No._____

IN THE SUPREME COURT OF THE UNITED STATES

CLIM EUGENE MURPHY THOMAS,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

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

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Petition for a Writ of Certiorari

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QUESTION PRESENTED

WHETHER THE UNITED STATE FIFTH CIRCUIT COURT OF APPEALS IMPROPERLY APPLIED ITS TOTALITY OF THE CIRCUMSTANCES ANALYSIS OF PETITIONER'S CHALLENGE TO THE LAW ENFORCEMENT'S CONSENSUAL ENCOUNTER OF PETITIONER, AN AFRICAN -AMERICAN, BY IGNORING ANY DISCUSSION OF RACE IN PETITIONER'S CONFRONTATION BY LAW ENFORCEMENT.

LIST OF PARTIES

All parties appear in the caption of the case on the over page.

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CLIM EUGENE MURPHY THOMAS, Petitioner in this matter, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Opinion Below

Petitioner is a federal inmate at the Federal Correctional Institute in Texarkana following his conviction upon a conditional plea in the Pecos Division of the Western District of Texas for Aiding and Abetting Possession with Intent to Distribute 100 Kilograms or More of Marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 18 U.S.C. Section 2, and Possession of a Firearm in Relation to a Drug Trafficking Offense, in violation of 18 U.S.C. § 924 (c).

The Fifth Circuit affirmed his conviction in an unpublished decision on April 13, 2023. *United States v. Clim Eugene Murphy Thomas*, No. 22-50518 (5th Cir., April 13, 2023) (unpublished).[1] Petitioner did not file a motion for rehearing.

Jurisdiction

This Court possesses jurisdiction over this case pursuant to 28 U.S.C. Section 1254.

Constitutional and Statutory Provisions Involved

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

[1] The Fifth Circuit decision is attached hereto as Appendix "A."

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

U.S. Const., Amend. 4.

Statement of the Case

The present case arises from an "encounter" between Petitioner, an African-American, and his co-defendant, Deondre Jackson, on an isolated stretch of Texas Highway 385 outside Big Bend state park in southwest, Texas.

i. One version of events.

May 22, 2021 was a pleasant day in Big Bend National Park, in southwest, Texas.[2] Petitioner and the co-defendant, were parked at a rest area on Highway 385, a narrow stretch of desolate roadway outside the park. As the two sat, enjoying the rustic, desert beauty of their rest point, two Border Patrol agents passed by on the highway. The agents shortly returned, parking behind Petitioner and Jackson's pickup trucks. The agents, both uniformed and armed, exited their marked vehicle,

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[2] The National Park service's webcite lauds the natural - and isolated- beauty in this distant part of the State of Texas:

> "Splendid Isolation: Big Bend
>
> There is a place in Far West Texas where night skies are dark as coal and rivers carve temple-like canyons in ancient limestone. Here, at the end of the road, hundreds of bird species take refuge in a solitary mountain range surrounded by weather-beaten desert. Tenacious cactus bloom in sublime southwestern sun, and species diversity is the best in the country. This magical place is Big Bend..."

https://www.nps.gov/bibe/index.htm

and approached the two sitting at a picnic table. While one agent directly advanced toward Petitioner and Jackson, the other - pen and notepad in hand - walked over to the parked pickup trucks and started inspecting the vehicles. Petitioner and Jackson, both African American, arose, offering their identification to the approaching agents – each knew the drill. The first agent questioned Petitioner about his activities that day while the second agent circled Jackson's pickup, then turned his attention to Petitioner's pickup. He circled Petitioner's vehicle, leaned in mere inches from the tinted windows and peered inside. While scrutinizing the interior, he observed wrapped bundles on the floorboard which he believed to be marijuana. He signaled the first agent, who arrested Petitioner. Jackson too was cuffed. The interaction between the agent arriving and discovering contraband in Petitioner's pickup lasted approximately five minutes.

Jackson would not consent to a search of his pickup, so the agents summoned a Texas Department of Public Safety canine handler to the scene to conduct a search. The trooper arrived and after his dog alerted on Jackson's pickup, the agents searched the vehicle, discovering wrapped bundles of suspected marijuana. Jackson, like Petitioner, was formally arrested.

ii. A parallax view of the events

The district court held a hearing on Petitioner's and Jackson's motions to

suppress the evidence of the search. While neither Petitioner nor Jackson testified at the hearing, Border Patrol Agents Phillip Winston and Jesse Thomason did, as well as the Texas Department of Public Safety canine handler.

Phillip Winston, an acting supervisor with United States Border Patrol was stationed in Big Bend National Park, on May 21, 2021. [ROA.22-50518.310-311, 314]. The Border Patrol maintained an immigration checkpoint on Highway 385 close to the park and Winston was assisting that day. It was a busy day and there was considerable traffic at the checkpoint. [ROA.22-50518.313-314].

Earlier in the morning, Winston had received a call from the Border Patrol supervisor in Alpine who passed along a tip from an anonymous "concerned citizen" relating she had observed two white pickup trucks and a gold Chevy Tahoe in Marathon, Texas "acting suspicious." The anonymous caller advised that the trucks had neither luggage or camping equipment. One truck had a Texas licence plate; the two other had out of state plates, one from Florida, the other from Arkansas. [ROA.22-50518.315, 321-322, 323, 353].

Winston shared the anonymous tip with Border Patrol agent Jesse Thomason. Later that morning, Thomason saw all three vehicles driving in the park, traveling "in tandem" and below the speed limit. [ROA.22-50518.341-342, 354-355]. Around 1 p.m. the Gold colored Chevy Tahoe came through the checkpoint. The agents

conducted a "consent" search of the Tahoe vehicle, but found nothing illegal. [ROA.22-50518.316].

About two hours later, Winston and Thomason left the checkpoint to return to the park to finish their shift. About 5 miles south of the checkpoint, they saw two white pickups "matching the description" of the tip parked in a rest area. [ROA.22-50518.317, 318]. Winston was suspicious of these two vehicles parked in a public rest stop because it was a "common tactic" for smugglers to send a "clean car" through a checkpoint to scope it out and then report back to other smugglers. Moreover, the rest area happened to be one of the few locations in the area with call reception. [ROA.22-50518.318].

The agents drove by, stopping down the highway - out of view of the rest stop -and formed a plan to return and "talk to the subjects" as part of a "consensual encounter" for the purpose of investigating the anonymous tip. [ROA.22-50518.318]. They returned in their Border Patrol vehicle and spied Petitioner and Jackson sitting at a picnic table. [ROA.22-50518.318 - 319]. Parking, they exited the vehicle and Winston approached the two men. Petitioner got up and offered his identification to Winston while Jackson went toward Thomason, offering his own identification. [ROA.22-50518.319 -320, 331 - 332].

Agent Winston focused upon Petitioner, and started to question him about his

activities that day; Petitioner responded he had visited the park and was waiting for his family. [ROA.22-50518.321]. Agent Thomason, with whom Jackson was trying to speak, motioned to Winston to watch the two so he could take down their licence plates. [ROA.22-50518.321]. Winston questioned Petitioner and Jackson, while Thomason circled around, inspecting the pickups. [ROA.22-50518.321]. Despite characterizing the interaction a "consensual encounter" Winston believed the agents actually had reasonable suspicion because both suspects "could not articulate a good reason why they were at the checkpoint at that time" and "adamantly wanted" the agents to stay away from their pickups. [ROA.22-50518.321, 342].

While questioning Petitioner and Jackson, Agent Winston observed Thomason motion that he had spotted contraband in Petitioner's pickup. Winston arrested Petitioner and Jackson. [ROA.22-50518.321-322, 323, 331-332]. Jackson would not give consent to search his vehicle, so Winston called for a Texas Department of Public Safety canine unit. [ROA.22-50518.323]. Upon arrival, the dog alerted on Jackson's pickjup, the agents opened the tailgate, and discovered wrapped bundles which they suspected to be marijuana. [ROA.22-50518.324].

The bundles seized from the pickups later tested positive for marijuana. [ROA.22-50518.324-326]. The search of Petitioner's pickup also uncovered a 9mm pistol located in the glove-compartment. [ROA.22-50518.464 (PSIR ¶ 9)].

Agent Jesse Thomason testified in the suppression hearing that he was assisting at the Highway 385 checkpoint in Big Bend National Park on May 22, 2021. [ROA.22-50518.359-361]. He was aware of an anonymous tip concerning three separate vehicles, a gold Yukon, a white Ford F150 and a white Chevy-traveling together from the town of Marathon. [ROA.22-50518.361]. He had been at a border patrol station in the park that morning before leaving for the check point and had seen the three trucks from the tip – as well as fourth one – on the road. Later, the gold Yukon came through the checkpoint. Thomason questioned the driver and searched the vehicle, finding nothing illegal. [ROA.22-50518.362-363]. The driver gave him a "vague" account of her time in the park - just driving around – and had no outdoor recreational or luggage in the truck. [ROA.22-50518.363].

Thomason, and his supervisor Agent Winston, later left the checkpoint in their separate vehicles to return to the park substation. En route, they saw a Ford and Chevy pickup truck parked in a rest area along the highway about 5 miles south of the checkpoint. [ROA.22-50518.364]. Aroused by the anonymous tip from that morning, Thomason and Winston, assembled down the highway and formed an investigative plan to return to the rest stop to "run the tags" and talk to the drivers. [ROA.22-50518.365-366]. The agents returned in Winston's vehicle and parked behind Jackson's pickup truck. [ROA.22-50518.365]. The two drivers were sitting at a picnic

table, playing dominoes when the agents exited their vehicle. Winston approached the two travellers as Thomason, pen and notepad in hand, moved straight toward the pickups. [ROA.22-50518.366, 367, 381]. Thomason's role in the plan was to record and run the licence plates through dispatch while Winston questioned the two drivers. [ROA.22-50518.366, 372]. He diverted from the plan, however, but proceeding to conduct a closer inspection by peering into the pickups' interiors. [ROA.22-50518.374].

Jackson approached Thomason as he began scoping out the pickups, and, unbidden, offered Thomason his driver's licence. [ROA.22-50518.366]. Thomason told Winston to "keep an eye on" Jackson because he wanted to get "*another* look at the front vehicle."[3] [ROA.22-50518.375]. He circled the Petitioner's pickup, approached closely, then peered into the tinted window. He observed several packages on the backseat floorboard, the wrapping consistent with narcotics trafficking. [ROA.22-50518.367-368, 369]. In order to peep into Petitioner's pickup, Thomason had to get within about two inches from the window and shield his eyes from the sun's glare. [ROA.22-50518.369, 376]. Seeing the packages, he signaled to Winston that he observed contraband and Winston arrested the two drivers. [ROA.22-50518.369].

Jackson would not consent to a search of his pickup. [ROA.22-50518.379].

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[3]This would be Petitioner's pickup.

Winston called a canine unit to search othe pickups. After arriving, the dog alerted to both vehicles, after which the agents searched the trucks and discovered marijuana in the cabs as well as the truck beds. [ROA.22-50518.370-371].

Agents Winston and Thomason insisted during the suppression hearing that Petitioner and Jackson had been free to leave up to the point that Thomason observed the marijuana bundles in Petitioner's pickup. [ROA.22-50518.331, 381].

No body camera footage from the agents was admitted at the suppression hearing.

iii. The District Court's ruling on the Motion to Suppress did not address Petitioner's Race or the Context that his Race might have Played in the Encounter.

The district court denied Petitioner's motion to suppress, holding that the searches of the pickup trucks had not violated the 4th Amendment. *United States v. Thomas*, 4:21-CR-00577-DC Order Denying Defendants' Motion to Suppress *20 (W.D.-Tex., Sept. 19, 2021) (Appendix B) [ROA.22-50518.101]. The court held the initial engagement between Petitioner and the agents had been a "consensual encounter", not a detention, up to the point at which the agents observed the suspected bundles of marijuana in Petitioner's pickup. Order * 17 - 19. [ROA.22-50518.96- 98]. The Court premised this encounter as consensual because the agents had not used physical force or express intimidation in approaching and speaking with the two drivers. Order * 97.

[ROA.22-50518.97]. It was only after observing the suspected marijuana under the "Plain View" exception that the encounter became a detention. Order * 19-20. [ROA.22-50518.98 - 99]. The court did not address Petitioner's race or whether his race might have influenced his responses to the two agents during the "encounter."

iv. The Fifth Circuit cursorily mentioned race, but made no effort to address race in the context of Petitioner's confrontation by law enforcement.

On appeal from Petitioner's conditional plea, the Fifth Circuit Court of Appeals issued a short decision, which while acknowledging the race-focus of Petitioner's claim, did not address race in context with the facts of the case. Though noting that Petitioner 'place[d] much emphasis on his race," the Court rejected this with a generic citation to *Mendenhall*: "[a]lthough not irrelevant, that factor is not decisive." *United States v. Thomas*, 22-50518 * 4 (5th Cir. April 14, 2023) (Appendix A). In its' analysis of the "encounter" the court of appeals found it important that Petitioner had approached the officer upon their arrival on scene and offered his identification for inspection. *Id.*, at 2. The court of appeals found it significant that the agents had not made any demands, "[t]o the contrary, [Petitioner] approached one of the agents and answered his questions." That the agents were uniformed and armed carried little weight since neither "brandished" their weapons during the "encounter." *Id.*, at 3.

Reasons for Granting this Petition

The totality of the circumstances test applies to the issue of consent in a

"consensual encounter." This Court's discussion of the totality of the circumstances includes the question of an individual's race or ethnicity. The recognition of the significance of race and ethnicity in citizen-police interactions has become prominent by virtue of the George Floyd killing by Minneapolis police officer in 2020 and subsequent social movement arising from that incident. But this merely reminds, rather than creates, the historical fact of tense relationships between law enforcement and minority communities – in particular, African Americans. State and federal courts have commented upon the role a suspect's race or ethnicity may play in the analysis courts utilize for addressing 4th Amendment consent issues between citizens and law enforcement.

The Fifth Circuit Court of Appeals, while acknowledging this issue in the abstract, forewent any substantive analysis of effect of Petitioner's race in the presenet case. Instead, the court noted it was a "factor" but proceeded along with box-check approach to the traditional indicia of coercion. The Court's failure to address the potential psychological compulsion in light of Petitioners race simply ignored a timely and pressing issue under the totality of the circumstances analysis.

This question of race and its' role in a totality of the circumstances analysis of consent is both timely and has widespread applicability. This issue is simply limited to an idiosyncratic case of an African-American suspected of smuggling marijuana on

the Texas border, but presages an important question of 4th Amendment law in a nation comprised of a growing population of racial and ethnic minorities.

Summary of the Argument

1. The totality of the circumstances, adopted by this Court to analyze the question of consent in the context of police-citizen "consensual" encounters includes a variety of relevant considerations of whether a citizen's actions in remaining on scene to interact with an police officer is purely voluntary, or compelled. A citizen's race is not determinative, but this Court has noted that it is a relevant factor under the totality of the circumstances. The factors to be considered under the totality of the circumstances are not immutable; context is important and plays a significant part in the analysis. And in recent times, society and the courts have come to recognize that an citizen's race may play a significant factor in his reactions when dealing with law enforcement. Given historical practices and tensions between law enforcement and certain racial or ethnic minority groups, a citizen within a group having historical tensions with law enforcement, may well feel coercion in what might otherwise be a "consensual" encounter with the police. Both federal and state courts have expressly acknowledged that race may be a significant factor in police-citizen encounters, and the totality of the circumstance analysis in these circumstances should give consideration to race and the context in which it may play a role in the interaction.

Despite this, the Fifth Circuit Court of Appeals adopted a check-the-box approach to its' application of the totality of the circumstances evaluation in this case.

Though noting that race is not irrelevant but also "not decisive," the Court failed to address race in any context, instead applying a standard, by the numbers approach to selected generic factors, e.g., whether the police "brandished" their weapons, whether they "made any demands" on Petitioner, the fact that they arrived at the picnic area in a single vehicle." *United States v. Thomas*, No. 22-50518 * 3(5th Cir., April 13, 2023). The Court's fact-light analysis, and its' failure to address race, despite acknowledging Petitioner's claim "places much emphasis on his race" left the Court's totality of the circumstances analysis critically wanting.

Ground for Issuance of a Writ of Certiorari

I. THE UNITED STATE FIFTH CIRCUIT COURT OF APPEALS, BY DECLINING TO ADDRESS THE SIGNIFICANCE OF PETITIONER'S RACE IN THE CONTEXT OF WHETHER HIS INTERACTIONS WITH THE BORDER PATROL WERE CONSENSUAL, FAILED TO CONDUCT A TOTALITY OF THE CIRCUMSTANCES ANALYSIS UNDER UNITED STATES V. MENDENHALL.

i. The issue of race and ethnicity in the context of police interactions is a pressing and topical fact.

Few can disagree at this juncture in history that the relationship between minority communities - particularly the African -American community - with law enforcement has long been marked by profound distrust:

> Scholars have examined ad nauseam the dynamics between marginalized groups—particularly African-Americans—and law enforcement. African-Americans generally experience police misconduct and brutality at higher levels than other demographics. Consequently, it is no surprise that scholars have also found African-Americans often perceive their interactions with law enforcement differently than other demographics. For many members of minority communities, however, the sight of an officer in uniform evokes a sense of fear and trepidation, rather than security...

State v. Spears, 429 S.C. 422, 839 S.E.2d 450, 463 (S.C. 2020) (Beatty, C.J., dissenting) (footnotes and internal citations omitted). *See also*, R. Jervis, USA Today, Who are police protecting and serving. Law enforcement has history of violence against many minority groups. (June 13, 2020) ("Police departments have a long history of violence and aggression toward many minority communities in the U.S., including Latino, Muslim, LGBTQ and Black Americans, creating a deep mistrust of police . . .") (available at https://www.usatoday.com/ story/news/nation /2020/06/13/ mistrust-police-minority-communities-hesitant-call-police-george-floyd/5347878002/); L. Santhanam, PBS News Hour, Two -thirds of black Americans don't trust the police to treat them equally. Most white Americans do. (June 5, 2020) (available at https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-don't-trust-the-police-to-treat-them-equally-most-white-americans-do); D. Desilver, *et al.*, PEW Research Center, 10 things we know about race and policing in the U.S (June 3, 2020) (noting significant racial disparities in attitudes of police treatment of African Americans) (available at https://www.pewresearch.org/ fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/); Nikole Hannah-Jones, ProPublica Yes, Black America Fears the Police. Here's Why. (March 4, 2015) (pressing theory that law enforcement across the country have played significant role in suppressing Afrian American civil rights throughout nation's history)(available at https://www.propublica.org/article/yes-black-america-fears-the-police-heres-why); Jill Lepore, The History of the Riot Report, The New Yorker (June 15, 2020) (noting,

among history of race riot reports the presence of police brutality as a factor) (available at https://www.newyorker.com/magazine/2020/06/22/the-history-of-the-riot-report).

This fact of conflict, even fear between racial minorities and law enforcement has even found recognition within this Court. Justice Sotomayor, writing in her dissent in *Utah v. Streiff* has acknowledged the longstanding sense of fear held by racial minorities against law enforcement stemming:

> [I]t is no secret that people of color are disproportionate victims of this type of . . . scrutiny. . . . For generations, black and brown parents have given their children "the talk" . . . out of fear of how an officer with a gun will react to them.

Id., ___ U.S. ___, ___136 S.Ct. 2056, 2070 - 2071 (2016) (Sotomayor, J., joined by Kagan, J, and Ginsberg, J.).

It does nothing to advance the argument by determining whether the sense of distrust of law enforcement is historically justified, or precisely dissect the nature of this distrust; what is important for the purposes of this issue is that a significant portion of citizens harbor negative attitudes toward law enforcement due to a wide-spread feeling of historical injustice and mistreatment. A sizeable number of citizens do not like, or trust, the police

ii. Consensual Encounters Between Citizens and Law Enforcement.

The Fourth Amendment prohibits unreasonable searches and seizures. United States Const., 4th Amend. When police detain a subject so that he is not free to leave, either as a result of force, or out of acquiescence to a show of authority, a seizure has occurred, implicating 4th Amendment. *Florida v. Bostick* , 501 U.S. 429, 434 (1991);

and, *Terry v. Ohio*, 392 U.S. 1 (1968). Yet as this Court has held not every interaction between the police and a citizen constitutes a seizure. This Court has crafted an exception – a "police-citizen encounter": "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen . . . " *Florida v. Royer*, 460 U.S. 491, 497 (1983).

This thin distinction between an outright seizure and a "police-citizen encounter" rests upon the voluntariness of the citizen's decision to interact with law enforcement; a citizen is not detained by an officer's unsolicited approach so long as the citizen's decision to speak with the officer is voluntary, rather than compelled. *See Royer*, 491 U.S. at 497 - 498. The voluntary nature of the encounter may be measured against the coercive aspects of the encounter and is "measured . . . by asking whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter . . ." *Brendlin v. California*, 551 U.S. 249, 255 (2007) (internal quotations omitted). And the test whether a citizen's decision is a voluntary – as opposed to compelled – is determined under the totality of the circumstances standard. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A citizen's mere acquiescence to a show of police authority, however, is not the same as consent. *See* e.g., *Gates v. Texas Dept. of Protective & Reg. Services*, 537 F.3d 404, 421 - 422 (5th Cir. 2008). *See also United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir.1990); *and*, *United States v. Worley*, 193 F.3d 380, 386 (6th Cir 1999); *and United*

States v. Hidalgo, 7 F.3d 1566, 1571 (11th Cir. 1993).

This Court left open a question raised, but unaddressed, in *Mendenhall*: how does the factor of race or ethnicity play out in a totality of the circumstances analysis? To be certain, this Court has acknowledged that race and ethnicity is "not irrelevant" but has provided no other guidance on the extent to which race may be considered. *See Mendenhall,* 446 U.S. at 558.

Citing *Mendenhall*, federal and state courts have expressly concluded that race may be a salient factor in determining whether a citizens interactions with police are indeed voluntary. *See United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015) (while race is not controlling, the court acknowledged it could "not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the country. Nor . . . ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system..."); *United States v. Washington,* 490 F.3d 765, 768-769, 773 (9th Cir. 2007) (commenting that in a totality of circumstances analysis, the local history of police shootings of African - Americans was a factor in whether defendant felt free to leave after being confronted by the police); *State v. Meredith*, 525 P.3d 584, 592 (Wash. 2023)(recognizing "the coercive effect that a weapon can have in a police encounter, which is known to disproportionately affect Black, Indigenous, Latinx, and Pacific Islanders based on reasonable fear[s] of how an officer with a gun will react to them.)(internal citations omitted); *State v. Sum*, 511 P.3d 92, 102 (Wash. 2022)(acknowledging federal law concluding that under the state constitution, race and ethnicity are relevant

considerations in whether a defendant has been seized.); *State v. Jones*, 235 A.3d 119, 126 (N.H. 2020)("we observe that race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis."); *and*, *Dozier v. United States*, 220 A.3d 933, 942-45 (D.C. 2019) (acknowledging that race is a salient factor in determining whether an individual may feel free to terminate his interaction with the police). *See also United States v. Easley*, Cause No. 2:17-CR-2, Order Suppressing Evid, *3 (S.D. Oh. April 19, 2019) ("The case that Mr. Easley was unlawfully arrested becomes even more potent when race is taken into consideration. . . . [E]ven "[t]he absence of overtly coercive police tactics" in Mr. Easley's detention "should not end the seizure analysis" and should not itself resolve the question of whether Mr. Easley was unlawfully arrested."). *See also*, *Spears*, 839 S.E.2d at 449 - 450 (Beatty, C.J., dissenting) ("In my opinion, the seizure analysis should consider whether a reasonable *Black* person felt free to end an encounter with police. At the very least, I believe courts should consider a person's race (and other personal characteristics) in examining the totality of the circumstances in a seizure analysis.").

The District of Columbia Court of Appeals has characterized acquiescence by African Americans to law enforcement as a type of conditioning, a psychological mechanism adopted to avoid potential harm:

> Even the innocent person we posit in our Fourth Amendment analysis might well fear that he is perceived with particular suspicion by hyper-vigilant police officers expecting to find criminal activity in a particular area.
>
> This fear is particularly justified for persons of color, who are more likely to be subjected to this type of police surveillance. . . As is known from well-publicized and documented examples, an African-American

> man facing armed policemen would reasonably be especially apprehensive. . . The fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police is relevant to whether there was a seizure because feeling "free" to leave or terminate an encounter with police officers is rooted in an assessment of the consequences of doing so. . . . A person who reasonably is apprehensive that walking away, ignoring police presence, or refusing to answer police questions or requests might lead to detention and, possibly, more aggressive police action, is not truly free to exercise a constitutional prerogative — "to be secure in their persons," even if they do not submit — in the same manner as a person who is not viewed with similar suspicion by police and, as a result, largely unafraid of triggering an aggressive reaction. . . .

Dozier, 220 A.3d at 944.

Chief Justice Beatty has voiced a similar observation: "[g]iven the mistrust by certain racial, ethnic, and socioeconomic groups, an individual who has observed or experienced police brutality and disrespect will react differently to inquiries from law enforcement officers.")." *Spears*, 429 S.C. 422, 839 S.E.2d at 463 (Beatty, C.J., dissenting) (quoting Robert V. Ward, Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a 'Reasonable Person', 36 How. L.J. 239, 247, 253 (1993)).

So, in conducting a totality of the circumstances test under *Mendenhall*, does a citizen's race or ethnicity when confronted by law enforcement provide a context which a court should give consideration? And if so, how much?

iii. The lower courts erred in applying a totality of the circumstances analysis of the facts of the stop without at least addressing the possible effect of Petitioner's race upon his consent to engage in a consensual encounter as the Border Patrol agents questioning him and his co-defendant and commenced to inspect their vehicles.

The present case offers a timely opportunity to address race / ethnicity in the context of *Mendenhall.* The cursory analysis by both the district court and Court of Appeals prompts such an inquiry. The district court's analysis adopted a narrow talismanic approach: the "encounter" was consensual because the agents had not "show[ed] or used any force, engaged in intimidating movements, brandished a weapon, blocked an exit, or uttered any threat or command." [ROA.22-50518.97]. The district court ignored the fact of race entirely.

The Fifth Circuit's own analysis at least acknowledged the race-focused aspect of Petitioner's claim, but nonetheless declined to address any facts or context of that claim, simply citing *Mendenhall* for the general proposition that race is relevant but not determinative.

The need for clarification of *Mendenhall*'s including of race as a factor is reflected by the circularity of the 5th Circuit's totality of the circumstances analysis. The court placed considerable focus on Petitioner's offering the approaching agents his identification and answering his inquisitor, Agent Winston's questions. *Thomas*, slip op. at 2. The court de-emphasized the agents having been armed and in uniform, seemingly because they did not "brandish" their weapons. *Id.*, at 3.

Absent is a more detailed discussion of the context of the encounter: two citizens are relaxing at rest stop along a two-lane highway in an isolated part of the State when two uniformed and armed Border Patrol agents suddenly pull up, exit their vehicle, one approaching the citizens and starting to question them about their activities, while the other starts to peer into their parked vehicles. Adding

Petitioner's race - if relevant – the situation potentially alters the analysis: two African Americans, are relaxing at a rest-stop along a low-traffic desert highway. Suddenly a Border Patrol vehicle pulls up and parks behind one of the pickups. Two uniformed and armed agents exit; one approaches the two, posing questions about their activities, while the other proceeds to inspecting the vehicles, peering into the interior through the windows. Are Petitioner's reactions to the newly arrived officers reflective of his voluntary decision to engage with them, or are they reflections of protective behavior by an African American man seeking to avoid conflict with law enforcement by submitting to a show of authority? *See and consider Dozier*, 220 A.3d at 944. The circularity of the court of appeals' analysis begs the question of whether Petitioner's reactions to the agents' arrival, questioning and inspection were consensual, or responsive acts of self-preservation.

This Court should grant certiorari to clarify the role of race in *Mendenhall's* totality of the circumstances analysis on consensual police-citizen encounters.

Conclusion and Prayer

Petitioner respectfully requests this Court grant certiorari on the issues presented within this petition, permit further briefing and argument, and upon briefing and argument, grant relief by reversing Petitioner's conviction.

Respectfully submitted,

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Appendix A

U.S. v. Thomas, No. 22-50518
(5th Cir., April 13, 2022)

United States Court of Appeals for the Fifth Circuit

No. 22-50518
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
April 13, 2023
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CLIM EUGENE MURPHY THOMAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:21-CR-577-1

Before SMITH, SOUTHWICK, and DOUGLAS, *Circuit Judges*.

PER CURIAM:[*]

Clim Murphy Thomas appeals the denial of his motion to suppress the evidence underlying his convictions of aiding and abetting possession with intent to distribute 100 kilograms or more of marihuana and possession of a firearm in relation to a drug-trafficking offense. He maintains that the initial encounter with Border Patrol agents was nonconsensual and violated his

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Fourth Amendment rights.

When considering a motion to suppress, this court reviews "the district court's factual findings for clear error and its legal conclusions, including its ultimate conclusion as to the constitutionality of the law enforcement action, de novo." *United States v. Chavez*, 281 F.3d 479, 483 (5th Cir. 2002). Whether a person has been seized or detained and Fourth Amendment protections are triggered is a finding of fact reviewed for clear error. *United States v. Mask*, 330 F.3d 330, 334–35 (5th Cir. 2003).

If, as in this case, a defendant claims he has been seized in the absence of physical force, this court "analyze[s] the encounter in two steps: whether the officer exerted a sufficient show of authority; and whether defendant submitted to it." *United States v. Wright*, 57 F.4th 524, 531 (5th Cir. 2023). In analyzing whether an officer has made "a sufficient show of authority," a reviewing court "considers whether, in the light of 'all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). A consensual encounter where an individual voluntarily agrees to speak with the officers "does not amount to a 'seizure' under the Fourth Amendment." *United States v. Cooper*, 43 F.3d 140, 145 (5th Cir. 1995).

The Border Patrol agents approached in a single vehicle rather than both vehicles. Upon seeing the agents, Murphy Thomas got up from where he was seated and approached them, offering his driver's license unprompted. Murphy Thomas and his codefendant interacted with the agents and moved about freely during the encounter. Moreover, before observing the illegal narcotics in plain view, the agents did not make any demands of Murphy Thomas. To the contrary, Murphy Thomas voluntarily approached one of the agents and answered his questions.

Murphy Thomas places much emphasis on his race. Although not irrelevant, that factor is not decisive. *See Mendenhall*, 446 U.S. at 558. That the agents were armed and in uniform has little weight, and neither brandished his weapon. *See United States v. Drayton*, 536 U.S. 194, 204–05 (2002).

Totality of the circumstances supports the conclusion that there was no seizure for purposes of the Fourth Amendment. *See Wright*, 57 F.4th at 531. Accordingly, the judgment is AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

No. 22-50518
Summary Calendar

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UNITED STATES OF AMERICA,

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J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

Appendix B

U.S. v. Thomas, No. 4:32-CR-00577-DC
(W.D. Tex - Pecos Div., Sept. 19, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA,	§	
	§	
v.	§	**PE:21-CR-577-DC**
	§	
CLIM EUGENE THOMAS-MURPHY,	§	
and DEANDRE MONTREZ JACKSON.	§	

ORDER DENYING DEFENDANTS' MOTIONS TO SUPPRESS

BEFORE THE COURT is Defendant CLIM EUGENE THOMAS-MURPHY's ("Thomas-Murphy") Motion to Suppress (Doc. 31), and Defendant DEANDRE MONTREZ JACKSON's ("Jackson") (collectively, "Defendants") Motion to Suppress (Doc. 33) (the "Motions"). The Government opposes the Motions. (Doc. 38). Based on a careful review of the law, the facts in the record, submissions of the parties, and the arguments of counsel and evidence presented at the hearing, the Motions shall be **DENIED**. (Docs. 31, 33).

I. PROCEDURAL BACKGROUND

On June 10, 2021, a federal grand jury returned an indictment charging Defendants with aiding and abetting possession with intent to distribute one hundred kilograms or more of marijuana in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(B), and 18 U.S.C. § 2. (Doc. 12). In addition, the three-count indictment charges Defendant Thomas-Murphy with felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and possession of a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c). (*Id.*). Defendants filed the instant Motions on August 2, 2021. (Docs. 31, 33). The Government filed a timely Response on August 17, 2021. The suppression hearing took place September 10, 2021.

II. FACTUAL BACKGROUND

On May 22, 2021, at approximately 3:00 p.m., while traveling on US Highway 385, within the Western District of Texas, two Alpine border patrol agents observed two white trucks with Florida and Arkansas license plates parked at a roadside rest area. (Doc. 1 at 2 ¶ 3). The rest area is located approximately five miles south of the border patrol checkpoint. (*Id.*). The agents pulled into the rest area and conducted a consensual encounter with two individuals sitting at a nearby picnic table. (*Id.*). The individuals were later identified as Defendants. (*Id.*).

During the consensual encounter, one of the agents observed large rectangular bundles wrapped in tan-colored tape, within plain view, in a Ford F-150. (*Id.* ¶ 4). Based on the training and experience of the border patrol agents, these bundles were consistent with packaging used to transport illicit narcotics. (*Id.*). Defendants claimed to be the drivers of the pickup trucks. (*Id.*). A white 2020 Ford F-150 with Florida License Plate KCET70 was driven by Defendant Thomas-Murphy and a white 2020 Chevrolet 1500 with Arkansas License Plate 807VPI was driven by Defendant Jackson. (*Id.*). The border patrol agents placed both Defendants under arrest under suspicion of transporting narcotics and both Defendants were advised of their *Miranda* rights. (*Id.* ¶ 6).

The supervisory border patrol agent requested a Texas Department of Public Safety ("DPS") canine to perform a canine sniff. (*Id.*). The DPS Trooper observed a positive alert from his canine for the presence of controlled substances in the Chevrolet. (*Id.*). Based upon the alert to the Chevrolet and the prior plain view observation of the bundles of suspected narcotics in the F-150, the border patrol agents and DPS trooper conducted a probable cause search of the vehicles, locating numerous bundles containing material that later tested positive for the

characteristics of marijuana. (*Id*.). The total weight of the marijuana is approximately 708.3 kilograms or 1561.5 pounds. (*Id*.).

Subsequently, border patrol agents transported Defendants and the bundles to the Alpine border patrol station in Alpine, Texas. (*Id*. ¶ 7). Drug Enforcement Administration ("DEA") Agents were called to assist with the investigation. (*Id*.). Defendants were given their *Miranda* warnings and each agreed to speak with DEA Agents without the presence of an attorney. (*Id*.). Defendants admitted to smuggling marijuana in return for money. (*Id*.).

A. Testimony of Border Patrol Agents

Agent Phillip Winston is employed with the United States Border Patrol in Big Bend National Park, Alpine, Texas substation. (ET[1] at 3:05 P.M.). Agent Winston has been employed with border patrol for nearly ten years, and he has worked in Alpine, Texas for approximately three years. (*Id*.). Currently, Agent Winston is the acting supervisor of the Big Bend National Park substation. (*Id*.).

1. Training and Experience

Agent Winston's job duties include patrolling and enforcing immigration laws as well as assisting with the needs of other law enforcement and park rangers in the area. (*Id*. at 3:06 P.M.). In 2011, Agent Winston attended border patrol academy in Artesia, New Mexico, and learned the fundamentals of law enforcement including what constitutes reasonable suspicion and probable cause, how to observe a person's behaviors for criminal activity, and how to identify illegal narcotics as well as the tactics used to transport illegal narcotics. (*Id*. at 3:07 P.M.).

Agent Winston testified that a border patrol agent receives instruction on narcotics because the United States border with Mexico is a high intensity drug trafficking area and border

[1] "ET" refers to the Electronic Transcript of the hearing on the Motions that the Court held on September 10, 2021.

patrol agents are authorized to enforce drug laws. (*Id*. at 3:08 P.M.). Agent Winston has assisted numerous border patrol stations but primarily works in Alpine where management is located. (*Id*.). Agent Winston assists the Alpine station in processing detainees, making arrests, and operating checkpoints. (*Id*. at 3:09 P.M.). On occasion, Agent Winston works the checkpoint on US Highway 385 by observing traffic and establishing the immigration status of everyone who passes through the checkpoint. (*Id*.).

Agent Jesse Thomason has worked at the Big Bend National Park border patrol station for four years. (*Id*. at 4:06 P.M.). Agent Thomason has training in narcotics, hand-to-hand training, firearms training, language training, and radio etiquette training. (*Id*.).

2. Concerned Citizen Callout

On the morning of May 22, 2021, at around 9:00 a.m., a concerned citizen anonymously reported to law enforcement that they had observed two white pickup trucks, a Ford and a Chevrolet, and a golden colored SUV with no camping supplies and out-of-state Florida, Texas, and Arkansas license plates acting suspiciously in or around Marathon, Texas, from approximately 7:30 a.m. to 8:00 a.m. (*Id*. at 3:11 P.M.; 3:47 P.M.; 4:00 P.M.; 4:07 P.M.). Based on limited manpower and how busy Big Bend National Park was at the time, with it being a weekend, border patrol decided the best way to deter crime that day was to open the checkpoint at 10:00 a.m. on US Highway 385 to establish immigration status of everyone passing through the checkpoint and to deter anyone from crossing illegally or transporting narcotics. (*Id*. at 3:11 P.M. – 3:12 P.M.).

That morning, Agent Thomason reported that he saw all three vehicles driving into the park under the speed limit and in tandem past the guard station. (*Id*. at 3:47 P.M.; 4:20 P.M.).

Agent Thomason also observed nervous behavior. (*Id*.). Agent Thomason saw the three vehicles around 8:00 or 8:30 a.m., together southbound on US Highway 385. (*Id*. at 4:08 P.M.).

Agent Winston went to the checkpoint on US Highway 385 at approximately 9:30 to 10:00 a.m. along with another border patrol agent, Agent Thomason, from Alpine and observed traffic coming through the checkpoint. (*Id*. at 3:10 P.M.). At the checkpoint, Agent Winston and Agent Thomason observed one of the previously-reported suspicious vehicles—a golden colored SUV with an out-of-state license plate—pass through the checkpoint in the primary lane at around 1:00 P.M. (*Id*. at 3:13 P.M.; 4:09 P.M.). The driver was a United States citizen and gave permission to search the vehicle, but no contraband was found. (*Id*.). Agent Thomason questioned the driver who said she had just been driving around, although there were no signs of hiking gear, luggage, or trash in her vehicle, which would have been typical for the area. (*Id*. at 4:09 P.M.). The gold SUV proceeded past the checkpoint, but the F-150 and Chevrolet never passed through the checkpoint. (*Id*.).

3. Consensual Encounter with Defendants

Agent Winston and Agent Thomason stayed at the checkpoint until 3:00 p.m. and then gathered their belongings to return to Big Bend National Park because it was time to go home. (*Id*. at 3:14 P.M.; 4:09 P.M.). However, the agents stopped early because of an encounter at a rest stop approximately five miles away from the checkpoint. (*Id*. at 4:10 P.M.; 4:18 P.M.).

On his way, Agent Winston observed the two white pickup trucks with out-of-state license plates previously described in the anonymous tip that morning. (*Id*. at 3:14 P.M.). The trucks were parked southbound on the West side of US Highway 385, one in front of the other. (*Id*. at 3:45 P.M.). The lead vehicle, a Chevrolet, belonged to Thomas-Murphy. (*Id*.). The rear vehicle, a Ford F-150, belonged to Jackson. (*Id*. at 3:46 P.M.).

As he traveled south, Agent Thomason also saw the two vehicles parked at rest area—white trucks with Arkansas and Florida plates. (*Id*. at 4:10 P.M.). Agent Winston and Agent Thomason were travelling in tandem at the time and decided to go to talk to Defendants and make contact. (*Id*. at 4:11 P.M.). Agent Winston and Agent Thomason rode together to return to the rest stop and encountered Defendants. (*Id*.).

Based on his training and experience, Agent Winston found it peculiar that the gold SUV was no longer with the two white pickup trucks because typically if someone is attempting to smuggle something through a border patrol checkpoint one party will go through first to see if the checkpoint is open and then call the other party to alert them of the fact. (*Id*. at 3:15 P.M.). Notably, the rest stop where the two white pickup trucks were parked was one of the only public rest stops with cellular service in the area. (*Id*.). Accordingly, it peaked Agent Winston's interest that the gold SUV was no longer with the two white pickup trucks and Agent Winston decided to talk to the suspects. (*Id*. at 3:16 P.M.).

Agent Winston explained in his testimony that consensual encounters are the preferred method of dealing with people in Big Bend National Park. (*Id*.). Agent Winston entered the rest area with no emergency lights and no signs to approach Defendants who were sitting outside at a picnic table. (*Id*. at 3:17 P.M.; 3:34 P.M.). Agent Winston and Agent Thomason got out of the car together at the same time and Agent Winston made first verbal contact. (*Id*.). Agent Winston noticed immediately that Defendants were acting evasive and attempting to distract agents. (*Id*.; 3:48 P.M).

Defendants were sitting at one of the picnic tables playing dominoes when the agents approached. (*Id*. at 4:11 P.M.). Agent Winston approached the subjects and Agent Thomason approached the vehicles. (*Id*. at 4:12 P.M.; 4:28 P.M.). As Agent Winston introduced himself as

U.S. Border Patrol, Defendants quickly jumped up from the table and began walking in a direction to guide the agents away from the vehicles, and adamantly insisted that the agents come see Defendants' identification. (*Id*. at 3:18 P.M.). Significantly, Agent Winston never asked for Defendants' IDs. (*Id*. at 3:33 P.M.). Yet, Defendants voluntarily and aggressively wanted to show the agents their IDs. (*Id*.). Defendants were still free to leave when Agent Thomason walked around the vehicles, and Defendants did not ask the officers to not walk around the vehicles. (*Id*. at 3:18 P.M.).

Agent Winston talked to Thomas-Murphy and noticed he acted nervous. (*Id*.). Agent Winston simply wanted to start a conversation and Thomas-Murphy wanted to show Agent Winston his ID. (*Id*. at 3:19 P.M.). Agent Winston asked Thomas-Murphy what he was doing that day and Thomas-Murphy said that he had been to Big Bend National Park and was waiting for family at the rest stop. (*Id*.). Agent Winston felt Defendants adamantly wanted the officers away from Defendants' vehicles, and Thomas-Murphy could not articulate a good reason why Defendants were there at that time. (*Id*. at 3:20 P.M.).

Meanwhile, Agent Thomason approached vehicles to write down plates and call them in to dispatch, which is typical. (*Id*. at 4:12 P.M.). Immediately, Defendants' behavior pointed to something else. (*Id*. at 4:13 P.M.). The agents believed Defendants wanted the attention on them and off the vehicles. (*Id*. at 4:27 P.M.). One of the suspects ran up behind Agent Thomason, in effect chasing him down with his ID even though Agent Thomason did not request his ID, and did not even speak to Defendants after exiting his car. (*Id*. at 4:13 P.M.). Agent Thomason did not take the ID that Defendant aggressively offered and instead proceeded to the vehicles. (*Id*. at 4:21 P.M.). Agent Winston and Agent Thomason separated Defendants and

Agent Thomason stayed with Jackson. (*Id*. at 4:27 P.M.). There were no firearms drawn, and no threats made by the officers. (*Id*. at 4:28 P.M.).

Jackson said he needed to get his pills, and started eating a snack while talking to Agent Thomason, trying to distract him from the truck. (*Id*. at 4:22 P.M.). Agent Thomason told Agent Winston to keep an eye on Jackson while Agent Thomason took a closer look at the front vehicle. (*Id*.). Both trucks had tinted windows and it was a sunny afternoon, so to see inside the truck, Agent Thomason shielded his eyes from the sun a few inches away from the window but did not lean up against, stand on, or touch the truck. (*Id*. at 4:23 P.M.).

Then, Agent Thomason observed something suspicious as he walked around the vehicles within five minutes of arriving at the rest stop. (*Id*. at 4:13 P.M.; 4:29 P.M.). Agent Thomason saw through the rear driver's side window of the front truck what appeared from his training and experience to be packaging containing narcotics wrapped in brown tape in all directions, a foot tall, and a foot or two long. (*Id*. at 4:14 P.M.; 4:25 P.M. – 4:26 P.M.). The packages had no markings. (*Id*. at 4:26 P.M.). Defendants were free to leave until the officer's plain view observation of the marijuana bundles. (*Id*. at 4:29 P.M.).

4. Detention and Arrest of Defendants

After walking around Thomas-Murphy's pickup truck, Agent Thomason came back and signaled to Agent Winston, which Agent Winston mistook to mean that illegal immigrants had been located. (*Id*.). Agent Winston mistakenly declared Defendants were under arrest for transporting illegal immigrants but Agent Thompson immediately corrected Agent Winston to explain that he saw illegal narcotics in Thomas-Murphy's pickup truck. (*Id*. at 3:21 P.M.). Then, Agent Winston corrected himself to say that Defendants were under arrest for transporting illegal narcotics. (*Id*.).

Agent Thomason then relayed to Agent Winston that he observed in plain view bundles that resembled packages of marijuana, based on his experience, in the back of Thomas-Murphy's vehicle. (*Id*. at 3:22 P.M.). According to Agent Thomason's testimony, Thomas-Murphy was under arrest because of the plain view seizure and Jackson was simply detained waiting for the officer with a canine. (*Id*. at 4:30 P.M.). Agent Winston placed Thomas-Murphy under arrest and Agent Thomason put him in the back of his patrol car, and then, Agent Winston asked Jackson if he consented to the search of his pickup truck. (*Id*.; 4:17 P.M.). Jackson denied consent to search his vehicle by stating, "I don't see why." (*Id*. at 3:44 P.M.; 3:46 P.M.).

Defendants were handcuffed after Agent Thomason saw the marijuana bundles in plain view. (*Id*. at 3:25 P.M.). When the agents directed Jackson to sit on the curb, loose leaf pieces of marijuana fell out of Jackson's pocket. (*Id*. at 3:27 P.M.). While the trace amount of marijuana was collected, it was not enough to weigh and had no evidentiary value since it mixed with grass and dirt on the ground. (*Id*. at 3:37 P.M.). Based on Agent Winston's training and experience, the substance appeared to be marijuana. (*Id*. at 3:38 P.M.). Defendants were already handcuffed when the marijuana fell out of Jackson's pocket. (*Id*. at 4:31 P.M.).

Agent Winston's testimony at the suppression hearing as to the exact point of arrest based on his subjective opinion varied:

- First, Agent Winston testified that when they were handcuffed, Defendants were being detained not arrested. (*Id*.).
- Second, Agent Winston explained probable cause existed to arrest Thomas-Murphy because of the plain view of narcotics in his vehicle. (*Id*. at 3:36 P.M.).
- Third, Agent Winston explained Jackson was detained under reasonable suspicion of narcotics being in his vehicle. (*Id*. at 3:38 P.M.).
- Fourth, Agent Winston circled back and said Defendants were both placed under arrest for transporting illegal narcotics when Agent Thomason observed the bundles of marijuana in plain view. (*Id*. at 3:39 P.M.). Agent Winston further explained that

he mistook Agent Thomason's hand signal to mean Defendants should be arrested for transporting illegal aliens. (*Id*. at 3:42 P.M.).

- Fifth, Agent Winston stated there was reasonable suspicion to believe Jackson was involved in the same crime as Thomas-Murphy. (*Id*. at 3:40 P.M.).

- Sixth, Agent Winston testified there was probable cause to believe Jackson was involved with Thomas-Murphy's illegal narcotic smuggling. (*Id*. at 3:44 P.M.).

At the time of Defendants' arrest for transporting illegal narcotics, Agent Winston read Defendants their *Miranda* rights from a card. (*Id*. at 3:26 P.M.; 3:45 P.M.). Agent Thomason observed Agent Winston read Defendants their *Miranda* rights and place both Defendants under arrest for narcotics smuggling. (*Id*. at 4:17 P.M.).

Agent Winston then realized the officers had not observed any narcotics with respect to Jackson's vehicle in plain view. (*Id*. at 3:43 P.M.). Because he was unclear on the legality of searching Jackson's vehicle without consent, Agent Winston called Trooper John Robert Handowsky on his cell phone to bring a canine to conduct a sniff for illegal narcotics in relation to Jackson's truck. (*Id*. at 3:23 P.M.; 3:29 P.M. – 3:30 P.M.). Trooper Handowsky arrived on the scene of the arrest within thirty (30) minutes, which was a fast response time for such a rural, unpopulated area. (*Id*. at 3:41 p.m.). According to Agent Thomason, the trooper arrived 30 minutes after Agent Winston called for a canine. (*Id*. at 4:31 P.M.). Within five minutes, the canine sniff was completed. (*Id*. at 4:32 P.M.).

Trooper Handowsky requested there be no marijuana in the area that could harm the dog. (*Id*. at 3:37 P.M.). Thus, the trace amount of marijuana that fell from Jackson's shorts was cleaned up out of a concern for safety. (*Id*. at 3:38 P.M.). After the canine alerted, the agents retrieved the keys from the Defendants and searched the pickup trucks based on probable cause and the warrant exception to search a vehicle. (*Id*. at 3:26 P.M.). The border patrol agents opened the vehicles, back tailgates, back doors of both vehicles, and observed large, wrapped

bundles of narcotics (that later tested positive for marijuana) inside the cabs of the pickup trucks and inside the truck beds. (*Id*. at 3:24 P.M. – 3:25 P.M.; 4:18 P.M.). The officers did not touch the vehicles or manipulate the windows other than opening the doors. (*Id*. at 3:25 P.M. – 3:26 P.M.).

B. Testimony of Trooper Handowsky

Trooper Handowsky is employed by the Department of Public Safety as a Trooper. (*Id*. at 2:17 P.M.). He went through a six-month academy in Austin, Texas and is certified as a licensed police officer by the State of Texas. (*Id*.). His current position involves the use of a canine. (*Id*. at 2:18 P.M.). He is trained to use a canine through canine school in multiple different environments. (*Id*. at 2:19 P.M.). Trooper Handowsky works exclusively with one canine—Tayson, a black Labrador, who has performed over 100 searches since 2019, and has never had a false positive. (*Id*.; 2:54 P.M.). Tayson is trained to sniff for controlled substances only. (*Id*. at 2:20 P.M.).

On May 22, 2021, Trooper Handowsky was approached by a member of law enforcement at approximately 3:30 p.m. to respond to an area south of Marathon, Texas to perform a canine sniff. (*Id*.; 2:55 P.M.). Trooper Handowsky received a phone call from Agent Winston. (*Id*. at 2:46 P.M.). Trooper Handowsky's office is in Alpine, Texas, approximately forty (40) miles from Marathon. (*Id*. at 2:21 P.M.). Trooper Handowsky arrived on the scene of the arrest at approximately 4:00 p.m., thirty (30) minutes after receiving the call requesting the canine. (*Id*.; 2:46 P.M.; 2:55 P.M.). The canine sniff was conducted at 4:10 p.m. (*Id*. at 2:55 P.M.).

When he arrived, Trooper Handowsky observed the two trucks in question, a Chevrolet and Ford F-150, and asked the border patrol agents what he should search. (*Id*. at 2:22 P.M.). Defendant Jackson was sitting at a picnic table at the rest stop. (*Id*. at 2:58 P.M.). Defendant

Thomas-Murphy was sitting in the backseat of the border patrol vehicle. (*Id*.). Defendants' trucks were parked on the westbound side of the road facing south. (*Id*.). The border patrol vehicle parked behind the trucks was also facing south. (*Id*. at 2:59 P.M.). There were no vehicles in front of or blocking Defendants' trucks from leaving. (*Id*.).

The border patrol agents indicated they already observed a bundle of marijuana in the first vehicle, the Ford F-150 belonging to Thomas-Murphy, and only needed a sniff on the second vehicle, the Chevrolet belonging to Jackson. (*Id*. at 2:52 – 2:53 P.M.). Trooper Handowsky observed the same marijuana bundle in Thomas-Murphy's F-150 that the border patrol agents had previously viewed. (*Id*. at 2:53 P.M.). Trooper Handowsky introduced himself to Defendant Jackson and said he understood Jackson exercised the right to refuse a search of his truck, but that Trooper Handowsky was going to use a canine to sniff the vehicle and if the canine alerted there would be probable cause to search the vehicle. (*Id*. at 3:00 P.M.).

Trooper Handowsky conducted a security and safety check to make sure there were no open windows that Tayson could jump through and harm himself during the canine sniff. (*Id*. at 2:48 P.M.). The border patrol agents told Trooper Handowsky that they had found marijuana on the ground next to Jackson that had fallen from Jackson's pocket. (*Id*. at 2:49 P.M.). The marijuana was sitting on the ground by the back right tire in the form of loose buds spanning the distance from the curb to the rear right tire of vehicle. (*Id*. at 2:56 P.M.).

Trooper Handowsky performed a canine sniff on the Chevrolet and Tayson alerted to the presence of narcotics. (*Id*. at 2:23 P.M.). Because of the amount of odor coming from the truck, Tayson was unable to locate a specific source of narcotics. (*Id*. at 2:24 P.M.). Tayson placed his front legs on the right rear wheel. (*Id*. at 2:25 P.M.). Tayson failed to produce a final response to a specific location of the narcotics but did alert to the vehicle itself. (*Id*.).

Trooper Handowsky testified that an alert is an observable change in behavior—in this case, the indication included rapid breathing on the detail pass by the vehicle toward the rear passenger side, excited and intent sniffing down the side of the vehicle, acting frantically, moving tail quickly, cutting back and forth abruptly on the front right passenger side to trace where the odor was emanating from, as well as going up and down the vehicle and placing his paws on the rear of the vehicle to find the main source of the odor. (*Id*. at 2:29 P.M. – 2:32 P.M.). Tayson repeatedly cut back and pulled back to the rear passenger door and continued around Jackson's vehicle, the Chevrolet. (*Id*. at 2:32 P.M.).

Trooper Handowsky explained that breathing rapidly and excitedly is different from simply breathing quickly. (*Id*. at 2:41 P.M.). The frantic desire to retrieve is indicated by rapid breathing. (*Id*. at 2:42 P.M.). Further, Trooper Handowsky stated that the fact Tayson was turning toward the Chevrolet, Jackson's vehicle, during the sniff, as opposed to toward the ground where the marijuana fell from Jackson's pocket, was indicative of narcotics present in Jackson's truck. (*Id*. at 2:50 P.M.). Finally, Trooper Handowsky explained Tayson could search a particular vehicle without focusing on the presence of narcotics in a different vehicle nearby. (*Id*. at 2:54 P.M.).

III. LEGAL STANDARD

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *United States v. Hunt*, 253 F.3d 227, 230 (5th Cir. 2001) (quoting U.S. Const. amend. IV). "The essential purpose of the Fourth Amendment is to impose a standard of 'reasonableness' upon law enforcement agents and other government officials in order to prevent

arbitrary invasions of the privacy and security of citizens." *Id*. (citing *Delaware v. Prouse,* 440 U.S. 648, 653–654, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)).

"The exclusionary rule was created by the Supreme Court to 'supplement the bare text' of the Fourth Amendment, which 'protects the right to be free from 'unreasonable searches and seizures,' but . . . is silent about how this right is to be enforced.'" *United States v. Ganzer,* 922 F.3d 579, 584 (5th Cir.), *cert. denied*, 140 S. Ct. 276 (2019) (citing *Davis v. United States*, 564 U.S. 229, 231 (2011)). The exclusionary rule operates to exclude the prosecution from introducing evidence obtained unconstitutionally. *Id*. Its purpose is to deter officer misconduct, not to redress injury to the victim of a constitutional violation or to address judicial errors or misconduct. *Id*. (citing *Davis v. United States*, 564 U.S. 229, 236–37 (2011); *United States v. Leon*, 468 U.S. 897, 916 (1984)). "[T]he exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and . . . evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree." *Utah v. Strieff*, 579 U.S. __, 136 S.Ct. 2056, 2061 (2016) (internal quotation marks omitted) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)).

Ordinarily, the defendant bears the burden of proving by a preponderance of the evidence that the evidence at issue was obtained in violation of the Fourth Amendment. *United States v. Guerrero-Barajas*, 240 F.3d 428, 432 (5th Cir. 2001). However, when law enforcement officers conduct a search or seizure without a warrant, the government bears the burden of proving by a preponderance of the evidence that the search or seizure was constitutional. *United States v. McKinnon,* 681 F.3d 203, 207 (5th Cir. 2012).

Incriminating statements made during a "custodial interrogation" are generally inadmissible if the suspect did not receive a *Miranda* warning. *Missouri v. Seibert*, 542 U.S.

600, 608 (2004). In *Miranda*, the Supreme Court held that "the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination require[s] that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981). Miranda warnings are required when an individual is both "in custody" and "subjected to interrogation." *R.I. v. Innis*, 446 U.S. 291, 300 (1980).

A person is in custody for *Miranda* purpose only if they are "placed under formal arrest" or "a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *United States v. Bengivenga*, 845 F.2d 593, 598 (5th Cir. 1988). This is "an objective inquiry that depends on the 'totality of the circumstances.'" *United States v. Ortiz*, 781 F.3d 221, 229 (5th Cir. 2015) (quoting *United States v. Wright*, 777 F.3d 769, 774–75 (5th Cir. 2015)) ("The subjective views harbored by either the interrogating officers or the person being questioned are irrelevant."). In determining whether custody exists, courts consider: (1) "the circumstances surrounding the interrogation"; and (2) whether "a reasonable person [would] have felt he or she was at liberty to terminate the interrogation and leave." *United States v. Cavazos*, 668 F.3d 190, 193 (5th Cir. 2012) (quoting *J.D.B. v. N.C.*, 564 U.S. 261, 270 (2011)). The United States Court of Appeals for the Fifth Circuit has identified the following factors relevant to this inquiry:

> (1) the length of the questioning; (2) the location of the questioning; (3) the accusatory, or non-accusatory nature of the questioning; (4) the amount of restraint on the individual's physical movement; and (5) statements made by officers regarding the individual's freedom to move or leave.

United States v. Romero–Medrano, 207 F. Supp. 3d 708, 711–12 (S.D. Tex. 2016) (citing *Wright*, 777 F.3d at 775). No one factor is determinative. *Wright*, 777 F.3d at 775. The

defendant has the burden of proving he or she was under arrest or in custody. *United States v. Webb*, 755 F.2d 382, 390 (5th Cir. 1985).

Questioning is interrogatory if it reflects "a measure of compulsion above and beyond that inherent in custody itself." *Innis*, 446 U.S. at 300. Interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id*. at 301; *see also Gladden v. Roach*, 864 F.2d 1196, 1198 (5th Cir. 1989) ("Interrogation is defined as words or actions that the police should know are reasonably likely to elicit an incriminating response from the suspect."). This inquiry is "focuse[d] primarily upon the perceptions of the suspect, rather than the intent of the police." *Id*. at 301.

The proper remedy for a *Miranda* violation is to exclude the un-warned statement from trial. *United States v. Patane*, 542 U.S. 630, 642 (2004) (citing *Chavez v. Martinez*, 538 U.S. 760, 790 (2003)). However, physical evidence obtained is still admissible. *Oregon v. Elstad*, 470 U.S. 298 (1985).

IV. DISCUSSION

Defendants' Motions invoke the exclusionary rule, as they seek to preclude the Government from introducing at trial certain evidence, specifically the marijuana bundles and firearm discovered during a warrantless search of the vehicles, and statements made during custodial interrogation. (Docs. 31, 33). Defendants challenge the search and arrest on two grounds: first, Defendants contend law enforcement unconstitutionally detained Defendants under the consensual encounter doctrine as no reasonable person under the facts of the case would feel free to terminate the encounter and leave; and second, Defendants argue the law

enforcement encounter was based on racial profiling in violation of the Equal Protection Clause in the Fourteenth Amendment and Texas law.[2] (*Id.*).

A. Consensual Encounter

The Fifth Circuit has recognized three types of encounters between officers and individuals: (1) a consensual encounter during which an individual voluntarily agrees to communicate with the police; (2) a limited investigatory stop based upon less than probable cause; and (3) an arrest which constitutes a seizure under the Fourth Amendment. *United States v. Williams*, 365 F.3d 399, 403–04 (5th Cir. 2004). "Under the consensual encounter arm of Fourth Amendment jurisprudence, the police can initiate contact with a person without having an objective level of suspicion, during which time the police may ask questions of the person, ask for identification, and request permission to search [items] that the individual may have in his possession." *United States v. Williams*, 365 F.3d 399, 404 (5th Cir. 2004).

The Government argues that law enforcement agents did not unconstitutionally detain either Defendant. (Doc. 38). Defendants contend that the officers' initial approach of them at a picnic table in a remote area of Big Bend was unlawful at the outset, and therefore, negates the validity of all subsequent actions. (Docs. 31, 33). The Court disagrees.

The evidence shows the agents contacted Defendants at a picnic table at a roadside rest stop situated five miles south of a border patrol checkpoint in an area with a high volume of drug and smuggling activity after receiving a concerned citizen call about suspicious activity of several vehicles, two of which matched the description, and asked if Defendants were the drivers of the two white pickup trucks parked nearby with out-of-state license plates. Although

[2] Defendants state in their Motions to Suppress that the issue of prolonged detention for a K-9 sniff under *Rodriguez v. United States,* 135 S.Ct. 1609 (2015), is not raised. (Doc. 31 at 2 n. 2); (Doc. 33 at 3 n. 2). The Court does not find that any facts were developed at the suppression hearing to support raising such an issue at this time since a 30-minute delay in detention to wait for a canine to perform a sniff in a very rural and low-manned area of West Texas does not amount to a prolonged detention, nor have Defendants submitted additional briefing arguing this point.

Defendants may not have been doing anything obviously illegal when the officers first approached them, the border patrol agents were not prohibited from approaching Defendants in a consensual manner to ask about the trucks.

Factors the court has considered in determining whether the officer and the defendant were engaged in a consensual encounter include whether the officer has shown or used any force, engaged in intimidating movements, brandished a weapon, blocked an exit, or uttered any threat or command. *See Williams*, 365 F.3d at 404. In deciding whether the encounter was consensual, the Supreme Court of the United States has instructed that, "the district court must determine if a reasonable person in the circumstances described would feel free to disregard the officers and proceed with his or her own business." *Id*. (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

In this case, the agents did not show or use any force, engage in any intimidating movements, brandish a weapon, block an exit, or utter threats or commands. Defendants' trucks were not blocked in the front by the officers' vehicle. The evidence shows that the border patrol agents approached Defendants on foot with their weapons holstered. The agents did not ask or command anything of Defendants, and instead, Defendants insisted on showing the agents their IDs to distract the agents away from the vehicles. The Court finds this was a consensual encounter up until the time when the border patrol agents saw what appeared to be bundles of suspected marijuana in plain view through the window of the Ford F-150 and announced that Defendants were under arrest.[3]

[3] Notably, a plain view observation is not a search for Fourth Amendment purposes and requires no articulation of probable cause or reasonably suspicion. *Texas v. Brown*, 460 U.S. 730, 740 (1983) ("Likewise, the fact that Maples 'changed [his] position' and 'bent down at an angle so [he] could see what was inside' Brown's car . . . is irrelevant to Fourth Amendment analysis. The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen.").

Up to the point of the plain view observation of the suspected marijuana bundles in the F-150, the border patrol agents had not yet seized Defendants. The fact that Defendant Jackson felt free to refuse the officers' request to search the Chevrolet provides evidence that Defendants were engaged in a consensual encounter up until this point in time. Because a reasonable person in the circumstances would feel free to disregard the officers and proceed with his own business, the initial encounter was consensual.

B. Probable Cause for Defendants' Arrest

Upon observing several bundles of suspected marijuana through the window of the Ford F-150, the border patrol agents developed probable cause to detain Defendants for suspected narcotics smuggling. After Agent Thomason observed suspected bundles of marijuana in plain view in Thomas-Murphy's F-150, the officers developed probable cause to believe that Defendants were engaged together in narcotics smuggling activity as well as reasonable suspicion to believe that Jackson's vehicle also contained marijuana, justifying the additional half-hour detention at the scene of the arrest to investigate the Chevrolet by canine sniff. At the time Defendant Jackson was answering the border patrol agents' question about searching the Chevrolet, the officers observed what appeared to be marijuana based on the agents' training and experience fall from Defendant Jackson's person. These observations constituted probable cause of criminal activity, and thus, Defendants were lawfully placed under arrest. *United States v. McSween*, 53 F.3d 684, 686–87 (5th Cir. 1995); *United States v. Reed*, 882 F.2d 147, 149 (5th Cir. 1989).

In *United States v. Brown*, 209 F. App'x 450, 453 (5th Cir. 2006), officers approached a vehicle which had been parked in an apartment complex for some time and observed the occupants bend down as if to hide something upon the officers' approach. The United States

Court of Appeals for the Fifth Circuit held that reasonable suspicion of possible criminal activity justified the officers' search of the vehicle. *Brown*, 209 F. App'x at 453. In this case, the observations of what appeared to be marijuana bundles in plain view through the window of the Ford F-150 amounted to probable cause of narcotics smuggling to detain Defendants and marijuana falling from Defendant Jackson's person gave rise to a reasonable suspicion of criminal activity with respect to the Chevrolet to justify further investigation by way of a canine sniff.

Based on the officers' observations of what appeared to be marijuana being present at the arrest scene as well as their experience in routinely interdicting drug smuggling cases, the border patrol agents had probable cause to search the Ford F-150 and to request a DPS drug-sniffing canine be deployed to the scene to sniff the Chevrolet.[4] The dog alerted to Jackson's Chevrolet. This provided the officers with probable cause to search the vehicles, resulting in the seizure of approximately 708 kilograms of marijuana. *United States v. Fields*, 456 F.3d 519, 523 (5th Cir. 2006) (citing *Maryland v. Dyson,* 527 U.S. 465, 467 (1999)).

The totality of the circumstances at the time of Defendants' search and seizure justified the border patrol agents' actions. The officers had probable cause to arrest Defendants for narcotics smuggling resulting from Agent Thomason's plain view observation of what looked like marijuana bundles in the window of the Ford F-150, and a marijuana-like item dropping from Defendant Jackson's shorts, and therefore, Defendants were properly detained pending a canine sniff as to the Chevrolet. Hence, the Court finds that no constitutional violations occurred.

C. Equal Protection

[4] "Discovery of [drugs] in plain view furnishe[s] sufficient probable cause to conduct a search of the vehicle." *United States v. Faulkner*, 547 F.2d 870, 871 (5th Cir. 1977).

Defendants assert that racial profiling resulted in a violation of their equal protection rights under the Fourteenth Amendment. As explained above, the stop and arrest of Defendants was valid and the Border Patrol Agents had reasonable suspicion upon the conclusion of the consensual encounter with Defendants to detain them for further investigation, which resulted in probable cause for an arrest and seizure of the marijuana and gun. The standard of review for Defendants' equal-protection (racial profiling) claim is the same as their Fourth Amendment claim. *United States v. Lopez-Moreno,* 420 F.3d 420, 434 (5th Cir. 2005).

There is no evidence that the stop and detention were driven by any discriminatory purpose, nor is there any authority for the proposition that an equal-protection violation can be remedied by suppressing evidence flowing from that violation. *United States v. Chavez,* 281 F.3d 479, 486–87 (5th Cir. 2002) ("Neither the Supreme Court nor our Court has ruled that there is a suppression remedy for violations of the Fourteenth Amendment's Equal Protection Clause"). Because the evidence does not establish that race was the agents' sole motivating factor or that they knowingly engaged in any illegal conduct, Defendants' racial profiling argument lacks merit.

D. Statements Made Following Arrest

Lastly, Defendants contend law enforcement unconstitutionally obtained statements from them. Defendants move to suppress all statements made during their encounter with the police up until the time they received *Miranda* warnings at the station. The only evidence in the record presently is that Defendants were read their *Miranda* rights upon arrest.

As to the marijuana and gun, the Court notes that the exclusionary rule does not apply to nontestimonial fruit of a *Miranda* violation. *See United States v. Lim*, 897 F.3d 673, 691 (2018) (quoting *Patane*, 542 U.S. at 645) (Kennedy, J., concurring) ("Admission of nontestimonial

physical fruits . . . does not run the risk of admitting into trial an accused's coerced incriminating statements against himself."). Because Defendants do not allege that the physical evidence was discovered from any involuntary statement, the gun and marijuana may not be suppressed in the *Miranda* context. *United States v. Gonzalez-Garcia*, 708 F.3d 682, 687 (5th Cir. 2013).

Finally, it is undisputed that Defendants received *Miranda* warnings before the officers began their questioning at the station. Thus, any post-warning confession was lawful. A post-warning confession is admissible "even where the police had previously obtained a pre-warning confession, so long as the pre-warning confession was voluntary." *United States v. Nunez-Sanchez*, 478 F.3d 663, 668 (5th Cir. 2007). Because the only evidence in the record shows that Defendants received Miranda rights, freely waived them, and voluntarily made confessions, the Motions are denied on this ground.

V. CONCLUSION

It is therefore **ORDERED** that Defendants' Motions to Suppress are hereby **DENIED**. (Docs. 31, 33).

It is so **ORDERED**.

SIGNED this 19th day of September, 2021.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE