Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DEMETRIUS VERARDI RAMOS, AKA Demetrius Ramos, *Defendant-Appellant*.	No. 21-10184 D.C. No. 4:20-cr-00051-JAS-DTF OPINION

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Argued and Submitted November 18, 2022
Phoenix, Arizona

Filed April 10, 2023

Before: Jay S. Bybee, John B. Owens, and Daniel P. Collins, Circuit Judges.

Opinion by Judge Owens;
Partial Concurrence and Partial Dissent by Judge Collins

SUMMARY*

Criminal Law

The panel affirmed the district court's denial of Demetrius Verardi Ramos's motion to suppress his post-arrest statements in a case in which a jury convicted Ramos of one count of conspiracy to transport, for profit, noncitizens who have entered or remain in the United States unlawfully; four counts of harboring such noncitizens for profit; and three counts of transportation of such noncitizens for profit.

Ramos argued that his statements were involuntary because, just prior to the interrogation, an agent had shown him a plastic baggie containing drugs and threatened him with drug charges if he did not cooperate. After holding an evidentiary hearing, a magistrate judge issued a report recommending that the district court deny the motion to suppress.

The panel held that the district court did not abuse its discretion by wholly adopting the magistrate judge's report and recommendation. The panel wrote that the district court did what the Federal Magistrates Act requires: it indicated that it reviewed the record de novo, found no merit to Ramos's objections, and summarily adopted the magistrate judge's analysis in his report and recommendation. The panel emphasized that this court presumes that district courts conduct proper de novo review where they state they have done so, even if the order fails to specifically address a

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

party's objections. Rejecting Ramos's assertion that the district court's "bare assertion" that it reviewed de novo is insufficient because the order was "mere boilerplate" and failed to address his specific objections, the panel noted that the district court asserted it conducted de novo review not only in its order adopting the magistrate judge's report and recommendation, but also in its order denying the motion for reconsideration. More importantly, the district court had no obligation to provide individualized analysis of each objection. Because the district court said it independently reviewed the record and there is no evidence indicating otherwise, the panel had no reason to second-guess its assertion of de novo review.

On the merits, Ramos contended that the district court erred in denying the motion to suppress because it mistakenly adopted the magistrate judge's "improper speculation regarding the contents of the baggie shown to" Ramos when he was detained. The panel disagreed. The magistrate judge did not, nor was he required to, make a proposed finding about the baggie; rather, he only had to consider whether Ramos's "will was overborne" under the totality of the circumstances. The panel wrote that, after observing the implausibility of Ramos's testimony and considering Ramos's verbal and signed *Miranda* waiver, age, education level, and fluency in English, the magistrate judge properly recommended finding the statements made during the interrogation voluntary. Moreover, the panel could not hold that the magistrate judge was wrong to reject Ramos's testimony, as the report and recommendation provided ample reason to find Ramos not credible, and the rest of the record supports the magistrate judge's analysis. The video footage does not clearly show the contents of the baggie, and two agents denied ever

threatening Ramos. Because there are two permissible views of the evidence, the magistrate judge's choice between them, with which the district court agreed, cannot be clearly erroneous.

The panel addressed Ramos's challenges to the denial of his motion to suppress evidence on *Miranda* grounds and to a special condition of his supervised release in a concurrently filed memorandum disposition, in which it affirmed in part and vacated and remanded in part.

Judge Collins concurred in the judgment in part and dissented in part. He concurred in the court's accompanying unpublished memorandum disposition. He dissented from the majority's conclusion that the district court properly denied the motion to suppress insofar as it was directed at Ramos's confession in jail after his arrest. He wrote that a presumption that the district court conducted a proper de novo review is not warranted here because (1) the magistrate judge's report contains an obvious factual error concerning a critical issue and the error was raised in Ramos's objections; (2) there are good reasons to suspect the district court's order adopting the magistrate judge's report here is, for all practical purposes, a 4½-page rubberstamp; (3) this court has previously admonished the same district judge for using boilerplate orders in ruling on objections to magistrate judges' reports, but to no avail; (4) the underlying issue here is one of constitutional dimension; and (5) the panel cannot say that the error was harmless. He would remand with instructions to re-examine the matter and, if warranted, to grant a new trial.

COUNSEL

Elizabeth J. Kruschek (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender, District of Arizona; Federal Public Defender's Office; Phoenix, Arizona; for Defendant-Appellant.

Robert L. Miskell (argued), Shelley K.G. Clemens, and Terry M. Crist III, Assistant United States Attorneys; Christina M. Cabanillas, Deputy Appellate Chief; Gary M. Restaino, United States Attorney, District of Arizona; Office of the United States Attorney; Tucson, Arizona; for Plaintiff-Appellee.

OPINION

OWENS, Circuit Judge:

Defendant-Appellant Demetrius Ramos appeals from his jury conviction and sentence for one count of conspiracy to transport, for profit, noncitizens who have entered or remain in the United States unlawfully, four counts of harboring such noncitizens for profit, and three counts of transportation of such noncitizens for profit, all in violation of 8 U.S.C. § 1324. We have jurisdiction under 28 U.S.C. § 1291 and affirm.[1]

I. BACKGROUND

A. Arrest and Interrogation

On December 3, 2019, U.S. Border Patrol agents stopped Ramos in his vehicle in the border town of Douglas, Arizona and arrested him for transporting noncitizens under 8 U.S.C. § 1324. The agents placed Ramos in a holding cell after arriving at the Border Patrol station. While getting fingerprinted, Ramos asked Agent Daniel Regan to retrieve his prescription medication located inside his vehicle.

Based on video footage, which contains no audio, Agent Robert Marrufo visited Ramos inside his holding cell at around 3:40 a.m. About forty minutes later, the video footage shows Agent Marrufo returning to the holding cell, showing Ramos a plastic baggie, and having a short

[1] We address Ramos's challenges to the denial of his motion to suppress evidence on *Miranda* grounds and to a special condition of his supervised release in a concurrently filed memorandum disposition, in which we affirm in part and vacate and remand in part.

discussion with him. The video then shows Agent Marrufo leaving the cell, followed by Ramos.

Shortly thereafter, Agents Marrufo and Jesus Barron conducted a *Mirandized* interview in an interrogation room. The agents encouraged Ramos to tell the truth, saying that "honesty goes a long way" and that "[t]here's an old saying [that] the truth will set you free." When asked about the events that had led up to his arrest, Ramos admitted he was offered $1,000 per person to transport people from Douglas to Phoenix but claimed that he was not aware that the passengers were undocumented. He also stated that he had transported people for pay on "many" occasions prior and that he was instructed to buy a separate phone for this purpose.

When asked about his citizenship status, Ramos confirmed that he was a Brazilian citizen and had overstayed his visa. Ramos expressed concern for himself and his family, telling the agents that he "[didn't] want to get deported."

Multiple times throughout the interrogation, Ramos attempted to negotiate with the agents, asking them for help in return for his cooperation. Ramos claimed that he knew "the bosses of this area" and that he was a "big piece of the puzzle." He also expressed a willingness to "get further information" for the agents. In response to Ramos's repeated attempts to cut a deal, the agents reiterated that they could not make any promises and that the "only thing [they could] do . . . is to take down the information" from the interrogation and relay it to someone else. Ramos asked the agents to "[l]et [him] talk to somebody else then." When Agent Barron tried to conclude the interrogation, the following exchange took place:

> BPA BARRON: So all the statements that you made today were voluntarily? Were you forced or coerced during your declaration? Did we force you to talk? Did we force you to say anything?
>
> MR. RAMOS: No, but I thought that I was going to get --
>
> BPA BARRON: All right.
>
> MR. RAMOS: -- something in return.
>
> BPA BARRON: Okay. So all the questions that you basically stated were voluntarily?
>
> SBPA MARRUFO: Yes or no?
>
> MR. RAMOS : I -- kind of, man, but I thought I was going to get something in return. I thought I was going to --
>
> SBPA MARRUFO: No. Like I -- like I told you, I never -- we never promised you anything.
>
> MR. RAMOS: You kind of did. You said, hey, man, this stuff, I'm going to take it, you just tell the truth.

After the agents again reminded Ramos that they "never promised [him] anything," Ramos offered to give them "all the information" and to wear a "bug."

The agents ended the interrogation at 5:14 a.m. During the nearly hour-long interview, no one mentioned the plastic baggie that Agent Marrufo had held during his second visit to the holding cell.

B. Motion to Suppress and Evidentiary Hearing

After his indictment, Ramos moved to suppress, among other things, his statements made during the interrogation. He argued that his statements were involuntary because, just prior to the interrogation, Agent Barron had shown him a plastic baggie containing drugs and threatened him with drug charges if he did not cooperate. In its response to the motion, the government denied that such a conversation ever took place.

The magistrate judge held an evidentiary hearing regarding the motion to suppress, at which the parties offered conflicting testimony. With regards to the events leading up to his arrest, Ramos testified that his friend "Gabriel" had offered him a flat rate of $1,000 to pick up passengers and take them Christmas shopping. Ramos initially testified that "Gabriel" asked him to take the passengers from Douglas to Phoenix, but later changed his story, claiming that he was planning on taking them to Tucson, where they would sleep overnight, go Christmas shopping the next morning, and then return to Douglas. Ramos also claimed that "Gabriel" provided him a separate cellphone for the job because it was "easier to communicate with [the] same cellphone company." According to Ramos, "Gabriel" asked him to pick up the passengers since Uber "didn't do that anymore because it's close to the border." When asked on cross-examination why he claimed to know the "bosses of this area" during his interrogation, Ramos testified that he had been exaggerating and lying to ensure that he went home that night.

Ramos also testified about the video footage of his holding cell. He claimed that Agent Barron[2] came to his holding cell and told him that he would have to talk to the agents or else it was "going to be very bad" for him. According to Ramos, Agent Barron promised Ramos that he could go home that night if he cooperated with the agents. Ramos also testified that, about half an hour later, Agent Barron returned with a plastic baggie containing a substance that tested positive for drugs and said that, because they found the baggie in Ramos's car, they could "use it" against him if he did not cooperate with the agents. Immediately thereafter, Agent Barron allegedly asked Ramos whether he would be willing to talk to the agents, to which Ramos agreed.

The government offered a different account of that evening and the plastic baggie. Without having watched the video footage, Agent Marrufo claimed that he—not Agent Barron—visited Ramos in the holding cell. Regarding the first interaction in the holding cell, Agent Marrufo testified that he went to conduct a welfare check and to verify Ramos's identity after discovering that he was a Brazilian citizen who had overstayed his visa. Regarding the second interaction in the holding cell, Agent Marrufo testified that he did not remember having a baggie in his hand.

Agent Barron also testified at the suppression hearing and claimed that he never made any threats to Ramos or forced Ramos to cooperate.

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[2] Ramos originally testified that Agent Barron visited him in the holding cell. On appeal, the parties do not dispute that the agent who visited Ramos was Agent Marrufo.

C. The Magistrate Judge's Report and Recommendation

After the evidentiary hearing, the magistrate judge issued a twenty-page report recommending that the district court deny Ramos's motion to suppress. In so recommending, the magistrate judge explained why he did not find Ramos's testimony credible. First, the magistrate judge noted that Ramos contradicted himself throughout his testimony and "told an untenable story." For example, Ramos initially testified that he was taking the passengers Christmas shopping in Phoenix but then later claimed they were headed to Tucson, where the passengers would sleep overnight and go shopping the next day. The magistrate judge also noted that Ramos's story seemed implausible given that he did not have his driver's license and was wearing hospital scrubs on the night of his arrest. Second, the magistrate judge observed that Ramos's "demeanor was not that of an honest but nervous witness, but instead was that of a fabricator." Third, the magistrate judge opined that Ramos's claim that his confession was coerced was inconsistent with his demeanor and numerous attempts to negotiate with the agents during the interrogation.

By contrast, the magistrate judge observed that the agents' testimony credible and consistent with the interrogation transcript. Addressing the plastic baggie, the magistrate judge wrote in a footnote that "[t]he Government does not explain the bag, but there are alternative explanations. The most likely of which is that the bag contained medicine Defendant had requested." The magistrate judge also considered Ramos's age, education level, fluency in English, over ten years of residency in the United States, and access to food and water the night of his interrogation. Based on the totality of these circumstances,

the magistrate judge recommended finding that Ramos's confession was voluntary.

Ramos timely filed objections to the magistrate judge's report and recommendation. In objecting to the magistrate judge's finding on voluntariness, Ramos reiterated that his interrogation had been coerced and argued that the magistrate judge had improperly speculated about the contents of the baggie, thereby relieving the government of its burden of proof.

D. The District Court's Orders Regarding the Motion to Suppress

The district court adopted the magistrate judge's report and recommendation in its entirety. In its order, the district court wrote, "Upon *de novo* review of the record and authority herein, the Court finds Defendant's objections to be without merit [and] rejects those objections . . . ."

In response to the district court's order adopting the magistrate judge's report and recommendation, Ramos filed a three-page motion for reconsideration. Without citing any authority, Ramos argued that the district court failed to conduct de novo review because the order did not discuss any facts or points of law. He also noted that the district court addressed "waiver" even though, according to Ramos, the case raised no waiver issue. The motion for reconsideration made no mention of the baggie.

The district court denied the motion for reconsideration, reiterating that it did conduct de novo review. The court noted that "'[i]t is common practice among district judges . . . to [issue a terse order stating that it conducted a *de novo* review as to objections] . . . and adopt the magistrate judges' recommended dispositions when they find that magistrate

judges have dealt with the issues fully and accurately and that they could add little of value to that analysis.' *Garcia v. City of Albuquerque*, 232 F.3d 760 (10th Cir. 2000)" (alteration in original).

E. Trial and Sentencing

The case proceeded to trial, where Agent Marrufo was shown video footage of the holding cell for the first time. After watching the footage, Agent Marrufo testified that he never showed Ramos a baggie "per se" and that, if he had one in his hand during their conversation, he was "doing something else with it." He also testified that he never threatened Ramos with drug charges. When asked to identify the bag, Agent Marrufo stated that it looked like an "evidence bag." According to Agent Marrufo, he had handled "a lot of evidence that night" and speculated that he was going to drop off the evidence after visiting Ramos's cell but prior to going to the interrogation room. When defense counsel asked Agent Marrufo to identify the "white stuff on the bottom of that bag," he was unable to do so, claiming that he could barely see the bag, "let alone what's in the bag."

The jury convicted Ramos on eight counts: one count of conspiracy to transport, for profit, noncitizens who have entered or remain in the United States unlawfully, four counts of harboring such noncitizens for profit, and three counts of transportation of such noncitizens for profit, all in violation of 8 U.S.C. § 1324. At sentencing, the district court imposed concurrent terms of four months in custody and four months of home detention. The district court also placed Ramos on three years of supervised release subject to special conditions. Ramos timely appealed.

II. DISCUSSION

A. Standard of Review

We review a district court's adoption of a magistrate judge's report and recommendation for abuse of discretion. *Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002). "A district court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact." *Briseño v. Henderson*, 998 F.3d 1014, 1022 (9th Cir. 2021) (cleaned up); *see also United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1181 (9th Cir. 2003). Under this highly deferential standard, we must uphold "a district court's determination that falls within a broad range of permissible conclusions, provided the district court did not apply the law erroneously." *Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017) (citation omitted). We review the voluntariness of a confession de novo and any underlying factual findings for clear error. *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009).

B. The District Court Did Not Abuse its Discretion by Wholly Adopting the Magistrate Judge's Report and Recommendation

Under the Federal Magistrates Act, a district court may designate a magistrate judge to conduct an evidentiary hearing and submit proposed findings of fact and recommendations for the disposition of a motion to suppress. 28 U.S.C. § 636(b)(1)(B). Within fourteen days, any party may file written objections to the report. *Id.* § 636(b)(1)(C). If an objection is made, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; *see also* Fed. R. Civ. P. 72(b)(3); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.

2003) ("[T]he district judge must review the magistrate judge's findings and recommendations de novo *if objection is made,* but not otherwise."). After conducting de novo review, the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). "In providing for a de novo determination . . . Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676 (1980) (internal quotation marks omitted).

Under this statutory scheme, the district court did what § 636(b) requires: it indicated that it reviewed the record de novo, found no merit to Ramos's objections, and summarily adopted the magistrate judge's analysis in his report and recommendation. We have presumed that district courts conduct proper de novo review where they state they have done so, even if the order fails to specifically address a party's objections. *See Wang v. Masaitis*, 416 F.3d 992, 1000 (9th Cir. 2005) (holding that "[t]here [was] no reason to question the de novo review done by" the district court based on an order stating it "reviewed the Petition and other papers along with the attached Report and Recommendation . . . as well as petitioner's objections and respondent's response to petitioner's objections, and has made a de novo determination"); *Holder v. Holder*, 392 F.3d 1009, 1022 (9th Cir. 2004) ("The district court expressly stated in its order that it adopted the magistrate judge's recommendations only after having undertaken a de novo review of the record . . . . The district court's approach fully complied with the statutory requirements in using the magistrate judge's assistance in this case."); *N. Am. Watch Corp. v. Princess*

Ermine Jewels, 786 F.2d 1447, 1450 (9th Cir. 1986) (holding that the district court satisfied de novo review because it provided a statement that it had reviewed the record and magistrate judge's report and recommendation before reaching its conclusion).[3]

[3] We have also upheld similar district court orders in unpublished cases. *See, e.g.*, *United States v. Drapel*, 418 F. App'x 630, 630-31 (9th Cir. 2011); *Brook v. McCormley*, 837 F. App'x 433, 435-36 (9th Cir. 2020); *Payne v. Marsteiner*, No. 21-55296, 2022 WL 256357, at *1 (9th Cir. Jan. 26, 2022).

Additionally, our sister circuits have upheld district court orders that adopt the magistrate judge's report and recommendation without additional analysis of case-specific facts or law. *See, e.g.*, *Elmendorf Grafica, Inc. v. D.S. Am. (E.), Inc.*, 48 F.3d 46, 49-50 (1st Cir. 1995) (noting that the appellant had "called no authority to [the court's] attention holding that, in order to demonstrate compliance with § 636's *de novo* requirement, a district court must make findings and rulings of its own rather than adopting those of the magistrate judge"); *Murphy v. Int'l Bus. Machs. Corp.*, 23 F.3d 719, 722 (2d Cir. 1994) (per curiam) ("We do not construe the brevity of the order [adopting the magistrate judge's report] as an indication that the objections were not given due consideration, especially in light of the correctness of that report and the evident lack of merit in [the plaintiff's] objections."); *United States v. Jones*, 22 F.4th 667, 679 (7th Cir. 2022) (noting that district courts may fulfill their obligation under § 636 by informing the appellate court that they conducted de novo review and that "in some cases, a district court may even adopt the magistrate's report and recommendation in its entirety without writing its own opinion"); *Gonzales-Perez v. Harper*, 241 F.3d 633, 636-37 (8th Cir. 2001) (rejecting the plaintiff's argument that the district court failed to conduct de novo review of the record because its order did not address all arguments); *Garcia v. City of Albuquerque*, 232 F.3d 760, 766 (10th Cir. 2000) ("[N]either 28 U.S.C. § 636(b)(1) nor Fed. R. Civ. P. 72(b) requires the district court to make any specific findings; the district court must merely conduct a *de novo* review of the record.").

Only in limited circumstances have we questioned a district court's de novo review of a magistrate judge's report and recommendation. For example, we have reversed and remanded district court orders adopting the magistrate judge's recommendation because it was clear that the district court failed to conduct review on the whole record. *See United States v. Remsing*, 874 F.2d 614, 616-18 (9th Cir. 1989) (reversing and remanding because the transcript of the evidentiary hearing was unavailable when the district court conducted its review); *Orand v. United States*, 602 F.2d 207, 209 (9th Cir. 1979) (reversing and remanding because, in part, the "stenographic notes from the magistrate's hearing were not fully transcribed until . . . three months after the district court adopted the magistrate's report and recommendation"). We have also vacated and remanded the district court's order where it clearly applied the wrong standard of review. *See CPC Pat. Techs. Pty Ltd. v. Apple, Inc.*, 34 F.4th 801, 810 (9th Cir. 2022) (vacating and remanding a district court order because it expressly reviewed the magistrate judge's decision for clear error rather than de novo).

Ramos argues that this is one of those limited circumstances where we should question the district court's repeated assertions that it conducted de novo review. According to Ramos, the district court's "bare assertion" that it reviewed de novo is insufficient because the order was "mere boilerplate" and failed to address his specific objections. But the district court asserted that it conducted de novo review not only in its order adopting the magistrate judge's report and recommendation, but also in its order denying the motion for reconsideration.

More importantly, as discussed above, the district court had no obligation to provide individualized analysis of each

objection. *See Wang*, 416 F.3d at 1000 (affirming a cursory district court order summarily adopting, without addressing any objections, a magistrate judge's report and recommendation); *Holder*, 392 F.3d at 1022 (holding that the district court's approach "fully complied with the statutory requirements" because it "expressly stated in its order that it adopted the magistrate judge's recommendations only after having undertaken a de novo review of the record, the Second Report and Recommendation, Jeremiah's objections, and Carla's responses"); *N. Am. Watch Corp.*, 786 F.2d at 1450 (holding that the district court "satisfied the de novo standard of 28 U.S.C. § 636" by noting it had "reviewed the complaint, counter-complaints, all the records and files, . . . and the . . . Report and Recommendation of the United States Magistrate").

The cases on which Ramos relies for this point are inapposite. Two of the three cited cases involved *new* claims raised for the first time in a party's objections to the magistrate judge's report and recommendation. *See Brown*, 279 F.3d at 745 (holding that the district court abused its discretion by failing to address the pro se habeas petitioner's equitable tolling argument raised for the first time in his objections to the magistrate judge's report and recommendation (citing *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000)); *United States v. Cha*, 597 F.3d 995, 1003 n.7 (9th Cir. 2010) (holding that the district court's "boilerplate language" was not enough when addressing the government's waiver argument raised for the first time in its objections). By contrast, Ramos's objection—that the magistrate judge erred in finding that he was not threatened with the baggie and drug charges—is a

reformulation of his argument from his motion to suppress.[4] The third (unpublished) case Ramos cites is also distinguishable because, there, the *magistrate judge* failed to address one of the defendant's arguments in his report and recommendation. *United States v. Jones*, 837 F. App'x 423, 424 (9th Cir. 2021). But here, Ramos does not contend that the report and recommendation itself failed to address an argument raised in his motion to suppress.

The dissent agrees with Ramos that the district court's order was procedurally deficient and believes that the district court failed to conduct de novo review, as evidenced by the "rubberstamp" order. Dissent at 33-35. But, like Ramos, the dissent cites no caselaw from any court requiring the district court to provide more analysis or case-specific reasoning when summarily adopting a magistrate judge's report and recommendation, absent newly raised objections. The only evidence that the dissent cites is the district court's nearly identical orders in other cases. Dissent at 34-35. The dissent finds it of no matter that the district court confirmed not only once (in its order adopting the magistrate judge's report and recommendation) but twice (in its order denying Ramos's motion for reconsideration) that it conducted de novo review of the case. When the district court said it independently reviewed the record and there is no evidence indicating

[4] Ramos raised an additional objection, arguing that the magistrate judge made an improper inference about the contents of the plastic baggie, thereby relieving the government of its burden of proof. But, as we explain below, the magistrate judge did no such thing. The magistrate judge noted that the government did not explain the bag but listed the many factors on which the government relied to prove the confession was voluntary by a preponderance of the evidence.

otherwise, we have no reason to second-guess its assertion of de novo review.[5] *See Wang*, 416 F.3d at 1000.

C. The District Court Did Not Err in Denying Ramos's Motion to Suppress on Voluntariness Grounds

Turning to the merits, Ramos contends that the district court erred in denying his motion to suppress because it mistakenly adopted the magistrate judge's "improper speculation regarding the contents of the baggie shown to Mr. Ramos when he was detained." We disagree and affirm the district court's denial of Ramos's motion to suppress his post-arrest statements and the underlying analysis in the magistrate judge's report and recommendation.

The magistrate judge did not, nor was he required to, make a proposed finding about the contents of the baggie; rather, he only had to consider whether Ramos's "will was overborne" under the totality of the circumstances. *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988); *see also Lego v. Twomey*, 404 U.S. 477, 489 (1972) ("[T]he prosecution must prove at least by a preponderance of the evidence that the confession was voluntary."). After observing the implausibility of Ramos's testimony and

[5] Ramos's motion for reconsideration argued that the district court failed to conduct de novo review because the order adopting the report and recommendation stated that "as to any new . . . arguments . . . not timely . . . raised before [the magistrate judge], the Court exercises its discretion to not consider those matters and considers them waived" even though, according to Ramos, the case raised no waiver issue. But this argument misses the point. The fact that the order contained extraneous language does not negate the district court's multiple assertions that it conducted de novo review and the magistrate judge's proper analysis in recommending denial of the motion to suppress.

considering Ramos's verbal and signed *Miranda* waiver, age, education level, and fluency in English, the magistrate judge properly recommended finding the statements made during the interrogation voluntary.

Moreover, we cannot hold that the magistrate judge was wrong to reject Ramos's testimony. *See United States v. Nelson*, 137 F.3d 1094, 1110 (9th Cir. 1998) ("This court gives special deference to the district court's credibility determinations."). The magistrate judge's report and recommendation provided ample reason to find Ramos not credible: (1) Ramos contradicted himself throughout his testimony, such as claiming that he was taking the passengers to Phoenix but later testifying that their destination was Tucson; (2) he told an "untenable story" where he was offered $1,000 to take the passengers "Christmas shopping," even though he did not have his driver's license and was wearing scrubs on the night of his arrest; (3) he offered claims that were inconsistent with his repeated requests during the interrogation asking what the "agents could do for him"; and (4) the magistrate judge observed that, during his testimony, Ramos's "demeanor was . . . that of a fabricator." Ramos's testimony bore many of the hallmarks of an unreliable witness. *See generally* Ninth Circuit Manual of Model Criminal Jury Instructions § 1.7 (2022) ("In considering the testimony of any witness, you may take into account . . . the witness's manner while testifying," "the witness's interest in the outcome of the case," "whether other evidence contradicted the witness's testimony," and "the reasonableness of the witness's testimony in light of all the evidence[.]").

The rest of the record also supports the magistrate judge's analysis. The video footage—the only other piece of evidence that Ramos cites to support his claim—only

confirms that Agent Marrufo had a baggie in his hand when talking to Ramos. But this footage is without audio and does not clearly show the contents of the baggie. And, in contrast to Ramos's account, Agents Marrufo and Barron denied ever threatening Ramos. Further, despite extensive back and forth between Ramos and the agents, the transcript of the interrogation that immediately followed Agent Marrufo's visit makes no mention of the plastic baggie or purported drug charges. Because there are "two permissible views of the evidence," the magistrate judge's choice between them, with which the district court agreed, cannot be clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). And without his claim that he was threatened, Ramos's "argument that his confession was coerced is meritless." *United States v. Wolf*, 813 F.2d 970, 975 (9th Cir. 1987).

The dissent argues that the district court's order denying the suppression motion was inadequate on the merits because it relied on a clearly erroneous proposed finding of fact in the magistrate judge's report and recommendation: "that the 'most likely' reason why Marrufo had the baggie was that it contained the medicine that Ramos had requested." Dissent at 31. According to the dissent, this finding was clearly erroneous because Agent Marrufo never actually gave the baggie to Ramos and Agent Regan testified that he was the one who gave Ramos his medication. Dissent at 31. But this mischaracterizes the magistrate judge's report, which accurately stated that the government failed to explain the bag but noted there were "alternative explanations," speculating "[t]he most likely of which is that the bag contained medicine Defendant had requested." Furthermore, as discussed above, the magistrate judge was not required to propose a factual finding about the contents

of the bag. The question before the magistrate judge was whether Ramos's confession was voluntary, which the magistrate judge addressed after considering the totality of the circumstances and rejecting Ramos's testimony from the motion to suppress hearing—the only evidence supporting the allegation of fabricated drug charges.

The dissent's selective focus on the plastic baggie thus ignores the actual question that was before the magistrate judge and district court: whether the confession was voluntary. Critical to that question was whether Ramos was credible. By ignoring the magistrate judge's detailed analysis finding Ramos not credible, the dissent improperly discounts the standard of review, which is especially important in this context: "Deference to the district court's factual finding is especially warranted here when the critical evidence is testimonial; the 'judge was in the unique position to observe the demeanor of both [the defendant] and the police officers while we have only the cold record, which is sterile by comparison.'" *Wolf*, 813 F.2d at 975 (quoting *United States v. Hood*, 493 F.2d 677, 680 (9th Cir. 1974)).

D. Conclusion

Because the district court was not obligated to explicitly address Ramos's objections, we hold that the district court did not abuse its discretion by adopting the magistrate judge's report and recommendation. On the merits, we also affirm the district court's denial of the suppression motion on voluntariness grounds.

AFFIRMED.

COLLINS, Circuit Judge, concurring in the judgment in part and dissenting in part:

I concur in the court's accompanying unpublished memorandum disposition, which holds that (1) the district court properly denied Defendant Demetrius Verardi Ramos's motion to suppress insofar as it was directed at the statements that he made prior to his arrest; and (2) the case must be remanded so that the written judgment's description of supervised release conditions can be properly conformed to the orally pronounced sentence. But I respectfully dissent from the majority's conclusion that the district court properly denied the motion to suppress insofar as it was directed at Ramos's confession in jail after his arrest. As to that issue, I would instead remand with instructions to re-examine the matter and, if warranted, to grant Ramos a new trial.

I

After Ramos was arrested, he was taken to a Border Patrol Station where agents placed him into a holding cell. The cell contained a video camera that recorded events within the cell, but without any audio. The video recording shows that, at approximately 3:41 AM, Agent Robert Marrufo visited Ramos's cell and spoke with him for about two minutes before leaving. The recording further shows that, at approximately 4:23 AM, Marrufo returned to Ramos's cell. This time, Marrufo spoke with Ramos for approximately 40 seconds, and for about half of that conversation, Marrufo was prominently holding out towards Ramos a clear plastic baggie that contained some substance at the bottom. Although the video is grainy, the plastic baggie contained at the top what appears to be a pinkish strip that is consistent with a Ziploc-type strip. Towards the end

of the conversation, Marrufo gestured with his right arm in a way that seemingly indicated that Ramos should follow him. At approximately the same time, Ramos moved to grab his shoes, put them on, and left the cell after Marrufo. Ramos proceeded to an interview room, where he waived his *Miranda* rights and gave a recorded confession.

Both Ramos and Marrufo testified at the suppression hearing about the content of these two conversations, and Marrufo also testified about them at trial. Marrufo was not shown the video recording at the suppression hearing, but he was shown it at trial. As to Marrufo's first visit, Ramos testified that Marrufo told him that if he did not cooperate with the agents, "it's going to be very bad for you," but that if Ramos cooperated, then he would be released that night.[1] Marrufo testified that he first visited Ramos to "check up on him," given that Ramos had been very distraught at the time of his arrest. Marrufo stated that, during this initial visit, he also told Ramos that they knew that he was a Brazilian who was unlawfully in the U.S. and that it would be helpful for Ramos to tell the truth. Marrufo specifically denied that he said anything about Ramos being released that night, and he denied making any promises to Ramos.

As to the second visit, Ramos testified that Marrufo said that the baggie contained drugs that had been found in Ramos's car and that, if he did not cooperate, he would be charged with drug trafficking and "[t]hat's going to give you

[1] In response to a leading question from his own counsel, Ramos mistakenly agreed that the agent who visited him was "Agent Barron" (who had also been involved in Ramos's arrest) rather than Agent Marrufo. All parties agree that the agent in the video is Marrufo. The magistrate judge did not rely on this error in explaining why he found Ramos not to be credible.

years in prison." Ramos said that Marrufo reiterated that, "if you talk to us you can go home tonight." According to Ramos, Marrufo asked him to agree to an interview right away, saying, "Come over here with us." At the suppression hearing, Marrufo testified that he did not remember whether he had brought a baggie with him to Ramos's cell, but he affirmatively denied telling Ramos that drugs had been found in his vehicle, and he denied threatening him with drug charges. In cross-examining Marrufo at the suppression hearing, the prosecutor elicited an affirmative response to a question about whether, as part of a "welfare check," Marrufo sometimes brought food in baggies. In redirect examination, defense counsel asked point blank whether Marrufo had given Ramos food in his cell, and Marrufo said, "I didn't give him any food." Defense counsel then asked, "So if you didn't ever give him food, why would you have a baggie in your hand?" Marrufo responded, "I don't recall if I had a baggie in my hand or not."

At trial, Marrufo was again asked about the second visit, and—before he had seen the video recording of the second visit—he testified that "I didn't show him a baggie. If I had one in my hand, then I had it in my hand because I was doing something else with it, but it wasn't to show him a baggie." Marrufo again denied threatening Ramos with drug charges, stating, "He didn't have any drugs in his possession, why would I charge him with drugs?" After being shown the recording, Marrufo said that the baggie "looks like an evidence bag," and he noted that Ramos's cell was "en route to the evidence locker."

Ramos moved to suppress his confession on the ground, *inter alia*, that it was involuntarily given in response to the threat that he would be falsely charged with a drug crime. The evidentiary hearing on the motion to suppress was held

before a magistrate judge, who prepared a report under 28 U.S.C. § 636 recommending that the motion be denied. The magistrate judge gave numerous reasons for finding Ramos not to be credible, including that many aspects of his overall testimony and statements were "not plausible" and that "his demeanor was not that of an honest but nervous witness, but instead was that of a fabricator." As to the conflicting testimony about a baggie, the magistrate stated: "The Government does not explain the bag, but there are alternative explanations. The most likely of which is that the bag contained medicine Defendant had requested." This comment was apparently a reference to the fact that Agent Daniel Regan had testified at the suppression hearing that, at one point, Ramos requested prescription medication that was in his car at the time of his arrest, and Regan retrieved it for him.

Ramos filed timely objections to the magistrate's report. On the voluntariness issue, Ramos's objection emphasized the "PLASTIC BAGGIE," which he referenced in all capital letters. After noting that the magistrate judge conceded that "the government could not explain the bag," Ramos argued that the magistrate judge engaged in an "extraordinary act of speculation" by positing an explanation that the Government itself had not offered, namely that "the bag likely contained medicine that the Defendant had requested." Ramos argued that a "viewing of the video of the bag does not support it containing medicine or pill bottles or anything but powder on the bottom of the bag." Ramos further argued:

> The video shows Border patrol Agent Mar[r]ufo showing Mr. Ramos a bag containing some sort of powder on the bottom of the bag. Agent Mar[r]ufo

> conveniently has no recollection. For some reason, the Magistrate Judge goes out of his way to present a reason for the baggie that is not supported in the evidence.

In a boilerplate order, the district court overruled the objections and adopted the magistrate judge's report. Ramos moved for reconsideration, complaining that the district court's order was bereft of any discussion of the facts or the issues of Ramos's motion and that, in his view, the district judge had failed to conduct the de novo review required by the statute. The district court denied the motion. Well more than half of the text of that order consists of verbatim quotations from the prior order adopting the magistrate's report. The remainder consists of conclusory assertions that the district judge reviewed everything and conducted a de novo review. The relevant text of the order denying reconsideration—like the prior order adopting the magistrate judge's report—contains no mention whatsoever of any of the case-specific facts or legal issues raised by Ramos's motion or by his objections to the magistrate judge's report.

II

In my view, the district judge's failure to discuss *any* of the issues raised by Ramos's motion to suppress or by Ramos's objections to the magistrate judge's report is unacceptable and warrants remand.

In defining what types of pretrial motions a magistrate judge is empowered to *resolve* in the first instance, the relevant statute specifically excludes a motion "to suppress evidence in a criminal case." 28 U.S.C. § 636(b)(1)(A). Instead, with respect to a defense motion to suppress, a magistrate judge is only authorized, if designated by the

district judge, "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court *proposed findings of fact and recommendations for the disposition*, by a judge of the court," of that motion. *Id*. § 636(b)(1)(B). The statute further provides that "[w]ithin fourteen days after being served with a copy" of the magistrate judge's report, "any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court." *Id*. § 636(b)(1). If such objections are timely filed, then a district "judge of the court *shall* make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id*. (emphasis added); *see also* FED. R. CIV. P. 72(b)(3).

We have held that, in some cases, a district judge may satisfy the required statutory de novo review by including, in the order ruling on the parties' objections, an unadorned statement that he or she has adopted the magistrate judge's report after fully considering the record, the report, and the parties' objections to the report. *See*, *e.g.*, *North Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1450 (9th Cir. 1986). But "[b]ecause there is a concern that a district judge may nevertheless be tempted on occasion to rubber stamp the recommendation of a magistrate, the courts of appeal[s] have responsibility to ensure that the district judge has taken the task of de novo review seriously." *See* 12 C.A. WRIGHT, A. MILLER, & R. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, p. 453 (3d ed. 2014). That responsibility is all the more important when, as here, the district judge's conclusory statement that a de novo review was conducted is unaccompanied by *any* case-specific reasoning whatsoever. *Cf. United States v. Jones*, 22 F.4th 667, 679 (7th Cir. 2022) (upholding district judge's adoption

of magistrate judge's report in a brief order that did contain case-specific discussion of objections (referencing *United States v. Jones*, 2020 WL 2507927 (N.D. Ind. May 15, 2020)). Thus, while we should "normally presume that the district court has made such a de novo review," that presumption should not apply if "affirmative evidence indicates otherwise." *United States v. Romano*, 794 F.3d 317, 340 (2d Cir. 2015) (simplified); *see also Gonzalez-Perez v. Harper*, 241 F.3d 633, 636 (8th Cir. 2001) (stating that the court will presume that the district judge conducted a proper de novo review "absent evidence to the contrary"). For several reasons, such a presumption is not warranted here.[2]

First, the magistrate judge's report contains an obvious factual error concerning a critical issue and the error was raised in Ramos's objections. *Cf. Murphy v. IBM Corp.*, 23 F.3d 719, 722 (2d Cir. 1994) (noting that the "correctness of the report" in that case was a factor that confirmed the propriety of summarily adopting it). Ramos's motion to suppress his confession based on voluntariness rested dispositively on his claim that, during his second visit to Ramos's cell, Marrufo had confronted Ramos with a baggie of drugs that Marrufo (falsely) claimed were found in Ramos's car and that, if Ramos did not cooperate, Ramos

[2] I reject the majority's suggestion that the relevant inquiry is whether there are grounds "to second-guess" the *veracity* of the district court's "assertion" that it has conducted a de novo review. *See* Opin. at 19–20. I have no reason to doubt that the district judge endeavored to address the merits of Ramos's motion conscientiously and that, subjectively, the judge believed that he had conducted a sufficient de novo review. But our subjective beliefs are not always objectively accurate and, when measured up against objective standards, the judge's order here falls short.

would be sent to prison for years on a drug trafficking charge. Marrufo flatly denied that he had said any such thing. Ramos's claim on this score simply cannot adequately be assessed without a sufficient factual finding as to what Marrufo did or did not say during that second cell visit. On this point, there were aspects to both men's testimony that were problematic. As the magistrate judge noted, Ramos's credibility was generally impaired by the implausibility of some of his other testimony and statements, and that general lack of credibility could suffice to reject his testimony on this score as well. On the other hand, as the magistrate judge noted, the Government had failed to explain the baggie. Marrufo could not explain it either, because he stated at the suppression hearing that he did not recall whether he had a baggie. In nonetheless finding that Marrufo did not threaten Ramos with a baggie of drugs, the magistrate judge speculated that the "most likely" reason why Marrufo had the baggie was that it contained the medicine that Ramos had requested. But that speculation is clearly erroneous, because (1) the recording shows that Marrufo did not give the baggie or its contents to Ramos during the cell visit; and (2) the hearing testimony established that a different agent was the one who gave Ramos his medication.

On appeal, the Government points to the different explanation that Marrufo gave at trial, when he stated that the baggie was probably an evidence bag that he happened to be carrying with him on his way to the evidence locker. *See Rocha v. United States*, 387 F.2d 1019, 1021 (9th Cir. 1967) ("In determining whether a district court erred in admitting evidence claimed to have been seized as the result of an unreasonable search, an appellate court will not ordinarily limit itself to the testimony received at a pretrial motion to suppress, but will also consider pertinent

testimony given at the trial."). But this explanation is hard to square with the video recording, in which Marrufo prominently extends his arm and holds out the bag towards Ramos for nearly half of the visit. Even though there is no audio, the inference appears inescapable that Marrufo is *discussing* the baggie with Ramos. Indeed, it is notable that *both* of the explanations raised at the suppression hearing (*i.e.*, the Government's suggestion in cross-examination that Marrufo was bringing Ramos food and the magistrate judge's suggestion that Marrufo was bringing him medicine) rest on the view that Marrufo *was* discussing the baggie with Ramos.

As I noted earlier, Ramos's objections to the magistrate judge's report prominently highlighted this key issue about why Marrufo was showing Ramos a baggie that appears to contain a powdery substance, and it specifically (and correctly) pointed out that the magistrate judge's medicine explanation was rank speculation that was unsupported by the record. Given this backdrop, it is very difficult to see how the requisite de novo review of this objection, and of the magistrate judge's report, could have led to a wholesale adoption of that report *without any modification whatsoever*. Even if the district judge thought that the magistrate judge reached the right ultimate conclusion for the wrong reasons, the district court would still be obligated either to correct the report before adopting it or to adopt it only in part. *See* 28 U.S.C. § 636(b)(1) (requiring a de novo "determination" of any "specified proposed findings . . . to which objection is made").

The majority dismisses this erroneous statement by the magistrate judge on the grounds that it was immaterial to the overall correctness of the report. *See* Opin. at 22–23. According to the majority, the error does not matter because

the magistrate judge "was not required to propose a factual finding about the contents of the bag," but only had to decide "whether Ramos's confession was voluntary." Opin. at 22–23; *see also* Opin. at 20. This comment fundamentally misconceives the role of a district judge in reviewing a magistrate judge's report and recommendation under § 636(b)(1)(B). That role is *not* akin to this court's review of district court judgments, which may be affirmed, despite clear errors, so long as those mistakes are harmless. *See generally Neder v. United States*, 527 U.S. 1, 8–9 (1999) (discussing scope of harmless-error review of constitutional errors); *United States v. Berry*, 627 F.2d 193, 201 (9th Cir. 1980) (stating that, if there was a "non-constitutional error," we may "affirm if the error is more probably harmless than not"). Because, for the narrow class of motions governed by § 636(b)(1)(B), the magistrate judge may only submit "*proposed* findings of fact and *recommendations* for the disposition" of the motion, *see* 28 U.S.C. § 636(b)(1)(B) (emphasis added), any such report—including the errors within it—becomes the ruling of the district court *itself* to the extent that it is adopted. In that sense, a magistrate judge's report under § 636(b)(1)(B) is more akin to a draft opinion than to a judgment. Accordingly, where, as here, the magistrate judge's report contains a clear error, and the error has been correctly called to the district court's attention by a timely objection, the district court abuses its discretion in proceeding nonetheless to formally adopt the error as its own. And the fact that the district court did so here is a strong indication that it did not perform the "*proper* de novo review" required by § 636(b)(1). *See* Opin. at 15 (emphasis added).

Second, there are good reasons to suspect that the district judge's order adopting the magistrate judge's report here is,

for all practical purposes, a 4½-page rubberstamp. Nearly all of the verbiage in the order is non-specific to this case and consists largely of citations addressing the legal framework for reviewing magistrate judges' reports. Indeed, nearly two full pages consist of a string citation of cases upholding, as sufficient to satisfy de novo review, district judges' unexplained orders summarily rejecting objections and adopting such reports. The only aspects that relate specifically to this case are the names of the magistrate judge who filed the report and of the party who objected and the docket numbers of the parties' filings. Moreover, a Westlaw search reveals that, on at least 30 other occasions since March 2021, this same district judge has entered largely verbatim identical boilerplate orders—complete with the exact same pages of string cites—rejecting objections to, and adopting, magistrate judges' reports.[3] Indeed, a Westlaw

[3] *See United States v. Rakestraw*, 2023 WL 2624461 (D. Ariz. Mar. 24, 2023); *Knight v. Commissioner of Soc. Sec. Admin.*, 2023 WL 119397 (D. Ariz. Jan. 6, 2023); *Elem v. Shinn*, 2022 WL 17668701 (D. Ariz. Dec. 14, 2022); *Loreto v. Arizona Bd. of Regents*, 2022 WL 17369424 (D. Ariz. Dec. 2, 2022); *Dorame v. Kijakazi*, 2022 WL 16707018 (D. Ariz. Nov. 4, 2022); *United States v. Alissa*, 2022 WL 4545758 (D. Ariz. Sept. 29, 2022); *Barone v. Kijakazi*, 2022 WL 4396262 (D. Ariz. Sept. 23, 2022); *Cisneros v. Ryan*, 2022 WL 3577270 (D. Ariz. Aug. 19, 2022); *Williams v. Arizona Super. Ct. of Pima Cnty.*, 2022 WL 2314757 (D. Ariz. June 28, 2022); *Morrow v. Temple*, 2022 WL 2286803 (D. Ariz. June 24, 2022); *United States v. Williams*, 2022 WL 2187745 (D. Ariz. June 17, 2022); *United States v. Monreal-Rodriguez*, 2022 WL 1957634 (D. Ariz. June 6, 2022); *United States v. Rakestraw*, 2022 WL 1237035 (D. Ariz. April 27, 2022); *United States v. Moore*, 2022 WL 112497 (D. Ariz. April 15, 2022); *United States v. Monteen*, 2022 WL 1044919 (D. Ariz. April 7, 2022); *Mendoza v. Commissioner of Soc. Sec. Admin.*, 2022 WL 897098 (D. Ariz. Mar. 28, 2022); *Felix v. Shinn*, 2022 WL 326360 (D. Ariz. Feb. 3, 2022); *United States v. Monreal-*

search revealed only three instances in that time period in which this district judge departed from this boilerplate order in ruling on objections to a magistrate judge's report. *See United States v. Garcia*, 2023 WL 1989644 (D. Ariz. Feb. 14, 2023) (rejecting, after the Government objected, a magistrate judge's report recommending granting a motion to suppress); *United States v. Moore*, ___ F. Supp. 3d ___, 2022 WL 5434268 (D. Ariz. Oct. 7, 2022) (same); *Frodsam ex rel. Fleming & Curti PLC v. Arizona*, 2022 WL 3082911 (D. Ariz. June 23, 2022) (summarily rejecting objections and adopting magistrate judge's report recommending transfer of case to Phoenix division of the district court). I am unaware of any circuit precedent that has ever upheld this sort of near-uniform use of unexplained orders that summarily adopt magistrate judges' reports wholesale. *Cf. Jones*, 22 F.4th at 679 (noting that "in *some* cases, a district court may *even* adopt the magistrate judge's proposed findings and recommendation in its entirety without writing its own opinion" (emphasis added)).

Third, we have previously admonished this same district judge for using boilerplate orders in ruling on objections to

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Rodriguez, 2022 WL 130969 (D. Ariz. Jan. 14, 2022); *Chiaminto v. Commissioner of Soc. Sec. Admin.*, 2022 WL 71985 (D. Ariz. Jan. 7, 2022); *Pesqueira v. Arizona*, 2021 WL 6125732 (D. Ariz. Dec. 28, 2021); *United States v. Lee*, 2021 WL 5782872 (D. Ariz. Dec. 7, 2021); *Randall v. Arizona*, 2021 WL 5771155 (D. Ariz. Dec. 6, 2021); *Norman v. Rancho del Lago Cmty. Ass'n*, 2021 WL 4272692 (D. Ariz. Sep. 21, 2021); *Bailey v. Ethicon Inc.*, 2021 WL 4190625 (D. Ariz. Sep. 15, 2021); *Celaya v. Shinn*, 2021 WL 3773766 (D. Ariz. Aug. 25, 2021); *United States v. Rakestraw*, 2021 WL 3046905 (D. Ariz. July 20, 2021); *Threats v. Shartle*, 2021 WL 2646873 (D. Ariz. June 28, 2021); *Russell v. University of Arizona*, 2021 WL 1138031 (D. Ariz. Mar. 25, 2021); *Hollingshead v. Shinn*, 2021 WL 871640 (D. Ariz. Mar. 9, 2021); *Channel v. Shinn*, 2021 WL 871530 (D. Ariz. Mar. 9, 2021).

magistrate judges' reports, but to no avail. In *United States v. Jones*, 837 F. App'x 423 (9th Cir. 2021), the district judge adopted the magistrate judge's report recommending denial of a motion to suppress in a one-page summary order that was devoid of any reasoning beyond an assertion that the "objected-to portions" of the report had been reviewed de novo. *See United States v. Jones*, 2018 WL 6329455, at *1 n.1 (D. Ariz. Dec. 4, 2018). In our February 24, 2021 memorandum affirming that decision, we nonetheless noted:

> *[T]he district court should not have summarily adopted the magistrate judge's report and recommendation without addressing all of Defendant's objections*, namely that the magistrate judge failed to address his constitutional challenges to [the detaining federal agent's] cross-certification [under Arizona law]. *See Brown v. Roe*, 279 F.3d 742, 745 (9th Cir. 2002). When a party objects to the proposed findings and recommendations, the district court judge must "make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made." 28 U.S.C. § 636(b)(1). However, in the case before us, addressing the objections would not have resulted in a different outcome.

Jones, 837 F. App'x at 424 (emphasis added). Less than two weeks later, on March 9, 2021, the district judge first issued what is now his 4½-page standard order overruling objections to, and adopting, magistrate judges' reports. *See supra* note 3. Thus, the district judge's apparent response to

our admonition in *Jones* about summarily adopting reports was to craft a new standard order explicitly defending and continuing a consistent practice of such summary adoptions.

As Ramos noted below, the boilerplate nature of the district judge's order in this case is starkly illustrated by the fact that the order begins with a wholly inapposite paragraph discussing the court's decision to "exercise[] its discretion to not consider" any "new evidence, arguments, and issues that were not timely and properly raised" before the magistrate judge and to instead deem those points to be "waived." This paragraph makes no sense, because there were no such "waived" matters in Ramos's objections, and the Government's response to those objections did not argue that any of them had been waived. By holding that even this peculiar inclusion of inapplicable boilerplate makes no difference here, *see* Opin. at 20 n.5, the majority underscores its wholesale abdication of any meaningful review in this area. Under today's opinion, every district judge in the circuit will now be incentivized to develop a similar, one-size-fits-all rubberstamp order.

Fourth, it is important to keep in mind that the underlying issue here is one of constitutional dimension. In holding that "the Constitution [is] not violated by the reference to a Magistrate [Judge] of a motion to suppress evidence in a felony trial," the Supreme Court has emphasized that the statutory requirement of de novo review ensures that "the handling of suppression motions invariably remains completely in the control of the federal district court." *Peretz v. United States*, 501 U.S. 923, 937–38 (1991) (quoting *United States v. Raddatz*, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring)). Where, as here, there are reasons to believe that the requisite review and control by the district judge may not have occurred, principles of

avoidance of constitutional concerns provide a further ground for a remand and re-examination.

Finally, I do not think that we can say that the district court's error was harmless. As I have explained, the problem here is that the magistrate's report contains a clearly erroneous finding about why Marrufo had the baggie, and this court, as an appellate tribunal, lacks any authority to say what factual finding should *replace* that defective determination. The evidence on the point was hotly disputed, there are difficulties with both side's explanations, and the record would support more than one resolution. Nor, on this record, do I think that we can say that, regardless of the competing explanations for the baggie, Ramos is somehow not credible on this point as a matter of law. The only person who ultimately can make this determination is not us, nor is it the magistrate judge—only the district judge can resolve this point by making appropriate factual determinations that are untainted by the magistrate judge's clear error.

Accordingly, I think that there are sufficient grounds to warrant remand here with instructions to issue a new order that reflects the requisite de novo review and that does not summarily adopt a magistrate judge's report that contains a clearly erroneous factual finding on a critical issue.

* * *

For the foregoing reasons, I would remand this matter to the district court with instructions that the district judge reconsider the suppression motion de novo and, if that motion is found to have merit, to then order a new trial. To the extent that the majority concludes otherwise, I respectfully dissent.

Appendix B

NOT FOR PUBLICATION

FILED

APR 10 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DEMETRIUS VERARDI RAMOS, AKA Demetrius Ramos, Defendant-Appellant.	No. 21-10184 D.C. No. 4:20-cr-00051-JAS-DTF MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Argued and Submitted November 18, 2022*
Phoenix, Arizona

Before: BYBEE, OWENS, and COLLINS, Circuit Judges.

Demetrius Ramos appeals from his jury conviction and sentence for one count of conspiracy to transport, for profit, noncitizens who have entered or remain in the United States unlawfully, four counts of harboring such noncitizens for profit, and three counts of transportation of such noncitizens for profit, all in violation of 8 U.S.C. § 1324. We have jurisdiction pursuant to 28 U.S.C. § 1291.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

As the parties are familiar with the facts, we do not recount them here. We affirm in part, vacate in part, and remand.[1]

1. Ramos challenges the district court's denial of his motion to suppress evidence, arguing that the district court erred by holding that he was not "in custody" for *Miranda* purposes. We review whether a defendant was "in custody" de novo and any underlying factual findings for clear error. *United States v. IMM*, 747 F.3d 754, 766 (9th Cir. 2014) (citation omitted).

A person detained during a *Terry* stop is generally not "in custody" for *Miranda* purposes. *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Although a *Terry* stop may require *Miranda* warnings if the questioning goes "beyond a brief *Terry*-type inquiry," *United States v. Kim*, 292 F.3d 969, 976 (9th Cir. 2002), such is not the case where, as here, questioning is limited to the suspect's name, date of birth, and citizenship status. *See Berkemer*, 468 U.S. at 439; *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (holding that an officer with reasonable suspicion that a car contains undocumented individuals may "question the driver and passengers about their citizenship and immigration status"). Although the stop lasted about an

[1] Ramos also challenges the district court's denial of his motion to suppress on voluntariness grounds and adoption of the magistrate judge's report and recommendation. We affirm the district court's decision in a concurrently filed published opinion.

hour, border patrol agents diligently pursued their investigation of the circumstances that led to the stop. *See United States v. Sharpe*, 470 U.S. 675, 687 (1985). Ramos also contributed to the delay by refusing to provide his driver's license and by calling his attorney and a friend. *See id.* at 687-88*; see also United States v. Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974) (finding that an hour-long delay caused by the defendant's evasive responses to legitimate police inquiries was reasonable). Accordingly, the district court did not err in finding that Ramos was not "in custody" for *Miranda* purposes at the time he requested to speak to an attorney.

2. Next, the parties agree that the district court erred by imposing a special condition of supervised release in its written judgment that was not pronounced at the sentencing hearing. The written judgment requires Ramos to "participate as instructed by the probation officer in a program of substance abuse treatment (outpatient and/or inpatient) which may include testing for substance abuse" and to "contribute to the cost of treatment in an amount to be determined by the probation officer." At the sentencing hearing, however, the district court made no mention of a substance abuse treatment program. Accordingly, we vacate and remand so the district court can make the written judgment consistent with the oral pronouncement. *See United States v. Hernandez*, 795 F.3d 1159, 1169 (9th Cir. 2015) ("When there is a discrepancy between an unambiguous oral pronouncement

of a sentence and the written judgment, the oral pronouncement controls." (citation omitted)).

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America

v.

Demetrius Verardi Ramos

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

No. CR-20-00051-002-TUC-JAS (DTF)

John D. Kaufmann (Retained)
Attorney for Defendant

USM#: 29868-508 ICE# A089305611

A Jury Trial was held between 3/30/2021 and 4/7/2021. At the conclusion of trial the Jury returned verdicts of GUILTY as to Counts 1-8 of the Superseding Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 8 U.S.C. §1324(a)(1)(A)(v)(I), 1324(a)(1)(A)(ii) and 1324(a)(1)(B)(i), Conspiracy to Transport Illegal Aliens for Profit, a Class C Felony offense, as charged in Count 1 of the Superseding Indictment; 8 U.S.C. § 1324(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(B)(i), Harboring of Illegal Aliens for Profit, a Class C Felony offense, as charged in Count 2 of the Superseding Indictment; 8 U.S.C. § 1324(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(B)(i), Harboring of Illegal Aliens for Profit, a Class C Felony offense, as charged in Count 3 of the Superseding Indictment; 8 U.S.C. § 1324(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(B)(i), Harboring of Illegal Aliens for Profit, a Class C Felony offense, as charged in Count 4 of the Superseding Indictment; 8 U.S.C. § 1324(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(B)(i), Harboring of Illegal Aliens for Profit, a Class C Felony offense, as charged in Count 5 of the Superseding Indictment; 8 U.S.C. § 1324(a)(1)(A)(ii), 8 U.S.C. § 1324(a)(1)(B)(i) and 18 U.S.C.§ 2, Transportation of Illegal Aliens, a Class C Felony offense, as charged in Count 6 of the Superseding Indictment; 8 U.S.C. § 1324(a)(1)(A)(ii), 8 U.S.C. § 1324(a)(1)(B)(i) and 18 U.S.C.§ 2, Transportation of Illegal Aliens, a Class C Felony offense, as charged in Count 7 of the Superseding Indictment; 8 U.S.C. § 1324(a)(1)(A)(ii), 8 U.S.C. § 1324(a)(1)(B)(i) and 18 U.S.C.§ 2, Transportation of Illegal Aliens, a Class C Felony offense, as charged in Count 8 of the Superseding Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **FOUR (4) MONTHS**, as to each count 1-8, said counts to run concurrently, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THREE (3) YEARS**, as to each count 1-8, said counts to run concurrently.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: $800.00 **FINE:** WAIVED **RESTITUTION:** N/A

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay a special assessment of $800.00 which shall be due immediately.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than $25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of $800.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1-8 of the Superseding Indictment.

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, (10) costs, including cost of prosecution and court costs.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

It is ordered that while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision as adopted by this court, in General Order 17-18, which incorporates the requirements of USSG §§ 5B1.3 and 5D1.2. Of particular importance, the defendant must not commit another federal, state, or local crime during the term of supervision. Within 72 hours of sentencing or release from the custody of the Bureau of Prisons the defendant must report in person to the Probation Office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

1) You must not commit another federal, state or local crime.
2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, 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.

STANDARD CONDITIONS

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or 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.

SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1) If deported, you must not re-enter the United States without legal authorization.
2) If not deported, you are placed on Home Detention for a term of 4 months. You must participate in the Location Monitoring Program for a period of 4 months utilizing the probation officer's discretion and should abide by all technology requirements. You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as preapproved by the officer. You must follow all the program rules and pay all or part of the costs of participation in the location monitoring program as directed by the Court and/or officer.
3) You must participate as instructed by the probation officer in a program of substance abuse treatment (outpatient and/or inpatient) which may include testing for substance abuse. You must contribute to the cost of treatment in an amount to be determined by the probation officer.
4) You must submit your person, property, house, residence, vehicle, papers, or office to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.
5) You must not use or possess alcohol or alcoholic beverages.
6) You must cooperate in the collection of DNA as directed by the probation officer.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

Defendant shall self-surrender to the United States Marshal Service by noon on August 23, 2021.

Date of Imposition of Sentence: **Monday, June 21, 2021**

Dated this 22nd day of June, 2021.

Honorable James A. Soto
United States District Judge

RETURN

I have executed this Judgment as follows: _____

_____, the institution

defendant delivered on _____ to _____ at _____

designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

_____ By: _____

United States Marshal Deputy Marshal

Appendix D

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Demetrius Verardi Ramos,

Defendant.

No. CR-20-00051-002-TUC-JAS (DTF)

REPORT AND RECOMMENDATION

Before the Court are Defendant Demetrius Ramos's motions to suppress statements (Doc. 88), to suppress evidence following unlawful seizure and arrest (Doc. 89), and to dismiss the indictment (Doc. 94).[1] Defendant seeks to suppress statements and evidence recovered following the stop, such as two cell phones, and dismissal of the case. (Doc. 88 at 1, Doc. 94 at 1, Doc. 194 at 28.) This case has been assigned to the undersigned for report and recommendation pursuant to LRCrim 5.1. (Doc. 10.) The motions came before the Court for an evidentiary hearing on September 1, 2020, and October 8, 2020. (Docs. 163, 173.) Magistrate Judge Ferraro recommends that the District Court, after its independent review, deny Defendant's motions.

FACTUAL BACKGROUND

Surveillance

On December 3, 2019, in Douglas, Arizona, agents from the Border Patrol Disrupt

[1]Defendant requests the Court take judicial notice of the deposition and grand jury testimony. (Doc. 127.) The Court has reviewed the items in the record, including the requested transcripts.

and Deny Unit conducted surveillance on a "stash house" within three miles of the international border,[2] where there had been recent smuggling activity. (Doc. 164 at 47-48, 190, 232; Doc. 177 at 15.) Agent Daniel Regan testified that, approximately a month before the incident, he had "seen illegal aliens coming out of that resident." (Doc. 177 at 12, 15.) Agent Brad Albertson attested he had known that an "alien smuggling coordinator" lived at the stash house based on a previous case. (Doc. 164 at 44, 48.) While conducting surveillance, Agent Albertson saw the known alien smuggling coordinator come in and out of the house, and "look up and down the street as if he was waiting for somebody." *Id.* at 70. Agent Albertson testified that, around 8:00 p.m., he had "noticed a 2017 Lexus ES 350 driving really slowly down 11th Street," seeming as though "the driver of the vehicle wasn't too familiar with the area." *Id.* at 49-50. Later, the agents identified Defendant as the driver. *Id.* at 242. Defendant made a U-turn and drove slowly down the street; he then made a second U-turn, and "slowly roll[ed] back down." *Id.* at 50-51. The car "turned into the driveway where the carport area is and just parked right in front of the house, turned off the headlights and waited for a second." *Id.* 51. Four people ran from the carport—crouching as they did so—and tried to get into the car. *Id.* at 53. Defendant let three individuals in the car but turned the fourth away. (Doc. 177 at 59; Exh. 12 at 15:17-20, 36:8-9.) Agents believed all four individuals were in the car. (Doc. 164 at 80.)

Agents testified they had followed Defendant as he drove and noted Defendant's driving had been "evasive," as though he believed someone was following him. *Id.* at 57, 75, 232. He returned to the stash house and told the passengers to get out. (Doc. 177 at 63.) Two agents testified that they had seen only two individuals go back toward the house. (Doc. 164 at 59, 194.) As Defendant drove away from the residence, agents followed him. *Id.* at 194.

Agent Walter Brown testified that he had seen Defendant drive into and immediately out of a parking lot and then turn into the next driveway, a gas station. *Id.* at

[2]Agents testified that they stopped Defendant within three or four miles of the international border. (Doc. 177 at 223, 263.) Exhibits show that the stash house is between where agents stopped Defendant and the international border. (Exh. 4.)

189, 195. For four to five minutes, the agents lost visual contact with Defendant, but they knew that he had left the gas station quickly after pulling in. *Id.* at 196, 224. Agents testified that they next saw Defendant at a second gas station, but he quickly left before they could contact him. *Id.* at 237-38.

Stop/Knock-and-Talk/Arrest

Agents followed Defendant as he left Douglas. *Id.* at 198-99. At approximately 8:30 p.m., Agents Walter Brown and Jesus Barron stopped Defendant. *Id.* at 189, 199, 213, 230. Agent Barron spoke with Defendant as Defendant sat in his car. *Id.* at 216. The agents testified that they had not seen anyone other than Defendant in the car. *Id.* at 200, 239. Agent Barron asked if he could inspect the trunk, to which Defendant agreed. *Id.* at 200, 263. No one was in the trunk. *Id.* Agent Barron testified that Defendant had appeared "very nervous"—"avoid[ing] eye contact," "rub[bing] his head" and hands, and "start[ing] to stutter." *Id.* at 240. He asked Defendant to identify himself, asked him about his citizenship, and asked for Defendant's driver's license. *Id.* Defendant provide his name, identified himself as a United States citizen, but refused to give his date of birth or a driver's license. *Id.* Agent Barron contacted Cochise County Sheriff's Office to send a deputy because Defendant had been driving without a license. *Id.* at 121, 201. When the deputy arrived, he also asked Defendant for his date of birth and identification. *Id.* at 121-22. Defendant still refused to provide his date of birth or produce a driver's license. *Id.* at 243-44. Defendant never provided this information, even after multiple requests by two agents and a deputy. *Id.* at 105-06, 243-44.

At about 8:45, agents at the stash house decide to conduct a "knock-and-talk." *Id.* at 62, 88. As agents approached the house, four undocumented immigrants and one United States citizen fled out of the back door and attempted to climb over the back fence. (Doc. 177 at 23-24.) But agents apprehended them. *Id.* Agent Albertson testified that there had been "food trash, trash that's associated with illegal alien smuggling" at the side of the house, and that in the house there had been a "bunch of like camouflage clothing" and more trash. (Doc. 164 at 64, 66.) According to Agent Albertson, he identified two of the

undocumented immigrants as the individuals he had seen running from Defendant's car about thirty to forty-five minutes after he had entered the house. *Id.* at 93.

At approximately 9:00, agents permitted Defendant to call his lawyer. (Doc. 164 at 201; Doc. 177 at 76-77.) Defendant attempted to call his attorney twice, but he was unable to reach him. (Doc. 177 at 74-75.) Defendant then he called a friend in law enforcement. (Doc. 177 at 76, 101; Exh. 62 at A3.) The agents were able to hear these calls because Defendant was using a speaker. (Doc. 164 at 106, 201, 244.) While Defendant was on his law-enforcement friend call, the agents received information that the two individuals who had run from Defendant's car were undocumented. *Id.* at 124. Agents testified that, after receiving this new information, they had informed Defendant he was under arrest and read him his *Miranda* rights. *Id.* at 203, 213, 245. Agent Brown testified this had occurred at 9:35, but a careful review of the record indicates that the call ended around 9:20.[3] (*Id.*; Exh. 62 at A3.) Immediately after this call Defendant was advised he was under arrest. (Doc. 164 at 108.) Then Defendant requested to call his wife, which agents permitted; he spoke with her at approximately 9:25. (Doc. 177 at 76; Exh. 62 at A3.)

At the Station

Agents transported Defendant to the Douglas Border Patrol Station and placed him in a cell. (Doc. 177 at 78.) At some point, Defendant asked for some prescription medication from his car. *Id.* at 27-28. When agents took Defendant's fingerprints, an agent checked if Defendant was okay because he had needed the medication. *Id.* at 27. An agent helped him get the medication. *Id.* The timing of the conversation and fingerprinting is unclear.[4]

Agent Robert Marrufo[5] discovered that Defendant was not a United States citizen and that his visa had expired. (Doc. 164 at 99, 109.) At approximately 3:40 a.m., Agent Marrufo went into Defendant's cell to conduct a welfare check and to inform him that the

[3]The Court does not find this difference to be significant but notes it.

[4]The Court believes there is some ambiguity that neither party clarified as to when this conversation took place. It is possible this was one conversation occurring as agents took Defendant's fingerprints or this was two conversations where the latter occurred as agents took Defendant's fingerprints. (Doc. 177 at 27-28.)

[5]Since this incident, Agent Marrufo has retired. (Doc. 164 at 99.)

agents knew he was unlawfully in the United States. *Id.* at 110, 112. About forty minutes later, Agent Marrufo again entered Defendant's cell and showed him a plastic bag. (*Id.* at 112-13; Exh. 70 at 2:34-2:35.) At the evidentiary hearing, Defendant claimed that an agent had come into his cell, had shown him a plastic bag with laboratory results indicating narcotics had been found in his car, and had told him that if he talked to the agents they would not "use" the narcotics against him. (Doc. 177 at 85-86.) After prompting from his attorney, Defendant identified this agent as Agent Barron. *Id.* at 82, 85. The Assistant United States Attorney (AUSA) asserts that the agent on the video was Agent Marrufo, and Agent Marrufo testified about going into the room. (Doc. 164 at 111; Doc. 174 at 197.) This Court finds that it is more credible that the agent was Agent Marrufo. Agent Marrufo did not recall having a plastic bag or what was in it, but he denied every aspect of Defendant's claim. (Doc. 164 at 115, 127-28.)

Agent Marrufo took Defendant into an interrogation room, and Agent Barron read Defendant his *Miranda* rights, once more. (Doc. 164 at 114; Exh. 9 at 3-4.) Defendant explicitly agreed to speak to them without a lawyer. (Exh. 9 at 3-4.) Defendant expressed multiple times that he understood his right to a lawyer. He told the agents, "I know I can, you know, get the lawyer and then, you know, play this stupid game, you know, but I'm—I'm on the receiving end here. You know, I'm overstay with my visa, and I don't want to get deported." *Id.* at 11:5-8. He asked, "Should I get a lawyer right now (indiscernible) like a sense of—like if you—what can be done for me?" *Id.* at 41:1-3. Throughout the interrogation, Defendant tried to see how the agents would "help" him; he offered to "get [them] more information" and wear a "bug." *Id.* at 31:13-21, 35:9-22, 44:24-25, 47:3-8, 49:5-7, 50, 54-55. He also said, "I gave up. You know, I can have a lawyer." *Id.* at 44:6-7. In the final mention of a lawyer, Defendant said,

> Look, man. If you want to catch me for [transporting illegal aliens], I'm going to be just like a sheep, man, all like those guys that—just one more guy doing that. If you guys just want to do that, man, like, yeah, I can call the lawyer, you know, and situate that shit[.]

Id. at 48:8-9. However, Defendant never invoked his right to an attorney during the

interrogation.

Defendant admitted to transporting undocumented immigrants for profit approximately twenty times. *Id.* at 17-18. He also described how he had agreed to transport people from Douglas to Phoenix for a thousand dollars per person on December 3 and how he had worn scrubs so he would not raise suspicions; however, he denied knowing that the three passengers he picked up were undocumented. *Id.* at 13, 16, 36, 40, 42, 47. He said he had "pushed" the fourth person out of the car because he "didn't really like him" and had a "gut feeling." *Id.* at 14. During the interrogation, Defendant admitted he was not forced to talk; however, he thought he would get something in return because the agents had "kind of" made promises to him. *Id.* at 52:22-53:10. At the evidentiary hearing, Defendant testified he had been desperate and had "exaggerat[ed]" his involvement so he could go home. (Doc. 177 at 117-18.) The agents were adamant, during the interrogation and at the evidentiary hearing, that they did not make any promises to Defendant or threaten him in anyway. (Doc. 164 at 118-19, 135, 137-38, 250-51, 265-66; Exh. 9 at 45:12-23, 49:8-11, 53:11-12.)

Defendant's Testimony from Evidentiary Hearing

At evidentiary hearing, Defendant testified to his version of the events. He first described his background. (Doc. 177 at 53-55.) Originally, he lived in Brazil and decided to come to the United States to finish school. *Id.* at 53. He graduated with degrees in physiology and nuclear medicine technology. *Id.* In 2017, his H1B visa for high qualified degree holders expired. *Id.* at 54. Afterward, he had difficulty obtaining employment. *Id.* at 55.

Turning to the events that led to his arrest, Defendant testified that Gabriel, a friend of his, had offered him a thousand dollars to "pick up passengers to do Christmas shopping in Phoenix." *Id.* at 56-57. Gabriel told him that Uber would not pick-up passengers so close to the border. *Id.* at 56. The Defendant testified that he had agreed to pick up the passengers from Douglas and take them to Tucson, so they could go Christmas shopping the next morning. *Id.* at 56. Then, he would return them to Douglas. *Id.*

Gabriel provided Defendant with a cellphone and an address. *Id.* at 57. Defendant drove to the house and spoke with someone about the shoppers. *Id.* at 58. Four people came to his car, but he refused to transport all four because "the groceries that they ha[d] to buy" would not fit in his car. *Id.* at 59. So, he left the house with three passengers. *Id.* He became suspicious that the passengers were not in the country legally because they were speaking Spanish and would not respond to him in English. *Id.* at 60-61. Defendant then decided to drop the passengers back at the house. *Id.* at 62. He was able to find the house in the dark while talking to Gabriel and using his phone to find the address. *Id.*

After dropping off his passengers, Defendant said he had driven to a gas station so he could "get [his] bearings." *Id.* at 64. However, the first gas station was very dark, and he did not have a "good signal." *Id.* He went to a second gas station because he was afraid Gabriel and his "ilk" would be mad at him and could be following him. *Id.* at 64-65. Then, he left Douglas. *Id.* at 65.

Defendant testified that, when the agents stopped him, they had only asked him for his name. *Id.* at 67, 77. He later admitted that the agents had asked for his date of birth. *Id.* at 120. Defendant gave them his name and his permission to search his trunk. *Id.* at 67. He did not tell them that he was a United States citizen or that his visa had expired. *Id.* at 77. He testified that he had asked if he was free to go home "[e]very minute," "every interaction," after "[e]very question that they asked." *Id.* at 68. Around 9:00 p.m., the agents let him call his attorney, but they required that he do so on speaker. *Id.* at 75, 76. He was unable to reach his attorney after two attempts, so he called a friend in law enforcement. *Id.* at 74-76. Before agents took him out of the car, he asked to call his wife, and they acquiesced. *Id.* at 76. Agents told him he was under arrest and took him to the Border Patrol Station. *Id.* at 78.

According to Defendant, the agents put him into a cell, where he was stressed and crying. *Id.* at 78-79. Defendant testified that an agent had come into his cell and told him "things would be much worse" if he did not talk to them. *Id.* at 82-83. The agent promised Defendant he could go home if he cooperated. *Id.* at 83. Defendant testified the agent

returned and showed him "a plastic bag with the laboratory result of a drugs that was test positive they said it was found in [Defendant's] car." *Id.* at 85. Defendant claimed the agent threatened to "use" the test results against him unless he talked. *Id.* at 86. So, he agreed to talk. *Id.* at 89. During the interrogation, he did not mention the plastic bag because then he "would incriminate [him]self." *Id.* at 111. He also characterized his questions about "what can be done" as his attempt to "talk to the[agents] about the conversation" he had with them in his cell. *Id.* at 114-15. He also testified that he had been desperate, so he had exaggerated his participation and knowledge to convince the agents he had helpful information. *Id.*at 117-18.

Defendant testified that, after the interrogation, agents had taken his fingerprints. *Id.* at 84-85. He said this had been when agents discovered his visa had expired and when they offered him food for the first time. *Id.* at 78, 86.

Procedural History

On December 20, 2019, the Government offered Defendant a pre-indictment plea, which Defendant rejected. (Doc. 94-1.) On January 2, 2020, the grand jury returned a three-count indictment, charging Defendant with the following: Count One knowingly and intentionally conspiring to transport two undocumented immigrants and Counts Two and Three transporting the two undocumented immigrants named in Count One. (Doc. 35.) On January 28, 2020, the parties participated in video depositions of the three of the four undocumented immigrants detained as material witnesses. (Doc. 49.) Fernando Lucrecio-Morales was released without completing a deposition because there was not an interpreter available in his native language, Nahuatl. (Doc. 126 at 6.) Lucrecio-Morales appears to have been the individual Defendant refused to transport. (Doc. 125-2 at 1.) The AUSA said that it "would just not be calling him as a witness, [and at trial the deposition was] not necessary to move forward with the government's case." (Doc. 126 at 4:13-14.)

After the video depositions, on March 11, 2020, the Government presented the case to the grand jury again. (Exh. 11.) The grand jury returned a nine-count superseding indictment charging Defendant as follows: Count One knowingly and intentionally

conspiring to transport all four undocumented immigrants, Counts Two through Five harboring or transporting the four immigrants, and Counts Six through Nine transporting the four immigrants. (Doc. 70.) Defendant then filed his motions and the Court conducted an evidentiary hearing. (Docs. 88, 89, 94, 163, 173.)

This Court took the matter under advisement. (Doc. 173.)

DISCUSSION

Defendant asserts that agents detained him for an unreasonable amount of time and arrested him absent probable cause. (Doc. 89 at 5.) He requests suppression of any evidence following these illegal seizures. *Id.* at 6.

Stop

In *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), the Supreme Court of the United States recognized that an officer's reasonable suspicion that criminal activity is afoot permits a brief stop to investigate further. Reasonable suspicion is a lesser standard than that of probable cause. *United States v. Valdez-Vega*, 738 F.3d 1074, 1078-80 (9th Cir. 2013). It exists when an officer can "point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Terry*, 392 U.S. at 21.

> In the context of border patrol stops, the totality of the circumstances may include characteristics of the area, proximity to the border, usual patterns of traffic and time of day, previous alien or drug smuggling in the area, behavior of the driver, appearance or behavior of passengers, and the model and appearance of the vehicle. Not all of these factors must be present or highly probative in every case to justify reasonable suspicion. And the facts must be filtered through the lens of the agents' training and experience.

Valdez-Vega, 738 F.3d at 1079 (citations omitted).

A *Terry* stop must end when either the "mission" of the stop is addressed or reasonably should have been. *See Rodriguez v. United States*, 575 U.S. 348, 354 (2015). This provides time to conduct the "ordinary inquiries incident" to a stop. *Id.* at 355 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)). "In assessing whether a detention is too long in duration to be justified as an investigative stop, [courts] consider it appropriate to

examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly . . . ." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). Officers may extend a stop if the individual's answers do not dispel their suspicions and actually created new ones. *United States v. Rodgers*, 656 F.3d 1023, 1027 (9th Cir. 2011) (quoting *United States v. Torres-Sanchez*, 83 F.3d 1123, 1128 (9th Cir. 1996)).

Here, defense counsel conceded at the evidentiary hearing "that the[agents] had founded suspicion to make the stop." (Doc. 177 at 186.) Instead, he argues that once agents saw he was alone in the car, the stop should have ended. (Doc. 89 at 5.) This fails for two reasons. First, the stop was extended because Defendant refused to provide identifying information to the agents and an officer. (Doc. 164 at 105-06, 240, 243-44) Defendant's attempts to argue that he was under no obligation to provide his date of birth and that this was a roving immigration stop are unavailing. (Doc. 177 at 139, 189.) Defendant was required to carry his identification, *see* 8 U.S.C. § 1304(e), and his driver's license, *see* A.R.S. § 28-3169(A). The date of birth permits law enforcement agents to check immigration and warrant status. Therefore, they were unable to perform "ordinary inquiries incident" to a lawful immigration stop, such as check immigration or warrant status. *See Rodriguez*, 575 U.S. at 355 (quoting *Caballes*, 543 U.S. at 408). Defendant conceded that agents had reasonable suspicion for the initial stop. (Doc. 177 at 186.) In conjunction with his nervous demeanor, his previous actions provided reasonable suspicion for agents to continue detaining Defendant.

Second, the agents' reasonable suspicion that Defendant had transported undocumented immigrants did not dissipate simply because they failed to catch him red-handed or because agents had been mistaken about the number of individuals to enter or exit the vehicle. In fact, Agent Barron testified that based on his training and five years of experience Defendant's demeanor had indicated "something's going on." (Doc. 164 at 230, 240.) The agents took a reasonable amount of time to conduct the knock-and-talk, which would quickly dispel or confirm their suspicions that Defendant had picked up undocumented immigrants and had dropped at least two back at the stash house. *Id.* at 62,

271-72. Thus, the agents only held Defendant for the time necessary to dispel their suspicions. Moreover, Defendant's demeanor and failure to answer their questions actually created new suspicions. The stop was not impermissibly extended and was lawful.

This Court recommends denying Defendant's motion to suppress evidence based on an illegal extension of a *Terry* stop.

Arrest

A warrantless arrest is constitutional if officers have probable cause to believe the individual committed a felony and the arrest occurs in a public place. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003). Probable cause has not been reduced to a precise or finely tuned standard; instead, it is fluid and relies on the totality of the circumstances. *Cf. Florida v. Harris*, 568 U.S. 237, 243-44 (2013) (considering warrantless search). It "exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested" or when "a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime." *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (alteration in *Lopez*) (quoting *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986)). "While conclusive evidence of guilt is of course not necessary under this standard to establish probable cause, '[m]ere suspicion, common rumor, or even strong reason to suspect are not enough.'" *Id.* (alteration in *Lopez*) (quoting *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984)).

Here, at the time of arrest, agents knew the following: a stash house close to the border with recent smuggling activity had items consistent with a smuggling operation, such as camouflage clothing and trash. (Doc. 164 at 64, 66, 232.) A known smuggling coordinator walked out of the house and looked around the street as if he were waiting for someone. *Id.* at 70. Thereafter, Defendant drove up to the house; four individuals ducked down and ran to his car, at least two quickly jumped inside. *Id.* at 50, 59. An agent later identified two of these individuals as two of the four undocumented immigrants found at the stash house. *Id.* at 66. The car was registered to a Tucson address, which is common in

smuggling operations. *Id.* at 70, 267. Defendant drove evasively, as though he thought someone were following him. *Id.* at 57. The agents believed Defendant had identified their surveillance, and consistent with their belief, Defendant returned to the stash house and dropped off his passengers. *Id.* at 59. Defendant then left the stash house and drove to two separate gas stations without purchasing gas. *Id.* at 174, 195, 196, 237. After Defendant was stopped, he appeared very nervous, and refused to completely identify himself. *Id.* at 240. Give these known facts, there was a fair probability that Defendant had transported undocumented immigrants and conspired with others to do so. Therefore, the agents had probable cause to arrest Defendant.

This Court recommends denying Defendant's motion to suppress because of an illegal arrest. The arrest was supported by probable cause.

Statements

Defendant moves to suppress all his statements taken contrary to his Fifth and Sixth Amendment rights to counsel. (Doc. 88.) He argues that agents violated his rights by initiating a custodial interrogation after he had requested to speak with a lawyer. *Id.* at 5. He also asserts that the agents acted coercively and deceptively, such that his statements were involuntary and must be suppressed for all purposes. *Id.* at 6.

The Government contends that when Defendant asked to call an attorney he was not in custody and that he waived his *Miranda* rights once under arrest. (Doc. 96 at 5-6.) The Government also denies that the agents threatened or coerced Defendant. *Id.* at 7.

Fifth Amendment

The Fifth Amendment prohibits a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Because the "circumstances surrounding in-custody interrogation can operate very quickly to overbear" an individual's will, the Supreme Court has held that an individual "must be clearly informed that he has the right to consult with a lawyer" prior to a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 469, 471 (1966). "Custody" requires a fact intensive question of whether, when considered objectively, a "reasonable person [would] have felt he or she was not at

liberty to terminate the interrogation and leave." *Howes v. Fields*, 565 U.S. 499, 509 (2012) (alteration in *Howes*) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). These rights may be waived, but the waiver must be voluntary, knowing, and intelligent. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Here, during the stop, Defendant asked to speak with his lawyer, and the agents allowed him to make several calls. (Doc. 164 at 201, 244; Doc. 177 at 76-77.) Defendant attempted to call his attorney twice, but he did not reach him. (Doc. 177 at 76, 101; Exh. 62 at A3.) Thereafter, the agents learned that two of Defendant's passengers had been undocumented immigrants, and they arrested him. (Doc. 164 at 203, 245.) Agents then transported Defendant to a Border Patrol Station. *Id.* at 246. Sometime later, they initiated a custodial interrogation. (Exh. 9.) Before questioning Defendant, Agent Barron read the *Miranda* rights to Defendant. *Id.* at 3-4. And Defendant agreed to talk with agents without an attorney present. *Id.* at 4.

First, Defendant was not in custody when he asked for an attorney. This was a road-side *Terry* stop based on founded suspicion that had not yet risen to the level of probable cause to arrest. *See United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th Cir. 2001) (considering a rural stop persons close to international border). *Terry* stops usually do not constitute custody. *See United States v. Bautista*, 684 F.2d 1286, 1291 (9th Cir. 1982). As discussed above, the stop was not longer than was reasonably necessary. Thus, Defendant was not in custody for the purpose of *Miranda* until agents told Defendant he was under arrest, well after he had asked for and attempted to contact his attorney. Defendant requested an attorney prior to being in custody.

Second, the Supreme Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *See Bobby v. Dixon*, 565 U.S. 23, 28 (2011) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991)). Further, the Court of Appeals for the Ninth Circuit has stated that based on *McNeil* and *Bobby* a request for a lawyer outside a custodial interrogation does not warrant protections

under *Miranda* or *Edwards*.[6] *See Robertson v. Pichon*, 849 F.3d 1173, 1185 (9th Cir. 2017) (concluding that "if a defendant is not in the context of custodial interrogation . . . the safeguards of *Miranda* and *Edwards* are inapplicable" and "even if the defendant had previously invoked *Miranda* and *Edwards* before being placed in a custodial interrogation context" there would not be protection under *Edwards*). Thus, Defendant's out-of-custody request for an attorney did not trigger protection under *Miranda* or *Edwards*. Therefore, agents were permitted to initiate a custodial interrogation, and if Defendant waived his *Miranda* rights, as was done here, the statement would not violate Defendant's rights. (Exh. 9 at 3-4.) Hence, the agents' actions did not run afoul of *Miranda* or Defendant's Fifth Amendment rights.

Thus, this Court recommends denying Defendant's motion to suppress statements. Agents did not violate *Miranda* when taking the statements.

Voluntariness

Defendant claims that agents threatened him with "a bag of alleged narcotics" and coerced him into making an involuntary statement. (Doc. 88 at 6.) He also asserts that agents made improper promises that if he cooperated, he would be able to go home. (Doc. 104 at 4; Doc. 177 at 183.) The Government disputes the facts of Defendant's claim. (Doc. 96 at 6-7.)

Voluntary confessions are "the product of a rational intellect and a free will." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). A statement is involuntary if law enforcement officers used physical intimidation or psychological pressure to coerce a suspect. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *United States v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981). Courts must consider if a defendant's "will was overborne by the circumstances" around the confession, including characteristics of defendant and those of the interrogation. *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (internal quotation marks omitted).

Defendant's account of the incident is central to this issue. The Court does not find

[6] *Edwards v. Arizona*, 451 U.S. 477 (1981).

Defendant's allegations that Agent Marrufo threatened him to be credible. In general, Defendant's testimony was incredible. Defendant contradicted himself throughout his testimony and told an untenable story. He initially stated he had been taking the passengers to Phoenix, then changed the location, saying the passengers were going to Tucson to go Christmas shopping. (Doc. 177 at 56.) According to Defendant, he had been contracted to take the passengers to Tucson to stay the night, so they could shop for Christmas the next day, then he would return them to Douglas, for which he was to be paid a thousand dollars. *Id.* He refused to drive the fourth passenger, even though his agreement was apparently for a flat rate—not per passenger as stated during the interrogation—because the passengers would not have room for their "groceries." (*Id.* at 56-57, 59; Exh. 9 at 13.) It is unclear why the "Christmas presents" or "groceries" would not fit into the car's trunk, why the passengers would not just go to Tucson the next day—eliminating the expense of a hotel—or why they would not have just taken a shuttle from Douglas to Tucson for considerable less money. Additionally, although no longer employed in the medical profession, Defendant wore his scrubs and did not bring his driver's license. This is inexplicable given Defendant was acting as a paid chauffeur. (Doc. 164 at 121, Exh. 9 at 36.) He also testified that agents had only asked for his information—not his date of birth—later admitting that two agents and a deputy had asked for his date of birth. (Doc. 177 at 77:7-10, 119-20.) His testimony was not plausible. Also, his demeanor was not that of an honest but nervous witness, but instead was that of a fabricator. Finally, his claims that the agents had made explicit promises to release him and to not charge him the narcotics if he talked are inconsistent with his numerous requests to know what the agents could do for him and his overall demeanor during the interrogation. (Exh. 9 at 31, 33, 35, 44-45, 47, 49, 54.) This Court finds Defendant's testimony was not credible. Accordingly, this Court finds that the agents did not threaten Defendant with a baggie or explicitly promise him he would go home if he cooperated.[7]

[7]The Government does not explain the bag, but there are alternative explanations. The most likely of which is that the bag contained medicine Defendant had requested. The timing of this request is not clear in the record, it either happened before or during fingerprinting. Also, the record does not help determine when Defendant was fingerprinted. Defendant

Instead, this Court finds the agents' testimony to be credible. Here, Agent Marrufo testified that had advised Defendant to tell the truth, that telling the truth could only help him and that it would "behoove[]" him to do so. (Doc. 164 at 112-13.) He added, "There's an old saying the truth will set you free . . . ." (Exh. 9 at 46.) And he questioned Defendant's information, stating "If you think you're unique and have all this information that's going to liberate you . . . ." *Id.* at 51. Defendant apparently took these as promises that he would be released if he provided information. (Doc. 177 at 122, 125-26.) Agent Barron told him that the agents could not "do anything or nothing can happen unless [he] provide[d] [them] with something," stressing that honesty was key. (Exh. 9 at 11-12.) Agent Marrufo explained

> So we can't promise you anything. The only thing we can do and our job is—right here is to take down the information. Now, whether it's truthful or you're withholding stuff and not being completely truthful, that's what somebody else will read this report, higher up, and they will—they can determine whether or not your—your information is credible, where they can maybe do something for you or not. Our job here is to get the information and the facts.

(Exh. 9 at 45.) Agent Marrufo told Defendant he would see a judge "regardless." *Id.* at 49. When Agent Barron told him someone else would evaluate his information, Defendant asked to speak with someone else. *Id.* at 52. Near the end of the interrogation, the agents asked Defendant if he spoke voluntarily; he said he "thought that [he] was going to get . . . something in return" and the agents had "kind of" promised him things. *Id.* at 53. He then offered to wear a "bug" as the agents were ending the interrogation. *Id.* at 54, 55.

Considering the potential implied promises that the truth would help Defendant and that the agents would take the information to their "higher up," this Court recommends finding that the statements were voluntary. Defendant is over forty years old, well

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attempted to argue he was not fingerprinted until 5:00 or 6:00 a.m., but defense counsel did not properly refresh the agent's recollection with the agent answering, "Possibly. Again, I'm not sure." (Doc. 177 at 33.) Defendant testified that he was not fingerprinted until after the interrogation, but also stated that agents had not discover he was an overstay until he was fingerprinted. *Id.* at 77-78, 84-85. Agent Marrufo claimed to talk to Defendant about his status before the interrogation, and Defendant's status was referenced during the interrogation. (Doc. 164 at 126, Exh. 9 at 13.)

education, fluent in English, and has been in the United States for well over a decade. (Doc. 177 at 53-54.) Before the interrogation, he slept in the cell and was not denied food or drink, as far as the Court is aware. (Doc. 177 at 86-87.) After looking at the totality of the circumstances, the general promises that telling the truth would be better and that the agents would take the information to their superiors were insufficient to overbear Defendant's free will. *See United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988) (promises that agent would inform prosecutor of cooperation did not render statements involuntary).

This Court recommends denying Defendant's motion to suppress involuntary statements.

Sixth Amendment

The right to counsel is rooted in both the Fifth and Sixth Amendments of the United States Constitution. *See McNeil*, 501 U.S. at 175 (considering Sixth Amendment right to counsel); *Moran*, 475 U.S. at 420 (explaining *Miranda* required law enforcement to inform suspects that, among other rights, they had right to counsel under Fifth Amendment). Here, there has been no indication or argument that any of the statements were taken after an adversarial judicial proceeding had commenced; thus, the Sixth Amendment had not attached and does not provide relief to Defendant. *See McNeil*, 501 U.S. at 175 (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). Accordingly, this Court recommends denying any relief under the Sixth Amendment.

Prosecutorial Vindictiveness/Misconduct

Defendant argues that the Government acted vindictively by seeking a superseding indictment after Defendant had rejected a plea offer and had exercised his right to confront the material witnesses. (Doc. 94 at 5.) He maintains that the Government presented false or deceptive testimony to the grand jury and misled Defendant as to importance of Fernando Lucrecio-Morales. *Id.* at 5-6. He asks that the entire indictment be dismissed and that the Government's offer to dismiss only Count Nine and strike Lucrecio-Morales be denied.[8] (Doc. 94 at 1; Doc. 177 at 178.)

[8]The record does not reflect that the Government has moved to strike Lucrecio-Morales from the indictment or dismiss any of the counts. To the extent the Government has

Due process prohibits prosecutors from penalizing a defendant for exerting their constitutional or statutory rights. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). When there exists a reasonable likelihood of vindictiveness, courts will presume the prosecutor was vindictive in increasing the number or severity of charges. *See United States v. Goodwin*, 457 U.S. 368, 373 (1982). Generally, this presumption does not arise pretrial because "the prosecutor may uncover additional information that suggests a basis for further prosecution, or he simply may come to realize that information possessed by the [government] has a broader significance." *Id.* at 381 ("At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized."); *United States v. Brown*, 875 F.3d 1235, 1240 (9th Cir. 2017). Absent a presumption, Defendant can succeed by showing actual vindictiveness. *Wasman v. United States*, 468 U.S. 599, 569 (1984); *Nunes v. Ramirez-Palmer*, 485 F.3d 432, 442 (9th Cir. 2007).

Here, the Government offered Defendant a pre-indictment plea, informing him it would be withdrawn if he did not accept by the upcoming status conference. (Doc. 94-1.) Defendant did not accept, and as promised, the Government withdrew the offer. This was not vindictive. *See Bordenkircher*, 434 U.S. at 363 (permitting "give-and-take" of plea negotiations if defendant is free to accept or reject). The grand jury returned a three-count indictment. (Doc. 35.) Following video deposition for three material witnesses, the parties agreed that Fernando Lucrecio-Morales could be released without completing his deposition. (Doc. 49.) Defendant claims that the prosecutors did not discover any new evidence between the original and superseding indictment. (Doc. 94 at 3.) The Government contends that it reexamined the facts of this case after the video deposition and decided to pursue more charges via the *Pinkerton* theory of liability. (Doc. 121-2 at 2-3.) This is the exact reason there is no presumption of vindictiveness pretrial, so prosecutors may reconsider evidence before their assessment has crystallized. *See Goodwin*, 457 U.S. at 381. It is possible that the Government was impressed with the video depositions or that a different prosecutor evaluated the evidence differently. There was no misconduct,

attempted to do so, Defendant has objected. (Doc. 177 at 178.) Accordingly, the Court will make no recommendation or ruling on the Government's offer.

presumed or actual, in seeking a superseding incitement in this matter.

Defendant asserts that the AUSA articulated that Lucrecio-Morales "would no longer be an issue." (Doc. 94 at 6.) This is not what the AUSA said; he expressed that he "would just not be calling him as a witness, [and at trial the deposition was] not necessary to move forward with the government's case." (Doc. 126 at 4:13-14.) However, given the misunderstand by Defendant, the Government has proposed striking Lucrecio-Morales from the indictment; the Court understands this offer to be gratuitous, especially as it does not find any prosecutorial misconduct here. The Government is not obligated to call every witness or person who may have information. *Cf. United States v. Bond*, 552 F.3d 1092, 1097 (9th Cir. 2009) (prosecution not obligated to call every witness on witness list). Accordingly, the AUSA was not dishonest and will have to make the case without Lucrecio-Morales.

The Government presented the case to the grand jury for a superseding indictment in March 2020, more than a month after the depositions. (Exh. 11.) Defendant alleges that the AUSA presented false testimony to the grand jury. (Doc. 94 at 6.) The AUSA asked the following questions that are relevant to our inquiry: "[D]id a border patrol agent believe he saw four people run from the house to the car, crouching as if to hide from view?"; "Did it appear that [Defendant] sensed he was being followed and he drove back toward the house?"; "Did he pull over, and did border patrol agents see two individuals run back to the house?"; "According to [Defendant], did he pull up to the house four people ran out, he told one to go back in, three got in and he drove them away?"; "Did he claim to have dropped them off after he felt he was being followed?" (Exh. 11 at 2-5.) The case agent answered in the affirmative to each of those questions. *Id.* These questions are not false and when taken together are not misleading; instead, they present a full picture of each side's contentions. The AUSA did not discuss the material witnesses' statements or deposition except to say that three material witnesses identified Ramos as the man driving the car. *Id.* at 7. It is not required to present all potential evidence to the grand jury. *Cf. United States v. Navarro*, 608 F.3d 529, 537 (9th Cir. 2010) (explaining that prosecutors

do not have a duty to present exculpatory evidence to grand jury).

The grand jury returned a nine-count superseding indictment against Defendant. (Doc. 70.) Defendant argues that there is no evidence to support some of these charges. (Doc. 94 at 5.) These new charges are supported by the *Pinkerton* theory of liability, which "renders all co-conspirators criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy they have joined, whether they were aware of them or not." *See United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008). For example, to transport undocumented immigrants, it may be foreseeable that members of the conspiracy will harbor those undocumented immigrants in furtherance of the transportation conspiracy.

This Court recommends denying Defendant's motion to dismiss. There has been no showing of prosecutorial misconduct or vindictiveness.

RECOMMENDATION

Accordingly, it is recommended that, after its independent review of the record, the District Court deny Defendant's motions (Docs. 88, 89, 94). Pursuant to Federal Rule of Criminal Procedure 59(b)(2), any party may serve and file written objections within fourteen days of being served with a copy of this Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the District Court. If objections are not timely filed, they may be deemed waived.

Dated this 5th day of February, 2021.

Honorable D. Thomas Ferraro
United States Magistrate Judge

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Demetrius Verardi Ramos, Defendant.	No. CR-20-00051-002-TUC-JAS (DTF) **ORDER**

Pending before the Court is a Report and Recommendation issued by United States Magistrate Judge Ferraro. The Report and Recommendation recommends denying Defendant Demetrius Ramos's motions to suppress statements (Doc. 88), to suppress evidence following unlawful seizure and arrest (Doc. 89), and to dismiss the indictment (Doc. 94). Defendant filed objections to the Report and Recommendation (Doc. 211) and the Government responded (Doc. 231).[1]

As a threshold matter, as to any new evidence, arguments, and issues that were not timely and properly raised before United States Magistrate Judge Ferraro, the Court exercises its discretion to not consider those matters and considers them waived. *United States v. Howell*, 231 F.3d 615, 621-623 (9th Cir. 2000) ("[A] district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation . . . [I]n making a decision on whether to consider newly offered evidence, the district court must . . . exercise its discretion . . .

[1] Unless otherwise noted by the Court, internal quotes and citations have been omitted when citing authority throughout this Order.

[I]n providing for a *de novo* determination rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate judge's proposed findings and recommendations . . . The magistrate judge system was designed to alleviate the workload of district courts . . . To require a district court to consider evidence not previously presented to the magistrate judge would effectively nullify the magistrate judge's consideration of the matter and would not help to relieve the workload of the district court. Systemic efficiencies would be frustrated and the magistrate judge's role reduced to that of a mere dress rehearser if a party were allowed to feint and weave at the initial hearing, and save its knockout punch for the second round . . . Equally important, requiring the district court to hear evidence not previously presented to the magistrate judge might encourage sandbagging. [I]t would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and—having received an unfavorable recommendation—shift gears before the district judge."); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1122 (9th Cir. 2003) ("Finally, it merits re-emphasis that the underlying purpose of the Federal Magistrates Act is to improve the effective administration of justice.").[2]

As to the objections filed by Defendant, the Court has conducted a *de novo* review of the record. *See* 28 U.S.C. § 636(b)(1)(C) ("Within fourteen days after being served with [the Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.").

[2] Assuming, *arguendo*, that such matters were not subject to waiver, the Court (in the alternative) has nonetheless conducted a *de novo* review, and upon review of the record and authority herein, rejects these issues and adopts the Report and Recommendation in its entirety.

In addition to reviewing the Report and Recommendation and any objections and responsive briefing thereto, the Court's *de novo* review of the record includes review of the record and authority before United States Magistrate Judge Ferraro which led to the Report and Recommendation in this case.

Upon *de novo* review of the record and authority herein, the Court finds Defendant's objections to be without merit, rejects those objections, and adopts United States Magistrate Judge Ferraro Report and Recommendation in its entirety. *See, e.g., United States v. Rodriguez*, 888 F.2d 519, 522 (7th Cir. 1989) ("Rodriguez is entitled by statute to *de novo* review of the subject. Under *Raddatz* [447 U.S. 667 (1980)] the court may provide this on the record compiled by the magistrate. Rodriguez treats adoption of the magistrate's report as a sign that he has not received his due. Yet we see no reason to infer abdication from adoption. On occasion this court affirms a judgment on the basis of the district court's opinion. Affirming by adoption does not imply that we have neglected our duties; it means, rather, that after independent review we came to the same conclusions as the district judge for the reasons that judge gave, rendering further explanation otiose. When the district judge, after reviewing the record in the light of the objections to the report, reaches the magistrate's conclusions for the magistrate's reasons, it makes sense to adopt the report, sparing everyone another round of paper."); *Bratcher v. Bray-Doyle Independent School Dist. No. 42 of Stephens County, Okl.*, 8 F.3d 722, 724 (10th Cir. 1993) ("*De novo* review is statutorily and constitutionally required when written objections to a magistrate's report are timely filed with the district court . . . The district court's duty in this regard is satisfied only by considering the actual testimony [or other relevant evidence in the record], and not by merely reviewing the magistrate's report and recommendations . . . On the other hand, we presume the district court knew of these requirements, so the express references to *de novo* review in its order must be taken to mean it properly considered the pertinent portions of the record, absent some clear indication otherwise . . . Plaintiff contends . . . the district court's [terse] order indicates the exercise of less than *de novo* review . . . [However,] brevity does not warrant

look[ing] behind a district court's express statement that it engaged in a *de novo* review of the record."); *Murphy v. International Business Machines Corp.*, 23 F.3d 719, 722 (2nd Cir. 1994) ("We . . . reject Murphy's procedural challenges to the granting of summary judgment . . . Murphy's contention that the district judge did not properly consider her objections to the magistrate judge's report . . . lacks merit. The judge's brief order mentioned that objections had been made and overruled. We do not construe the brevity of the order as an indication that the objections were not given due consideration, especially in light of the correctness of that report and the evident lack of merit in Murphy's objections."); *Gonzales-Perez v. Harper*, 241 F.3d 633 (8th Cir. 2001) ("When a party timely objects to a magistrate judge's report and recommendation, the district court is required to make a *de novo* review of the record related to the objections, which requires more than merely reviewing the report and recommendation . . . This court presumes that the district court properly performs its review and will affirm the district court's approval of the magistrate's recommendation absent evidence to the contrary . . . The burden is on the challenger to make a *prima facie* case that *de novo* review was not had."); *Brunig v. Clark*, 560 F.3d 292, 295 (5th Cir. 2009) ("Brunig also claims that the district court judge did not review the magistrate's report *de novo* . . . There is no evidence that the district court did not conduct a *de novo* review. Without any evidence to the contrary . . . we will not assume that the district court did not conduct the proper review.").[3]

[3] *See also Pinkston v. Madry*, 440 F.3d 879, 893-894 (7th Cir. 2006) (the district court's assurance, in a written order, that the court has complied with the *de novo* review requirements of the statute in reviewing the magistrate judge's proposed findings and recommendation is sufficient, in all but the most extraordinary of cases, to resist assault on appeal; emphasizing that "[i]t is clear that Pinkston's argument in this regard is nothing more than a collateral attack on the magistrate's reasoning, masquerading as an assault on the district court's entirely acceptable decision to adopt the magistrate's opinion . . ."); *Garcia v. City of Albuquerque*, 232 F.3d 760 (10th Cir. 2000) ("The district court's order is terse . . . However, neither 28 U.S.C. § 636(b)(1) nor Fed.R.Civ.P. 72(b) requires the district court to make any specific findings; the district court must merely conduct a *de novo* review of the record . . . It is common practice among district judges . . . to [issue a terse order stating that it conducted a *de novo* review as to objections] . . . and adopt the magistrate judges' recommended dispositions when they find that magistrate judges have dealt with the issues fully and accurately and that they could add little of value to that analysis. We cannot interpret the district court's [terse] statement as

CONCLUSION

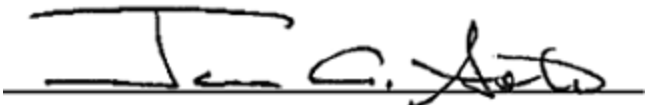
Accordingly, IT IS HEREBY ORDERED as follows:

(1) United States Magistrate Judge Ferraro's Report and Recommendation is accepted and adopted in its entirety.

(2) Defendant's objections are rejected.

(3) Defendant's motions to suppress statements (Doc. 88), to suppress evidence following unlawful seizure and arrest (Doc. 89), and to dismiss the indictment (Doc. 94) are DENIED.

Dated this 15th day of March, 2021.



Honorable James A. Soto
United States District Judge

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establishing that it failed to perform the required *de novo* review . . . We hold that although the district court's decision is terse, this is insufficient to demonstrate that the court failed to review the magistrate's recommendation *de novo*."); *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995) ("The district court is required to conduct a *de novo* determination of those portions of the magistrate judge's report and recommendations to which objections have been filed. But this *de novo* determination is not the same as a *de novo* hearing . . . [I]f following a review of the record the district court is satisfied with the magistrate judge's findings and recommendations it may in its discretion treat those findings and recommendations as its own.")

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Demetrius Verardi Ramos, Defendant.	No. CR-20-00051-002-TUC-JAS (DTF) **ORDER**

Pending before the Court are Defendant's Motion for Production of Address and Phone Number (Doc. 222) and Motion to Reconsider Order Adopting Report and Recommendation of Magistrate (Doc. 239).

Motion for Production of Address and Phone Number

Defendant requests that the Court order the disclosure of Retired Border Patrol Agent Robert Marrufo's address and phone number. Defendant intends to call Marrufo as a witness so that the jury can evaluate the voluntariness of Defendant's statements. The Court will grant the motion. However, the Court wishes to make clear that it will not relitigate the suppression issue addressed by the Report and Recommendation (Doc. 205), which the Court adopted in its entirety (Doc. 237). The precise portions of Defendant's recorded interview that shall be admitted is the subject of a motion work in this case and shall be addressed separately.

Motion to Reconsider Order Adopting Report and Recommendation of Magistrate

Defendant request that the Court reconsider its order adopting the report and

recommendation issued by Magistrate Judge Ferraro. Defendant argues that the Court failed to conduct a *de novo* review. *See* 28 U.S.C. § 636(b)(1)(C). However the Court did, in fact, conduct a *de novo* review and stated so several times in its order:

> As to the objections filed by Defendant, the Court has conducted a *de novo* review of the record. . . . In addition to reviewing the Report and Recommendation and any objections and responsive briefing thereto, the Court's *de novo* review of the record includes review of the record and authority before United States Magistrate Judge Ferraro which led to the Report and Recommendation in this case. . . . Upon *de novo* review of the record and authority herein, the Court finds Defendant's objections to be without merit, rejects those objections, and adopts United States Magistrate Judge Ferraro Report and Recommendation in its entirety.

Defendant contends that no facts or points of law were discussed. However, as the Court's order made clear, "[i]t is common practice among district judges . . . to [issue a terse order stating that it conducted a *de novo* review as to objections] . . . and adopt the magistrate judges' recommended dispositions when they find that magistrate judges have dealt with the issues fully and accurately and that they could add little of value to that analysis." *Garcia v. City of Albuquerque*, 232 F.3d 760 (10th Cir. 2000). "The district court is required to conduct a *de novo* determination of those portions of the magistrate judge's report and recommendations to which objections have been filed. But this *de novo* determination is not the same as a *de novo* hearing . . . . [I]f following a review of the record the district court is satisfied with the magistrate judge's findings and recommendations it may in its discretion treat those findings and recommendations as its own." *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995).

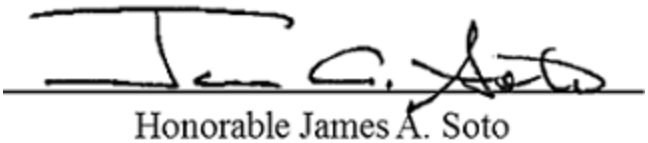
In adopting the report and recommendation, the Court reviewed not only the recommendations but the complete record in the case, the authorities relied on in the report and recommendation, and all other pertinent authority. Defendant's argument that the Court did not conduct a *de novo* review directly contradicts this Court's repeated, explicit statements and the relevant law. Accordingly,

IT IS ORDERED GRANTING Defendant's Motion for Production of Address and Phone Number (Doc. 222). The Government shall provide Agent Marrufo's address and

phone number to Defendant.

IT IS ORDERED DENYING Defendant's Motion to Reconsider Order Adopting Report and Recommendation of Magistrate (Doc. 239).

Dated this 19th day of March, 2021.



Honorable James A. Soto
United States District Judge

Appendix G

FILED

JUN 20 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DEMETRIUS VERARDI RAMOS, AKA Demetrius Ramos, Defendant-Appellant.	No. 21-10184 D.C. Nos. 4:20-cr-00051-JAS-DTF-2 4:20-cr-00051-JAS-DTF District of Arizona, Tucson ORDER

Before: BYBEE, OWENS, and COLLINS, Circuit Judges.

Judges Bybee and Owens have voted to deny the petition for panel rehearing. Judge Collins has voted to grant the petition for panel rehearing.

Judge Owens has voted to deny the petition for rehearing en banc, and Judge Bybee so recommends. Judge Collins recommends granting the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.