bag for five seconds, not moving from the spot where the cousin handed him the bag, while the cousin pulled change out of his pocket (TDNH, Docket No. 99, pp. 19, 23, 27-28, 31; THMJ, Docket No. 74, pp. 145-146).[3]

Around that same time frame, officers of the Puerto Rico Police Department ("PRPD") arrived at the scene (TDNH, Docket No. 99, pp. 8-9; THMJ, Docket No. 74, p. 146). Everyone in the group, including Sierra-Ayala's cousin, started running except Sierra-Ayala. Id. The cousin left without giving Sierra-Ayala the change he had asked for (Docket No. 99, p. 18). As various officers chased the persons who had fled the scene, Sierra-Ayala was approached by Sergeant Jesús López of the PRPD's Drugs and Narcotics Division (TDNH, Docket No. 99, pp. 18, 37, 38, 39,

[2] Defendant testified it was his understanding that he was responsible for the bag, was to return it to the cousin, and could not give it to anyone else. TDNH, at pp. 17, 19-20. The cousin did not testify at either the hearing before the Magistrate Judge or the *de novo* hearing.

[3] A photograph of the bag was introduced as Defense Exhibit N (TDNH, p. 43).

40). Even though what happened next is contested,[4] the bottom line is that Sergeant López saw drugs inside the bag and placed Sierra-Ayala under arrest. Id. at 40, 44.[5] Sierra-Ayala said he had not seen the bag before; did not know what was inside the bag until Sergeant López told him; did not own the drugs; and had not seen them before that day. Id. at 27-28, 30-31. Moreover, he testified that his cousin had never asked him to watch anything for the cousin in the past. Id. at 31. Their relationship was not close. Id. at 19.

II. DISCUSSION

Sierra-Ayala claims Sergeant López seized and searched the bag in violation of the Fourth Amendment (Docket No. 38). The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures …". U.S. Const. amend. IV. Fourth Amendment rights are personal. See, United States v. Collins, 811 F.3d 63, 65 (1st Cir. 2016) *cert. denied* 2016 WL 1615540 (U.S. May 31, 2016)(so recognizing). The ability to assert a Fourth Amendment challenge to the search of a particular venue depends upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the object at stake. See, United States v. Lipscomb, 539 F.3d 32, 35-36 (1st Cir. 2008)(stating proposition).

The Supreme Court has set out a two-part test for analyzing the expectation question: first, whether the movant has exhibited an actual, subjective, expectation of privacy in the object of the

[4] According to Sergeant López, after he identified himself as a police officer Sierra-Ayala held open and showed López what was inside the bag (TDNH, pp. 40, 42, 44). According to Sierra-Ayala, Sergeant López told Sierra-Ayala to give him the bag, Sierra-Ayala did so, López took the bag and opened it. Id. at 18, 34. The Magistrate Judge credited Sergeant López' version, finding his testimony credible in all material respects (Docket No. 83, p. 7). For purposes of this Opinion and Order, the court assumes that the interaction between Sierra-Ayala and Sergeant López occurred the way Sierra-Ayala described it.

[5] The bag contained heroin and crack cocaine (TDNH, Docket No. 99, p. 30). During the *de novo* hearing Sergeant López testified without contradiction that the bag was open. Id. at 40. In the initial hearing before the Magistrate-Judge, Sierra-Ayala said that the bag's zipper was closed (THMJ, Docket No. 74, p. 145). For purposes of this Opinion and Order, the court assumes the bag was closed.

challenged search; and second, whether such subjective expectation is one that society is prepared to recognize as objectively reasonable. See, California v. Ciraolo, 476 U.S. 207, 211 (1986)(articulating formulation). While the Supreme Court has noted that the threshold analysis is more properly placed within the purview of substantive Fourth Amendment law, "courts continue to refer to it as an issue of standing." Lipscomb, 539 F.3d 32, 35-36.

In United States v. Aguirre, 839 F.2d 854 (1st Cir. 1988), the First Circuit identified the sort of factors pertinent to this inquiry, guiding courts to look into whether the individual thought of the place or the article as a private one and treated it as such; and if so, whether or not the individual's expectation of confidentiality was justifiable under the circumstances. Id. at 856-857. Whatever facts may shed light upon either step of this two-tier evaluation may be weighed in the balance, including ownership, possession, and/or control of the property; ability to regulate access; historical use; surrounding circumstances; existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case. Id. The burden of proof "is on the defendant." United States v. Lochan, 674 F.2d 960, 965 (1st Cir. 1982).

Sierra-Ayala alleges that he has standing because he accepted possession of the bag from his cousin, which created a bailment between them, and as a bailee he had a legally cognizable expectation of privacy in the seized bag that allows him to challenge the constitutionality of the bag's search as a violation of the Fourth Amendment (Docket No. 101, p. 7).[6] By one account, at common law bailment consists of a contractual relationship resulting from the delivery of personal chattels by one person, called the bailor, to a second person, called the bailee for a specific purpose.

[6] The term "bailment" derives from the Norman-French word *bailler*, to deliver. See, Michael H. Rubin, "Bailment and Deposit in Louisiana", 35 La. L. Rev. 825 & N. 2 (1974)(so observing).

See, Michael H. Rubin, *supra* at 825 (discussing topic). When this purpose is accomplished, the chattels must be returned or dealt with according to the bailor's direction. Id. at 825, 830. Other definitions bypass the contractual element, recognizing obligations derived from possession of the good. See, Black's Law Dictionary (10th Ed.), p. 169 ("Although a bailment is ordinarily created by the agreement of the parties, resulting in a consensual delivery and acceptance of the property, such a relationship may also result from the actions and conduct of the parties in dealing with the property in question" such that, "[a] bailment relationship can be implied by law whenever the personal property of one person is acquired by another and held under circumstances in which principles of justice require the recipient to keep the property safely and return it to the owner." (quoting 8A Am. Jur. 2d *Bailment*, § 1 (1997)).[7]

In Puerto Rico, giving something to another person for safekeeping until the first person returns to recover the thing is known as depositum or deposit. See, Jewelers Mut. Ins. Co. v. N. Barquet, Inc., 410 F.3d 2, 12 (1st Cir. 2005)(examining subject); United States v. González Medina, 797 F.2d 1109, 1114 (1st Cir. 1986)(same). It arises out of a contract whereby one person (the depositor) hands a piece of personal property to another person (the depositary) for the sole purpose of having the depositary keep, conserve, and return the property. Id. at 12. It has some relationship with the common law concept of bailment, albeit the two concepts are not identical. Id. (citing Michael H. Rubin, *supra*)(examining differences between civil law deposit and common

[7] See also, Hartford Fire Ins. Co. v. Empresa Ecuatoriana de Aviación, 945 F.Supp. 51, 56 (S.D.N.Y. 1996) *aff'd* 122 F.3d 1056 (2d Cir. 1997)(noting that "[in] the absence of a mutual contract of bailment, an implied bailment arises when a party comes into lawful possession of the personal property of another"); Wilson v. Citizens Central Bank of Nelsonville, 11 N.E.2d 118, 119 (Ohio App. 1936)("Bailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the things as the property of another, that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense"); 19 Samuel Williston, *A Treatise on the Law of Contracts,* 4 (4th ed. 2016)(discussing what the author refers to as "involuntary bailments," where possession of property passes from one person to another by mistake, accident, or through the force of circumstances under which the law imposes upon the recipient the duty and obligation of a bailee).

law bailment)); II-2 José Puig Brutau, *Fundamentos de Derecho Civil*, Bosch, Barcelona, 1982, pp. 524-525(same).[8] Unlike other contracts that involve possession of something with the aim of benefitting from or using the object,[9] in the depositum contract the person who receives the deposit receives the possession of the thing with a different aim: to care for it. See, Astoria Jewelry v. N. Barquet, Inc., 291 F.Supp.2d 16, 25 (D.P.R. 2003), *aff'd* 410 F.3d 2 (1st Cir. 2005)(analyzing depositum contract)(citing José Ramón Vélez Torres, IV-II *Course of Civil Law*, *Contract Law*, Interamerican University of Puerto Rico, San Juan, p. 475, and José María Manresa y Navarro, XI *Commentaries to the Spanish Civil Code*, Instituto Editorial Reus, Madrid, 1950, p. 657)); Travelers Indemnity Company v. S. Klein of Puerto Rico, Inc., 676 F.Supp.32, 33 (D.P.R. 1987)(identifying custody as the essence of the deposit contract, one involving "a service or *facere*," consisting of "engaging in the necessary acts to protect and conserve the object of the contract").

As in a bailment, depositum imposes a duty of care upon the depositary. See, Astoria Jewelry, 291 F.Supp.2d at 25-27 (duty of care in depositum); United States v. Houseal, 2014 WL 626765, *18 & n. 17 (W. D. Ky. Feb. 18, 2014)(same as to bailment). Possession must be restored to the depositor when the depositor reclaims it, at the time agreed upon, or when the contractual purpose has been accomplished. See, José Puig Brutau, *supra* at pp. 539-540 (discussing issue). The depositary is presumed liable for loss to the item deposited while under his exclusive possession and custody. See, Astoria Jewelry, 291 F. Supp. 2d at 26-27 (addressing presumption).[10]

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[8] Broadly stated, bailment is a generic term referring to different relationships involving the exchange of possession of movables, whereas deposit is confined to storage and care. See, Michael H. Rubin, *supra* at 843-844 (distinguishing terms); José Puig Brutau, *supra* at pp. 524-525 (similar).

[9] The elements of possession and custody are also found in contracts of lease, commodatum, and pledge, among other contracts. See, Travelers Indemnity Company, 676 F.Supp. at 33 (examining subject); José Puig Brutau, *supra* at p. 521 (same).

[10] On the relationship between the asserted exclusivity and potential liability, see, Goudy & Stevens v. Cable Marine, Inc., 924 F.2d

As regulated by the Puerto Rico Civil Code, P.R. Laws Ann. tit. 31 §§ 4621-4715, the depositum contract derives from "relevant provisions of the Spanish Civil Code". N. Barquet, Inc., 410 F.3d at 12. It is not necessary that the contract be driven by a business motive. Id.[11] It is presumed gratuitous absent some agreement to the contrary and may be formed even if the depositary's motive in accepting the depositor's property is simple courtesy. Id. (citing 22:1 Manuel Albaladejo, Private Law Review: Comments to the Civil Code and Local Compilations 198-99 (1980)(describing as paradigmatic the case where a passerby, without asking for any compensation, agrees to care for another person's oxen in a public market for a few moments)). A party "receiving delivery of a thing is not required to have known the contents of it in order for a depositum contract to have been formed." Astoria Jewelry, 291 F.Supp.2d at 25.

In determining whether the parties have formed a depositum contract, courts focus on whether the delivery of the thing has been accomplished and the depositary has received the effective possession and control of the thing to the point of excluding possession by the depositor. See, N. Barquet, Inc., 410 F.3d at 13 (articulating and applying formulation); Cesaroni v. United States, 624 F.Supp.613, 620 (S.D.Ga. 1985)(pointing out that in a bailment "there must be an actual or constructive possession in the bailee, exclusive and independent of the bailor and all other persons"); Hekmat, 247 F.Supp.3d at 435 (noting that for a bailment to arise, "there must be a full transfer of property so as to exclude the possession of the owner and all other persons and give to

16, 18-19 (1st Cir. 1991)(addressing role of exclusivity in explaining liability for damages to a bailed object in the context of a bailment related to repair work on a vessel); Hekmat v. U.S. Transportation Security Administration, 247 F.Supp.3d 427, 435-436 (S.D. N.Y. 2017)(rejecting as inappropriate presumption of liability where purported bailee did not have sole and exclusive possession and control over luggage when jewelry was allegedly stolen).

[11] A depositum contract is deemed commercial, and therefore governed by the Commercial Code where: (1) the depositor is a merchant; (2) the items deposited are commercial goods; and (3) the deposit constitutes a commercial transaction or has been made by reason of a commercial transaction. See, N. Barquet, Inc., 410 F.3d at 13 (examining issue). There is no need to further distinguish between civil and commercial depositum contracts, as the difference is of no consequence here.

bailee sole custody and control thereof"). Consent may be express or implied. It can be inferred from the depositor's delivery of an item to the depositary, the depositary's knowing acceptance of that item, and the depositary's effective and exclusive possession and control over the item. See, N. Barquet, Inc., 410 F.3d at 5, 13-14 (so recognizing).

Measured by these parameters, the court is not persuaded that Sierra-Ayala entered into a depositor-depositary or even a broader bailor-bailee relationship with his cousin. Depositum may exist for a few moments. See, Manuel Albaladejo, *supra* at 198-199 (acknowledging scenario). Yet for a depositum to have been perfected or bailment to have been configured, the cousin must have surrendered full possession, custody and control of the bag, which was not apparent from Sierra-Ayala's description of the events, particularly as the cousin, who did not testify, remained by Sierra-Ayala's side, close to the bag, which contained heroin and crack cocaine, while he pulled change out of his pocket to give to Sierra-Ayala. Sierra-Ayala may have had physical possession of the bag, but from the evidence the court cannot conclude that the cousin relinquished custody and control over the bag and the drugs that it contained. See, In re Jeff Benfield Nursery, Inc., 565 B.R. 603, 619-611 (Bankr. W.D.N.C. 2017)(no bailment because purported bailee did not have exclusive possession, custody and control of goods but rather shared control over them)(citing Mid-South Investments, LLC v. Statesville Flying Service, Inc., 2016 WL 3958721, *8 (W.D. N.C. July 22, 2016)(bailment did not exist, for the purported bailee never had exclusive possession, custody, and control of aircraft in question)); Lieber v. Smith, 1980 WL. 935, *651 (Pa.Ct.Com.Pl. May 8, 1980)(no bailment where plaintiffs made no delivery to defendant of exclusive possession and control of their property).[12]

[12] Ownership of property carries with it a "bundle of sticks," a set of rights and prerogatives that can be exercised by the owner or a third party with the owner's consent. See, United States v. Craft, 535 U.S. 274, 278 (2002)(describing "property")(citing B.

Notwithstanding the absence of depositum or bailment and irrespective of how the relationship between Sierra-Ayala and his cousin is characterized, Sierra-Ayala received the bag from the apparent owner. In this way, he was authorized to possess it. But the person in legal possession of a good seized during an allegedly illegal search has not necessarily been subject to a Fourth Amendment deprivation. See, United States v. Salvucci, 448 U.S. 83, 91 (1980)(so observing). The capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from government intrusion. See, Macusi v. DeForte, 392 U.S. 364, 368 (1986)(articulating formulation).

The government argues that Sierra-Ayala lacks standing because in asserting that the bag did not belong to him, he forfeited any right to privacy in the bag (TDNH, p. 51). In United States v. Zapata, 18 F.3d 971 (1st Cir. 1994), the First Circuit sustained the trial court's decision to deny a motion to suppress to a defendant who had disclaimed to the arresting officer ownership of duffel bags found in the trunk of the car he was driving. Id. at 979. According to the Court, "disclaiming ownership is tantamount to declaring indifference, and thus, negates the existence of any privacy concern in a container's contents." Id. at 979. In United States v. De Los Santos Ferrer, 999 F.2d 7 (1st Cir. 1993), the Court held that defendant's repeated statement to agents in the scene that she could not give them authority to open luggage because it was not hers, forfeited any claim of privacy in its contents. Id. at 9. In Collins, 811 F.3d at 63, the Court sustained the district court's

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Cardozo, Paradoxes of Legal Science 129 (1928)(reprint 2000) and Dickman v. Commissioner of Internal Revenue, 465 U.S. 330, 336 (1984); II José Ramón Vélez Torres, *Curso de Derecho Civil, Los Bienes, Los Derechos Reales*, Madrid, p. 66 (discussing conception of property reflected in Puerto Rico's Civil Code). The owner may transfer all or some of these rights and prerogatives in accordance with the law. As to possession, Article 362 of the Puerto Rico Civil Code provides that "possession of property … may be considered in one of two aspects: either in that of the owner or in that of the holder of the thing." P.R. Laws Ann. tit. 31 § 1423. Thus, the physical possession of a thing with the owner's authorization does not necessarily include other attributes of ownership, such as custody, use, and control.

decision to deny a motion to suppress filed by a defendant who, in response to a police officer's question about whom a bag belonged to, disclaimed ownership of the bag. Id. at 64-66. In the Court's view, because the defendant did not "challenge the District Court's finding that he did not claim the bag was his, he cannot show he had an expectation of privacy in the bag." Id. at 65.

Along the same line, in United States v. Mc Bean, 861 F.2d 1570 (11th Cir. 1988), the defendant denied to the detaining officer ownership of two closed pieces of luggage in a car he was driving as well as knowledge of the contents of the luggage. The Court held that the defendant lacked a legitimate expectation of privacy in the luggage and its contents, finding the disclaimer analogous to abandoning the property and given that there is no legitimate expectation of privacy in abandoned luggage, the defendant could not challenge the legality of the search. Id. at 1571, 1572, 1573-1574. Similarly, in United States v. Monie, 907 F.2d 793 (8th Cir. 1990), the defendant had been hired to drive an automobile rented by another person to carry two suitcases from one point to another. He knew that the suitcases and their content belonged to someone else. When the officers asked about the suitcases, the defendant stated that they were not his, that the contents belonged to someone else, and that he had no access to the contents. The court stated that the defendant did not exhibit a subjective expectation of privacy and with his words had disavowed that expectation. Id. at 794-795.

From these cases, Sierra-Ayala would seem to have forfeited the opportunity to challenge the bag's search. But he did not disclaim anything when he was arrested at the scene. At least there was no testimony that he did so. And during the *de novo* hearing, he said that the cousin gave the bag to him, to hold it for a moment while the cousin looked for change in his pocket. In these conditions, he cannot be said to have relinquished all links to the bag to the point of legally abandoning it. See, United States v. Reeves, 798 F.Supp.1459, 1465-1466 (E.D. Wash.

1992)(defendant who, in response to an officer's question, said that a briefcase stored in his car belonged to his cousin, had standing to challenge the briefcase's search).

Turning to the quality of Sierra-Ayala's link to the bag and its correlation to the privacy inquiry here, in United States v. Rodríguez-Ramos, 704 F.2d 17, 721 (1st Cir. 1983), *cert. denied,* 463 U.S. 1209 (1983), the First Circuit recognized that there are circumstances where bailment may support a legitimate expectation of privacy. Id. at 725. Those circumstances include the relationship between travelling companions, the conditions of bailment, and precautions taken to maintain privacy. Id.[13] Thus, the existence of a bailment is merely "one of a number of circumstances to be considered when determining whether a defendant has a reasonable expectation of privacy." Houseal, 2014 WL 626765 at *18. But a bailment per se "says nothing about anyone's reasonable expectation of privacy." Id. & n.17.

Several cases shed light on where courts have drawn the line on when an individual has a legitimate expectation of privacy under analogous settings and can therefore challenge a search, and when he does not. In Rawlings v. Kentucky, 448 U.S. 98 (1980), the petitioner had stashed drugs in the purse of a woman sitting next to him as the police entered the room. Id. at 101-102. The Supreme Court found that he had no reasonable expectation of privacy in the purse that would permit him to challenge the reasonableness of a search of that purse. The fact that he claimed ownership of the drugs discovered in the purse was one factor to be considered but was not sufficient to create a Fourth Amendment interest. The Court also considered: (1) that the petitioner

[13] In Rodríguez-Ramos, 704 F.2d at 17, the prosecution sought to introduce in evidence a deed to the defendant's house, which he allegedly brought to a meeting with undercover drug agents to exchange for cocaine. The deed was discovered through the warrantless search of a travel bag, which was carried by the defendant's female companion at the time of his arrest. The district court concluded that the bag belonged to the companion and ruled that defendant had no standing to seek suppression of the deed. The First Circuit affirmed, noting, among other things, that the burden was on the defendant to establish circumstances substantiating an expectation of privacy in the bag, and that he had failed to carry that burden. Id. at 21.

had known the woman for only a few days, had never had access to the purse prior to the sudden bailment, and had no right to exclude other persons from access to the purse; (2) the precipitous nature of the transaction did not support any reasonable inference that normal precautions had been taken to maintain privacy; and (3) the petitioner admitted that he had no subjective expectation that the purse would remain free from governmental intrusion. Id. at 105.[14]

In the present case, Ayala-Sierra was in legal possession of the bag five seconds. The sudden and precipitous nature of the transaction does not support any reasonable inference that he took precautions to maintain privacy. The record reflects none. Sierra-Ayala's relationship with the cousin was not close. There was no historical use or prior occasion on which the cousin had ever asked Sierra-Ayala to watch the bag in question or any other bag for that matter. And the cousin was with him while Sierra-Ayala held the bag, undermining any semblance of control he may have had over the bag. See, Lochan, 674 F.2d at 965 ("Possession of the vehicle registration indicates control, but this is diluted by the owner's presence").

In United States v. Benitez-Arreguin, 973 F.2d 823 (10th Cir. 1992), the defendant was an itinerant worker who had been given a duffel-type bag to transport the bag from Los Angeles to Salt Lake City, where a woman would get the bag at a designated hotel and take defendant to a farm to work. Law enforcement officers detained defendant in the Salt Lake City train station and opened the bag, finding heroin. The defendant did not look inside the bag and did not know what was inside the bag but took care of it as if it were his. The Court held that a person transporting luggage as a bailee or at least with the permission of the owner, has a reasonable expectation of

[14] At the suppression hearing, the petitioner had answered "no" to the questions: "Did you feel that Vannessa [*sic*] Cox's purse would be free from the intrusion of the officers as you sat there? When you put the pills in her purse, did you feel that they would be free from governmental intrusion?" Id. at 104, n.3.

privacy that society would recognize. Id. at 825-828. Contrary to the situation of Sierra-Ayala, the defendant in Benitez-Arlequin had the bag in his possession much more than five seconds, to transport the bag to another city. Sierra-Ayala stayed where he was when, by his account, the cousin gave him the bag.

In United States v. Perea, 986 F.2d 633 (2d Cir. 1993), defendant moved to suppress a duffel bag with drugs seized from the trunk of a taxi he was riding as a passenger. He had been paid to keep the duffel bag in his apartment and subsequently transport it in a cab in which he and the driver were the only occupants. The Court found that the defendant had a subjective expectation of privacy confirmed by his repeated glancing about for surveillance while the cab was in transit, and a person transporting luggage as a bailee or at least with the permission of the owner, has a reasonable expectation of privacy that society would recognize. Id. at 636, 640-641. Differently than Sierra-Ayala, the defendant in Perea had the bag in his possession for more than five seconds, to transport it to another location. And the bag was inside the trunk of a vehicle. In the present case, the bag was in plain view.

In United States v. Carlisle, 614 F.3d 750 (7th Cir. 2010), the defendant was arrested at the home of another individual during a drug sweep. He was caught fleeing from the back of the house carrying a closed backpack, while two other officers entered the front door of the house. The Court pointed out that although defendant had disclaimed ownership of the bag, he was legitimately in possession of it, had the right to exclude all others from the bag except the home owner, who had asked him to carry the bag to the garage, and indicated that he intended to maintain privacy in the bag by holding onto it as he left the house and by keeping it closed. Still, he did not know what was in the bag or who was using the bag immediately prior to his taking it, and there was no evidence that defendant had any expectation that the bag would remain free from governmental

intrusion. Id. at 752-754, 759-760.

As previously mentioned, Sierra-Ayala was in legitimate possession of the bag and testified that when the cousin handed it to him he understood he was responsible for it, was not to turn the bag over to anyone else while the retrieved change for him and would return the bag to the cousin (TDNH, p. 7). This may signal a subjective expectation of privacy but is insufficient to support a legitimate expectation of privacy under the Fourth Amendment.[15] In the brief period that he was in possession of the bag he undertook no affirmative precautions to maintain privacy. *Cf.* Hershenow, 680 F. 2d at 855 (defendant's subjective expectation of privacy demonstrated because "his purpose in taking the box to [a hiding place] shortly after the search warrant was executed at his office was to hide it and its incriminating contents). The record is silent on whether he had a subjective expectation that the bag was to remain free from governmental intrusion, and like the defendant in Carlisle, he did not know what was in the bag, which he had not seen before that day.

In United States v. Allen, 741 F.Supp.15 (D. Me. 1990), law enforcement authorities seized in the United States mails a package addressed to "Kurt Humphrey" and searched it, finding LSD. Humphrey was not the intended recipient; he had agreed, in exchange for $50, to let his name and address be used as addressee for packages belonging to the defendant, and to deliver these packages upon receipt, to the defendant. The government argued that because the defendant was neither the sender nor the addressee of the envelope and its contents, he had no Fourth Amendment interest to assert. Id. at 15-16. The Court rejected the argument, applying the factors that the Supreme Court identified in Rawlings, 448 U.S. at 105, and those the First Circuit relied on in

[15] Despite this testimony, Sierra-Ayala did not say he could prevent people from looking inside the bag or that he considered the bag private. The Magistrate Judge observed that Sierra-Ayala did not show that he could exclude others from the bag, and never testified or even alluded to the fact that he had a subjective expectation of privacy in the bag (R&R, Docket No. 83, p. 12).

Aguirre, 830 F.2d at 856.

As to the Rawlings factors, the Court observed that in contrast to the petitioner in Rawlings, Humphrey had been providing the mail service to the defendant for some months; the defendant had used the indirect mail arrangement on two previous occasions; there was no suggestion of any access to the envelope's contents by anyone other than the defendant; the use of a sealed envelope traveling in the United States mails would ordinarily be conserved a prudent way to maintain privacy inasmuch as federal law prevents tampering or unauthorized access to the mails; and there was no admission of lack of expectation that the envelope would remain free from governmental intrusion. See, Allen, 741 F.Supp. at 16-17 (applying Rawlings).

In connection with the Aguirre factors, the Court pointed out that the defendant asserted ownership of the envelope and its contents whereas no one else asserted any ownership or possessory interest in the envelope; on two previous occasions the same mail delivery procedure had been used and Humphrey delivered the material to the defendant; federal law precluded access by others while the item was in the United States mails, and there was no suggestion that Humphrey's access to the content was contemplated when the bailment relationship was established; the defendant had a subjective expectation of privacy, maintaining close check on the delivery, calling frequently to inquire as to the envelope's arrival; and the defendant's expectation of privacy was objectively reasonable because federal law protects objects in the United States mails from unauthorized access except in limited circumstances and the defendant had arranged a bailment with Humphrey pursuant to which Humphrey was to deliver the package to him upon receipt. Id. at 17-18 (applying Aguirre).

In contrast to Allen, the Rawlings and Aguirre factors weigh against Sierra-Ayala. The facts show no more than a tenuous arrangement with the cousin, without prior interactions between

them in connection with the bag at issue or any other bag. The mail delivery arrangement in Allen made the relationship more than transient, an element Sierra-Ayala cannot escape from, given the brief five-second period that he was in contact with the bag and the other circumstances of the case.

Relying on Perea, Sierra-Ayala argues that duration of a bailment is irrelevant to the standing analysis (Docket No. 104, pp. 8-9). In the context of Perea, where the bailee was in transit, duration may be irrelevant. But the Supreme Court has considered the duration of a defendant's contact with the property as a factor in determining whether the defendant has shown a legitimate expectation of privacy entitling him to invoke the exclusionary rule. In Rakas v. Illinois, 439 U.S. 128 (1978), it observed that a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would have no legitimate expectation of privacy in the house. Id. at 142. In Minnesota v. Carter, 525 U.S. 83 (1998), it held that defendants, who were in another person's apartment for a short period of time solely for the purpose of packaging cocaine, had no legitimate expectation of privacy in the premises, distinguishing between the legitimate privacy expectations of overnight guests and the mere permission to be on the premises given to those without previous connections with the householder who enter the premises to conduct a business transaction for a relatively short period of time. Id.

In this light, casual, transient visitors, or what comes down to the same thing, those with a casual, transient contact with property and owners or householders do not have standing to challenge the search of those premises. See, United States v. Torres, 162 F.3d 6, 10 (1st Cir. 1998)(casual visitor in apartment lacks reasonable expectation of privacy in the premises); United States v. Flores, 172 F.3d 695, 699 (9th Cir. 1999)(defendant who was in apartment to conduct a

brief drug transaction has no standing to object to the admission of evidence seized from the apartment). And the principle is not exclusive of real estate, having been applied in other Fourth Amendment settings.

For example, in United States v. Sánchez, 943 F.2d 110 (1st Cir. 1991), the First Circuit concluded that a defendant lacked sufficient expectation of privacy in a vehicle he was driving, pointing out, among other things, that defendant had only a casual possession of the car and there was no evidence that he had used the car on other occasions. Id. at 113-114. In the Court's view, a pattern of permission, together with defendant's sole control on a long trip, would have minimized the informal and "temporary" nature of the way defendant had acquired possession of the car. Id. at 114.[16] Likewise, in Lochan, 674 F.2d at 965, the First Circuit observed that the fact defendant was driving a vehicle in a long trip engendered a greater privacy expectation than would a short trip. And as noted above, in Rawlings the Supreme Court took into account what it described as the "sudden" bailment and "precipitous" nature of the transaction.

These adjectives –temporary, sudden, precipitous– all apply to the brief, five-second contact that Sierra-Ayala had with the bag with the cousin standing nearby. Contrary to the cases Sierra-Ayala relies on for support, Benítez-Arlequín and Perea, he stood in the same spot where his cousin gave him the bag and did not move or attempt to move the bag to any other location. Compare this situation with that of the defendant in Reeves, 798 F.Supp. at 1461-1463, 1465-1466, who was accorded standing to challenge the search of his cousin's locked briefcase, stored in the hatchback portion of defendant's vehicle while the defendant drove the vehicle from Medical Lake to Spokane, Washington.

[16] Defendant had been given the car by the owner's girlfriend. 943 F.2d at 113.

III. CONCLUSION

Taking into account the totality of circumstances, Sierra-Ayala did not have a legitimate expectation of privacy in the bag. He was not the bag's owner and had no belongings inside the bag. He was in legitimate possession of it. The possession, however, was brief, lasting five seconds, during which Sierra-Ayala's cousin –the apparent owner of the bag– stood next to him. The relationship between Sierra-Ayala and his cousin was not close. Additionally, there was no evidence that: (1) the cousin gave Sierra-Ayala permission to use or take the bag anywhere; (2) in the past, Sierra-Ayala had taken care of the bag at issue or any other bag for the cousin; or (3) Sierra-Ayala took precautions to safeguard any privacy interest he may have had in the bag, seeking to preserve it as private.

What is more, the record is silent on whether Sierra-Ayala had any expectation that the bag would remain free from governmental intrusion. He said he did not know what was inside the bag. Assuming he demonstrated a subjective expectation of privacy in the bag, a legitimate expectation of privacy means more than a bare subjective expectation. Given this set of facts, Sierra-Ayala cannot challenge the search and seizure of the bag under the Fourth Amendment. Therefore, the motion to suppress at Docket No. 38 is DENIED.

SO ORDERED.

In San Juan, Puerto Rico, this 2nd day of August, 2019.

s/Pedro A. Delgado Hernández
PEDRO A. DELGADO HERNÁNDEZ
United States District Judge

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **LUIS MIGUEL SIERRA-AYALA,** **Defendant.**	**CRIM. NO. 17-063 (PAD)**

OPINION AND ORDER

Delgado-Hernández, District Judge.

This Opinion and Order supplements the one entered on August 2, 2019 (hereinafter "OP") which adopted the Magistrate Judge's recommendation (Docket No. 83) to the effect that defendant lacks standing to challenge the seizure of a bag he had in his possession the day of his arrest (Docket No. 105).[1] After the arresting officer (Sergeant Jesús López of the Puerto Rico Police Department) saw packages that from experience he knew were used to pack heroin inside the bag, he arrested the defendant and frisked him, finding a gun.

The defendant asks that the gun be suppressed (Docket No. 107, pp. 3-4). He may challenge the seizure of the gun. But the challenge fails, hence the request to suppress must be denied, because the defendant had not been seized when the officer saw the packages inside the

[1] The court uses the term "standing" as a shorthand method of referring to the issue of whether the defendant's own Fourth Amendment interests were implicated by the challenged governmental action. Technically, though, the concept of standing has not had a place in Fourth Amendment jurisprudence since the Supreme Court in Rakas v. Illinois, 439 U.S. 128 (1978), indicated that matters of standing in the context of searches and seizures actually involve substantive Fourth Amendment law. See, United States v. Kimball, 25 F.3d 1, 5 n.1 (1st Cir. 1994)(using the term "standing" in the same way, with the same technical clarification).

bag. That observation led to the defendant's arrest and a search incident to a lawful arrest, which uncovered the gun.[2]

I. BACKGROUND

Following the ruling at Docket No. 105, the court scheduled a conference for August 8, 2019 (Docket No. 106). On August 5, 2019, defendant asked that the conference be advanced, adding that even though standing was not recognized with respect to the bag, the OP did not address the suppression of the gun (Docket No. 107, p. 1). The court granted the request to advance the conference, holding it on August 6, 2019 (Docket Nos. 108, 110).

During the conference, defendant stated that a decision from the court was needed on whether defendant's seizure was illegal or not (Transcript of Conference, p. 7).[3] After hearing arguments on the issue, the court noted that it was crediting the testimony of the arresting officer, who among other things, said that he approached the defendant, identified himself as a police officer, and the defendant showed him the open bag with the drugs. Id. at 8.[4] The defendant

[2] The factual background is described in the Magistrate Judge's Report and Recommendation (Docket No. 83) and in the OP (Docket No. 105). Basically, the defendant was with a group of individuals who ran away when police officers arrived in the area. The defendant, however, stayed in place. One of the officers (Sergeant López) approached the defendant, identifying himself as a police officer. The defendant held open and showed the contents of the bag to the officer, who saw a clear plastic bag that had purple packages in it, which the officer knew was the type of packaging used for heroin. The officer placed the defendant under arrest and frisked him, finding the gun. The packages field tested positive for heroin and crack cocaine.

[3] District Judges have Court Reporters as part of their staff when presiding over the different proceedings held before them. Among other responsibilities listed in 28 U.S.C. § 753, reporters are responsible for promptly transcribing, when requested, the original record of all proceedings held before the judge and prepare and file a certified transcript of them. The transcript is available, following applicable rules and regulations, to parties who have arranged payment. And it is also available at the request of a judge, at no charge to the court. District Judges have access to the rough drafts of the transcripts before a formal request is made by any interested party, or the transcript is filed for the record in the court.

[4] Defendant's version is that the officer ordered him to give him the bag. In the OP, the court did not make a credibility finding on this matter, assuming instead that the facts occurred as defendant described them. Such description had no bearing on the issue of whether defendant had a legitimate expectation of privacy in the bag.

contends that the officer could not have approached him without meeting the standards for a Terry stop or probable cause, and that those standards are not satisfied here. Id.[5] The court rejected the argument, observing that law enforcement officers are entitled to approach people. Id. Following are the grounds in support of the court's ruling.

II. DISCUSSION

A. Standing to Challenge Initial Interaction between Officer and Defendant

The Fourth Amendment protects the "right of the people to be secure in their persons … and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Defendant alleges that he was seized in violation of the Fourth Amendment (Docket No. 38, p. 3; Docket No. 79, pp. 19-27; Docket No. 107, p. 3). The assertion that a particular person has been unlawfully seized entitles that person to challenge the government's action. See, Kimball, 25 F.3d at 9 (noting that standing to challenge a search presents issues separate and distinct to challenge a stop in rejecting government's argument that defendant lacked standing to challenge the constitutionality of the stop of codefendant's vehicle, but concluding that defendant did not have standing to question the constitutionality of the inventory search of the vehicle). Thus, even though, as ruled in the OP, defendant cannot challenge the seizure of the bag, he has standing to challenge the initial interaction between him and the officer that ultimately led to the seizure of the gun he has asked the court to suppress.

[5] The term "Terry stop" refers to a modality of seizure involving a temporary investigatory detention falling short of arrest. See, Terry v. Ohio, 392 U.S. 1, 19 (1968)(explaining concept). Such a detention does not offend the Fourth Amendment as long as it is justified at its inception and reasonable in scope, accounting for the "emerging tableau" of information known to the detaining officer. United States v. Arthur, 764 F.3d 92, 97 (1st Cir. 2014). To be justified at its inception, it must be accompanied by a reasonable, articulable suspicion of an individual's involvement in some criminal activity. Id. The reasonable suspicion standard is a protean one; it defies strict boundaries, requiring more than a visceral hunch about the presence of illegal activity but less than probable cause. Id.

B. Legality of Initial Interaction

Not all encounters between law enforcement officers and citizens are seizures for purposes of the Fourth Amendment. See, United States v. Young, 105 F.3d 1, 5-6 (1st Cir. 1997) (acknowledging principle); United States v. Mask, 330 F.3d 330, 336 (5th Cir. 2003) (same). As the Supreme Court discussed in Florida v. Royer, 460 U.S. 491 (1983), there are three basic categories or levels of police-citizen encounters: (1) an encounter which does not reach the level of a seizure within the meaning of the Fourth Amendment so that the prosecution need offer no justification for the encounter at all in order to satisfy the Fourth Amendment; (2) a Terry stop requiring reasonable suspicion; and (3) an arrest requiring probable cause. Id. at 497-499 (plurality opinion). See also, Young, 105 F.3d at 5-6 (describing three-tier interaction model); United States v. Willis, 759 F.2d 1486, 1495 (11th Cir. 1985)(analyzing identical three-level framework); United States v. Puglisi, 723 F.2d 779, 783 (8th Cir. 1984)(similar).[6]

A person is seized by the police when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement. See, Brendlin v. California, 551 U.S. 249, 254 (2007)(discussing topic). To determine whether an officer has restricted an individual's freedom of movement, courts ask "whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter." United States v. Camacho, 661 F.3d 718, 725 (1st Cir. 2011)(quoting Brendlin, 551 U.S. at 255)(internal quotations omitted).

An officer restrains the liberty of someone through a show of authority "only when in view of all circumstances, a reasonable person would have believed that he was not free to leave."

[6] An initial encounter between an officer and a citizen may ripen into a seizure, triggering the Fourth Amendment and requiring officers to be able to articulate reasonable suspicion for a Terry stop or probable cause for an arrest. See, United States v. Álvarez-Sánchez, 774 F.2d 1036, 1040 (11th Cir. 1985)(examining and applying proposition); Mask, 330 F.3d at 336 (same).

United States v. Fields, 823 F.3d 20, 25 (1st Cir. 2016)(quoting United States v. Mendenhall, 446 U.S. 544, 553-554 (1980)). Characteristics of an encounter with law enforcement that might indicate there was a show of authority include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Id.

This said, law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable searches and seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. See, United States v. Drayton, 536 U.S. 194, 201 (2002)(articulating formulation). Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage, provided they do not induce cooperation by coercive means. Id.[7]

By this account, the defendant was not seized when the officer first approached him. Crediting the officer's testimony, the officer said nothing other than he was a police officer. An encounter between a citizen and police does not turn into a seizure simply because the officer identifies himself as an officer. See, Royer, 460 U.S. at 497 (stating proposition); United States v. Hayden, 759 F.3d 842, 847 (8th Cir. 2014) ("[The officers] clearly identified themselves as police, and approached the men. The officers did not block the ability of Hayden and Crockett to cross

[7] Treatise writers share this judicial view. See, Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation (3d Ed. 2017), Carolina Academic Press, Durham, N.C., p. 253 (noting that the mere approaching of a citizen by a law enforcement officer and posing questions to the person is not a seizure); 4 Wayne R. La Fave, Search and Seizure, A Treatise on the Fourth Amendment (5th Ed. 2012), § 94(a), pp. 574-577 (pointing out that if an officer merely walks up to a person standing or sitting in a public place and puts a question to him, this alone does not constitute a seizure).

the street, did not touch the men, and did not display weapons. Merely identifying oneself as "Police" does not effect a seizure of a citizen who stops to listen or talk, because self-authentication is not a command in the nature of 'Police, halt' or 'Stop, in the name of the law!"); United States v. Maragh, 894 F.2d 415, 418 (D.C.Cir. 1990)("… Maragh was aware of one plainclothes police officer, who approached him in mid-afternoon, in a public place, displayed no weapons, and did not block his path).

In like manner, the officer here never drew his gun or told the defendant not to move or to do anything. There was no evidence that the officer touched the defendant or blocked him in any way. The officer was the only one near the defendant at the time. Moreover, the encounter took place on a public location, a street, in daylight. See, Young, 105 F.3d at 5-6 (finding only a minimally intrusive interaction that did not trigger the protections of the Fourth Amendment when the police officers had pulled alongside the appellant, identified themselves as police officers, and asked "Got a minute?", to which the appellant replied, "Sure"); United States v. Williams, 413 F.3d 347, 349, 352 (3rd Cir. 2005)("We conclude that there was no seizure because there was no use of physical force, nor was there any show of authority when the police [4 officers] approached the van [inside of which the defendant was seated] in their marked cruiser, exited the vehicle and approached the parked van on foot"). And as that Court further recognized, "the police could approach the parked van without any reasonable suspicion, just as they could approach an individual standing on the street without any reasonable suspicion. Merely approaching an individual, standing or in an automobile, does not constitute a seizure under the Fourth Amendment." Id. at 354.

The "free to leave" test focuses on whether the conduct of police officers objectively communicates that law enforcement is exercising its official authority to restrain the individual's

liberty of movement. See, Fields, 823 F.3d at 25 (addressing issue). In other words, the standard is objective. It is concerned "not with the citizen's subjective perception or the officer's subjective intent." Mask, 330 F.3d at 336 (internal quotations omitted). Considering the totality of factual circumstances, the court reaches the same conclusion that the Magistrate Judge reached: the defendant was not seized when the officer first approached him and identified himself as a police officer.[8] By extension, the defendant had not been seized when he showed the officer the content of the open bag.

C. Search Incident to a Lawful Arrest

When the officer observed the content of the bag, he recognized the type of packaging used for heroin. At that point, he had probable cause to arrest the defendant, and did so. Warrantless arrests do not violate the Fourth Amendment when conducted "in a public place upon probable cause." United States v. Santana, 427 U.S. 38, 42 (1976). The subsequent frisk was a search incident to a valid arrest. If an arrest is lawful, the arresting officers "are entitled to search the individual apprehended pursuant to that arrest." United States v. Uricoechea-Casallas, 946 F.2d 162, 165 (1st Cir. 1991).

The justification or reason for the authority to search incident to a lawful arrest "rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." United States v. Robinson, 414 U.S. 218, 234 (1973). In this way, in case of a lawful custodial arrest, "a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a reasonable search under than Amendment." Id.

[8] The court is in agreement with the Magistrate Judge's factual analysis and legal conclusions.

III. CONCLUSION

For the reasons stated, the defendant's request to suppress the gun is DENIED. There was nothing objectively coercive about the initial encounter between the defendant and the officer. The officer did not draw his gun, block the defendant's path, touch the defendant, or command him to do or refrain from doing anything. The encounter occurred on a public location, in daylight. Nothing constitutionally prevented the officer from approaching the defendant in the first place.

After the officer saw the content of the bag, he had probable cause to arrest and to search the defendant as an incident to a lawful arrest. And because the defendant's arrest did not violate the Fourth Amendment, the search of his person was constitutionally permissible. The evidence obtained from the search was therefore not, as the defendant contends, the fruit of an illegal arrest or search, and should not be suppressed.

SO ORDERED.

In San Juan, Puerto Rico, this 14th day of September, 2019.

s/Pedro A. Delgado Hernández
PEDRO A. DELGADO HERNÁNDEZ
United States District Judge

Appendix F

United States Court of Appeals
For the First Circuit

No. 20-1145

UNITED STATES,

Appellee,

v.

LUIS MIGUEL SIERRA-AYALA,

Defendant - Appellant.

Before

Barron, Chief Judge,
Selya, Lynch, Lipez, Kayatta,
Gelpí, and Montecalvo
Circuit Judges.

ORDER OF COURT

Entered: October 17, 2022

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Eric A. Vos, Jesus Abel Hernandez-Garcia, Franco L. Perez-Redondo, Luis Miguel Sierra-Ayala, Kevin Lerman, Jose Capo-Iriarte, Mariana E. Bauza Almonte, Francisco A. Besosa-Martinez, Daynelle Maria Alvarez-Lora, David Thomas Henek