Docket Number: _____

IN THE UNITED STATES SUPREME COURT

Yanier N. Tellez, *Petitioner*

v.

United States of America, *Respondent*

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question for Review

During a routine traffic stop, Petitioner consented to the search of his car by a law enforcement officer. The officer, upon concluding the search, asked Petitioner if he had his wallet. Petitioner clarified the question then answered that he did have his wallet and reached for it in his back pocket. While Petitioner had the wallet in his hand, and it possibly had been partially removed from his pocket, the officer stated. "Let me see it for a moment" then took it from Petitioner's hand. The ensuing search of the wallet extended the investigation which revealed incriminating information.

Petitioner, arguing that the warrantless wallet search was unreasonable, sought to suppress the evidence recovered as a result of the wallet search. The District Court Denied the Motion to Suppress. A panel of the Sixth Circuit Court of Appeals voted 2-1 to uphold the District Court's denial holding the District Court did not commit clear error.

> Was the District Court's denial of Petitioner's Motion to Suppress a result of clear error in determining the facts relative to consent for search versus acquiescence to apparent lawful authority?

Parties to the Proceeding

All Parties to this proceeding appear on the cover page of this Petition for Writ of Certiorari and are listed in the caption.

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Constitutional and Statutory Provisions Cited

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Citations to Opinions and Orders Below

a. The Judgment of the United States Court of Appeals for the Sixth Circuit appears at Appendix A and is reported as follows:

United States v. Tellez, 86 F. 4th 1148 (6th Cir. 2023).

b. The Judgment of the United States District Court for the Eastern District of Tennessee appears at Appendix B and is unpublished.

c. The Memorandum Opinion and Order Denying Motion to Suppress by the United States District Court for the Eastern District of Tennessee appears at Appendix C and is unpublished.

Jurisdictional Statement

Petitioner timely filed a Notice of Appeal form the final judgment of the United States District Court for the Eastern District of Tennessee pursuant to 28 U.S.C. § 1291. The Sixth Circuit Court of Appeals heard the appeal as it has jurisdiction over cases appealed from the Eastern District of Tennessee pursuant to 28 U.S.C. § 41.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 17, 2023. No petition for rehearing was filed in the Sixth Circuit. This petition is being filed on or before ninety (90) days following entry of the judgment.

The United States Supreme Court has jurisdiction to consider this matter as conferred under 28 U.S.C. § 1254(1).

The Constitutional Provisions Involved

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. Amend. IV.

Statement of the Case

Yanier Nelson Tellez-Crespo ("Petitioner") was pulled over on November 14, 2017 by Deputy George Camacho of the Lee County Florida Sheriff's Department for failure to maintain his lane of travel. (R. 89, Suppression Hearing, Page ID # 477 and Appendix D) The stop took place on Interstate 75 between Tampa Florida and Miami Florida. (*Id.*) The entire episode was captured on audio and video by a series of cameras installed on Deputy Camacho's patrol vehicle. (*Id.* at Page ID # 476) Petitioner and Deputy Camacho communicated in Spanish during the traffic stop. (*Id.* at Page ID # 477)

Deputy Camacho removed Petitioner and his passenger from the vehicle then conducted the business of the stop. (*Id.* at Page ID # 478) After announcing that Petitioner would be issued a warning ticket, Deputy Camacho requested consent to search the vehicle previously occupied by Petitioner and his passenger. (*Id.* at Page ID # 484) Petitioner indicated that Deputy Camacho was welcome to search the vehicle. (*Id.*) Deputy Camacho then explicitly verified that Petitioner had given consent to search the vehicle. (*Id.*)

The Deputy performed a search of the vehicle which revealed the presence of some expensive-looking consumer goods such as clothes, shoes, and an iPad. (*Id.* at Page ID # 486) While the Deputy apparently became suspicious of some manner of criminal activity as a result of locating the items in the car, he nonetheless did not detect any contraband or other items which were illegal in appearance. (*Id.* at Page ID # 486 – 487)

The Deputy returned to the front of his patrol vehicle where he engaged Petitioner in another discussion. During the discussion with Petitioner, Deputy Camacho asked Petitioner if he had his wallet with him. (*Id.* at 546) Petitioner responded initially with "What?" to which the Deputy responded verifying he wanted to know if he had his wallet. (*Id.* at Page ID # 546 – 547) Petitioner indicated that he did have his wallet then reached into his back pocket. (*Id.* at Page ID # 547) In the motion of Petitioner grabbing his wallet and prior to handing it over, Deputy Camacho says to Petitioner, "Let me see it for a moment." (*Id.* at Page ID # 546 - 548) Deputy Camacho testified that he was directing Petitioner to give him the wallet. *Id.* at Page ID # 548. Petitioner handed over the wallet to Deputy Camacho as directed. (*Id.*) Deputy Camacho testified that he got access to the wallet contrary to the manner in which he got access to the car. (*Id.*)

Upon seizing the wallet, Deputy Camacho immediately undertook a search of the wallet's contents without inquiry as to whether Petitioner consented to a search of its contents. (*Id.* at Page ID # 548 – 549) The Deputy's search of the wallet revealed several plastic cards of the type commonly used as "gift cards" which contain a magnetic strip. (*Id.* at Page ID # 549) The magnetic strip often contains a series of numbers which correspond to the numbers written on the outside of the card. Deputy Camacho noticed a series of numbers on the cards which caused him to suspect that the numbers were five (5) digit postal zip codes. (*Id.* at Page ID # 516) Deputy Camacho asked for permission to scan the cards on a device in his patrol vehicle to verify that the numbers encoded on the magnetic strips were the same as indicated on

the outside of the cards. (*Id.* at Page ID # 513 – 514) During the interaction involving the wallet and cards, Deputy Camacho reiterated that Petitioner indicated the cards could be scanned, and then Petitioner stated he no longer gave permission for the Deputy to conduct a scan of the cards. (*Id.* at Page ID # 515) Deputy Camacho testified that the scan of the cards indicated they were fraudulent. (*Id.* at Page ID # 521) Petitioner was then arrested for possession of counterfeit credit cards under Florida law. (R. 66, PSR, Page ID # 262)

Subsequent searches revealed the presence of websites used to identify which banks certain account numbers are associated with on Petitioner's phone and several USB drives which contain bank account numbers inside the vehicle driven by Petitioner. (Id. at Page ID # 525 and 527) The Florida charges were dismissed in March 2018. (Id.)

On November 18, 2020, the Grand Jury for the United States District Court for the Eastern District of Tennessee charged Tellez and a codefendant who was not present at the Florida traffic stop in 2017, with a series of offenses including Conspiracy to Commit Bank Fraud & Aggravated Identity Theft (18 U.S.C. § 371, 18 U.S.C. §§ 1344(2) and 1028(a)(1)), Bank Fraud (18 U.S.C. § 1344(2)) and Aggravated Identity Theft (18 U.S.C. § 1028A(a)(1)). (R. 3, Indictment, Page ID # 3 – 12)

Petitioner was arrested on October 2, 2021 and has remained in custody. (R. 17, Detention Order, Page ID # 59 – 66) During the months that followed Petitioner's arrest, both his defense team and the United States prepared for trial which was to be held April 5, 2022. The deadline to file pretrial motions expired in December 2021. (R.

12, Scheduling Order, Page ID # 45) On or about March 10, 2022, the United States disclosed the materials at issue in this appeal. (R. 88, Continuance Hearing Transcript, Page ID # 451) Prior to trial preparations, it appears the United States was not aware of the November 17, 2017 traffic stop in Florida until shortly before March 10, 2022. (*Id.*) The connection between the traffic stop in question and the indicted charges became apparent when the USB drives searched and analyzed following the arrest of Petitioner in 2017 were alleged to contain account numbers and identifying information for some of the alleged victims associated with the charges in the 2020 Eastern District of Tennessee Indictment. (*Id.* at Page ID # 447)

Ultimately, the district court allowed Petitioner to late-file a Motion to Suppress evidence obtained during the traffic stop. (*Id.* at Page ID # 453 – 454) The Motion to Suppress asserted that the search of Petitioner's wallet was unreasonable under the Fourth Amendment and the evidence obtained later as a result of the search should be suppressed. (R. 53, Motion to Suppress, Page ID # 198 – 202) The district court held a hearing on the morning of the scheduled trial and denied the Motion to Suppress. The district court then allowed Petitioner and counsel to confer on Petitioner's wishes as to trial after denial of the Motion to Suppress. (R. 89, Suppression Hearing, Page ID # 576 – 577) Petitioner elected to plead guilty to all five counts in the Indictment. (R. 59, Change of Plea Minutes, Page ID # 230)

Argument for Granting the Writ

Was the District Court's denial of Petitioner's Motion to Suppress a result of clear error in determining the facts relative to consent for search versus acquiescence to apparent lawful authority?

The search at issue in this controversy resulted from Petitioner's acquiescence to apparent lawful authority and the facts require that to find otherwise would amount to clear error. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . U.S. Const. Amend. IV. A search conducted without a warrant issued upon probable cause is per se unreasonable, subject only to a few specifically established and well-delineated exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). One established exception to the requirement of both a warrant and probable cause is a search conducted pursuant to consent. *Id.* To establish consent as an applicable exception, the prosecution must demonstrate that the consent was voluntarily given, and not the result of duress or coercion, express or implied. *Id.* at 248. "Where there is coercion there cannot be consent." *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) "Consent will not be found upon mere acquiescence to a claim of lawful authority." *Id.* at 548 – 549. The consent exception is "jealously and carefully drawn." *Jones v. U.S.*, 357 U.S. 493, 499 (1958).

The decision of the Sixth Circuit Court of Appeals to affirm the District Court's denial of Petitioner's Motion to Suppress poses far reaching dangers to the sanctity of the Fourth Amendment. "It is the duty of the court to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. U.S.*, 116 U.S. 616, 635 (1886). Consideration of this matter reveals just such a stealthy encroachment.

Constitutional guarantees, such as the guarantee of freedom from unreasonable searches and seizures, are precious to a society of free choice. The case before The Court presents a compelling question of individual rights in the light of apparent law enforcement authority. At the district court, Petitioner sought to have certain inculpatory evidence suppressed on grounds of an unreasonable search in violation of the Fourth Amendment. The record is complete to the extent necessary to determine the salient facts.

The Supreme Court reviews a district court's factual findings under the deferential clear error standard. *Glossip v. Gross*, 576 U.S. 863, 881 (2015). The clear error standard does not entitle one to have a finding overturned simply because the Court is convinced it would have decided the case differently. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Petitioner had no more right to refuse to hand over his wallet to Deputy Camacho for a search than he did to refuse to pull his car to the side of the road in the first place. The uncontroverted testimony of Deputy Camacho established the necessary facts to decide the question presented at the Suppression Hearing.

Both the district court and a majority of the Sixth Circuit panel concluded that the Officer's question "Do you have your wallet?" implied a request for consent. The majority further concluded that "[b]y reaching for his wallet and then holding it out towards the officer, Tellez demonstrated his understanding of the officer's desire to search the item." *U.S. v. Tellez*, 86 F. 4th 1148, 1152 (6th Cir. 2023). We are not forced to disagree with these findings to prevail though we dispute whether Petitioner ever held his wallet out towards the officer prior to being directed to do so. Deputy Camacho himself testified at the suppression hearing that he directed Petitioner to give him Petitioner's wallet as he was reaching for it and prior to handing the wallet over. (R. 89, Suppression Hearing, Page ID # 547 - 548) Petitioner's understanding of Deputy Camacho's desire to search the item, much like the officer's obvious desire for him to pull his car to the side of the highway in response to blue lights, is consistent with his acquiescence, we argue, to the authority of a law enforcement officer directing he take certain action.

Petitioner's Motion to Suppress did not assert that every search and every seizure which occurred during the traffic stop were unreasonable. First, the traffic stop itself, a seizure based on probable cause resulting from Camacho's observation of a traffic violation, was consistent with The Court's prior holding in *Whren v. United States*, 517 U.S. 806, 809 - 810 (1996). Second, the search of Petitioner's vehicle resulted from Deputy Camacho's obtaining consent from Petitioner, a recognized exception to the warrant requirement. Deputy Camacho expressly asked for consent to search the car, going so far as to verify that Petitioner consented, before proceeding.

(R. 89, Suppression Hearing, Page ID # 477 and Appendix D) The remaining searches, and their bounty, beginning with the wallet search and concluding with the USB drive searches are tainted by the unreasonable wallet search.

When the subject of a search is not in custody and the prosecution attempts to justifiy a search on the basis of consent, the prosecution must establish that consent was voluntarily given and not the result of duress or coercion, express or implied. *Schneckloth, at* 248. Individuals must give consent to search "unequivocally, specifically, and intelligently" for a warrantless search to surmount the constitutional hurdle. *U.S. v. Worley*, 193 F.3d 380, 386 (6th Cir. 1999). Voluntariness is a question of fact to be determined from all the circumstances and knowledge of the right to refuse is a factor to be considered. (*Id.* at 249) When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. *Bumper*, at 548.

The contrasted with the consent search of Petitioner's car the circumstances of the wallet contrast with the findings of the district to such a degree, the factual findings of the district court are clearly erroneous. Petitioner advised of his consent to the search of the vehicle earlier in the detention than the wallet. In the later "wallet" scenario, the officer does not expressly ask for consent to search the wallet but directs Petitioner to let him see it for a moment. The demand to let Camacho "see" the wallet which followed questioning into the source and nature of personal items in the car which were observed during the search of the car signaled a change in the nature of the encounter.

The Sixth Circuit has continually held that consent must be proven by clear and positive testimony, and, to be voluntary it must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion. *U.S. v. Scott*, 578 F.2d 1186, 1188 - 1189 (6th Cir. 1978) The Sixth Circuit, concedes in its opinion that: "True, the officer's precise wording --- "Let me see [the wallet] for a moment" --- could, in some contexts, perhaps be viewed as a command." *Tellez*, at 1153. The majority ultimately found no clear error for the district court to find otherwise. (*Id.*) We respectfully suggest that Deputy Camacho's testimony wherein he admits that he "directed" Petitioner let him have the wallet is clearly and unequivocally a command. Deputy Camacho's stated demands for the wallet approximately 15 minutes into an investigatory detentions requires the conclusion that when viewing these facts in the light most favorable to the United States that Petitioner acquiesced to the apparent lawful authority of the uniformed law enforcement officer before him.

The Sixth Circuit found that Petitioner exhibited "telltale signs of a consented-to search" by "reaching for" his wallet and then "handing the item over to the officer." 6. The record, as demonstrated by the testimony of Deputy Camacho and the video of the encounter, does not support a finding that Tellez gave the wallet but rather it was taken from him. The officer additionally did not *ask* to see Petitioner's wallet. The officer *told* him to let him see it for a moment. (R. 89, Suppression Hearing, Page ID # 548 and *Tellez*, at 1157) Asking for consent and demanding consent in this context are strikingly different findings and only one of which may be found in the facts here.

Consent need not be verbal and may be communicated through gestures or conduct. *U.S. v. Carter,* 378 F.3d 584, 587 (6th Cir. 2004). Had Petitioner extended his hand with wallet inside in response to Deputy Camacho *asking* "May I see it for a moment?" the argument here would not overcome the fact that consent may be established through gestures or conduct. However, the Sixth Circuit was in clear error when it found that "[Petitioner] indicated that he [had his wallet], first by reaching for it, and then handing the item over to the officer --- telltale signs of a consented-to search." *Tellez,* at 1152. The courts below ignore the command of the officer to "Let me see it for a moment" prior to taking the wallet from Petitioner's hand. The Sixth Circuit clearly erred by finding that the Deputy Camacho "asked" Petitioner if he could see Petitioner's wallet in the first place. The record is devoid of Deputy Camacho asking for consent to search the wallet at all. The record is, however, sufficient to demonstrate that Deputy Camacho was "directing" Petitioner to "give [Deputy Camacho] the wallet" according to Deputy Camacho's sworn testimony. (R. 89, Suppression Hearing, Page ID # 548 and *Tellez*, at 1157)

The Hon. Judge Karen Nelson Moore, correctly distinguished the district court's conclusion in clear error that Petitioner had been asked for permission to search the car immediately prior to the wallet search and in the same way as the wallet search. *Tellez*, at 1158. The dissent also correctly determined that to view these two interactions in the same way amounted to clear error. *Id.* at 1159. Deputy Camacho expressly asked for permission to search the car and received permission. The search

of the wallet was not preceded by an express request for consent but by a command to "let" him, a uniformed law enforcement officer, do something.

An imperative command to "let me see it for a moment" with regard to the wallet cannot be contrived in any reasonable fashion to then result in consent to hold the wallet or search its contents. Deputy Camacho failed to inform Petitioner of his intent to search the wallet prior to doing so but it should make no difference once he made his demand. Mere acquiescence to a show of authority, like the Officer's imperative command here, falls short of the demanding standard for establishing voluntary consent. *Worley*, at 386.

The circumstances of the stop were not overtly hostile or coercive until the demand for the wallet. A traffic stop which had lasted approximately fifteen minutes is not insignificant in terms of time for an investigatory detention. No reasonable person would then and there feel free to terminate the encounter under the circumstances Petitioner experienced. *U.S. v. Richardson*, 385 F.3d 625, 629 – 630 (6th Cir. 2004). Due to the length of the detention and the change in demeanor of Deputy Camacho from asking for permission to search to demanding the wallet, further action on the part of Petitioner must then only have been in acquiescence to the apparent lawful authority of the deputy.

Knowledge of the right to refuse a request for consent is irrelevant to the question presented here. The finding contrary to this determination is in clear error. Petitioner's attempt to withdraw consent to the scanning of the cards indicates he did not wish to have them scanned certainly. However, the Sixth Circuit has held that

swiping a card is not a search under the Fourth Amendment. *U.S. v. Bah,* 794 F.3d 617, 630 (6th Cir. 2015) Knowledge of a right to refuse is "highly relevant to the determination that there had been consent." *U.S. v. Mendenhall,* 446 U.S. 544, 558 - 559 (1980). Temporary detention of individuals during the stop of an automobile by the police constitutes a seizure of persons within the meaning of the Fourth Amendment. *Whren,* at 809 - 810. Without a request for consent to search the wallet, knowledge of the right to refuse is irrelevant. As he was directed to let Deputy Camacho see his wallet for a moment, he had no more right to refuse the apparent law enforcement authority than he would have had he refused to pull over in the first place for the investigatory stop.

One who, upon the command of a law enforcement officer to act, acquiesces in obedience to such a request, no matter what language is used in the acquiescence, is but showing a regard for the supremacy of the law. *Bumper*, at n. 14 citing *Meno v. State*, 164 N.E. 93, 96 (Ind. 1925).

In a case cited by the Sixth Circuit in its opinion, *Gale v. O'Donohue,* 824 F. App.'x 304 (6th Cir. 2020), the defendant had been expressly informed of the officer's intent to search by a question as opposed to the supposed implied request here to search Petitioner's wallet. In *Gale*, the police had undertaken a brief investigatory stop of the subject and expressly asked to search and received "absolutely" in response to the request to search before proceeding to remove the subject's wallet from his pocket themselves. *Gale,* at 307. We submit this unpublished opinion cited earlier in support

of the finding of consent does more to support the argument for acquiescence to apparent lawful authority.

Assertion of law enforcement authority to search and acquiescence thereto has been found when, unlike in Petitioner's case, the subject of the search was under no investigatory detention at all. For example, when an officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. *Bumper*, at 550. Likewise, when an officer directs that he be handed a subject's wallet even "for a moment" the subsequent search of the wallet is tainted with coercion. Petitioner's position is further strengthened by contrasting *Bumper* wherein the occupant of the premises to be searched was under no Fourth Amendment seizure and here where Petitioner was under a roadside investigatory detention that had already lasted around fifteen minutes.

The Fourth Amendment to the Constitution exists for the express purpose of guarding individuals from unreasonable searches. Once an officer has made a show of authority, like issuing the imperative command here or announcing the authority of a search warrant as in *Bumper*, an individual cannot provide voluntary consent as required by the Constitution simply by complying with the command. The record and the precedent of The Court as discussed herein make abundantly clear, the seizure of the Petitioner's wallet was presumptively unreasonable and there exists no exception which might overcome this presumption. Petitioner's consent to the search of his wallet may not be found, considering the evidence in the light most favorable to the government, unless by clear error. Having established the facts and applicable law,

The Court should be left with the "definite and firm conviction that a mistake has been committed." *U.S. v. Loines*, 56 F.4th 1099, 1105 (6th Cir. 2023). The wallet search and searches conducted as a result of the wallet search produced evidence in violation of the Fourth Amendment. Evidence obtained by searches and seizures in violation of the Constitution is constitutionally inadmissible in state court and federal courts. *Mapp v. Ohio*, 367 U.S. 643 (1961). The judgments are in clear error.

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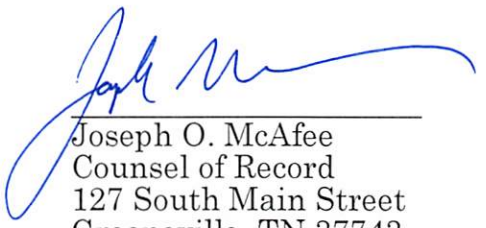
Conclusion

Wherefore, Petitioner hereby asks the Court to grant this request for a *writ of certiorari* and to place this case on the docket to be fully heard on the merits. Upon granting of the writ, we request the judgment of the district court denying the Motion to Suppress be reversed and the matter remanded for a new trial. 28 U.S.C. § 2106.

Respectfully Submitted,



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