No. 16-1009

In the Supreme Court of the United States

MURAT AKSU,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of the State of California, for the County of Ventura, Appellate Division

BRIEF OF THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE *AMICUS CURIAE* IN SUPPORT OF PETITION

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae The National Association of Public Defense (NAPD)[1] is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are the advocates in jails, in courtrooms, and in communities. They are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of indigent defense services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, misdemeanor, felony, capital, and appellate offices, and through a diversity of traditional and holistic practice models.

With reference to the Fourth Amendment right to be free from unreasonable searches and seizures, NAPD has been a leader in training public defenders to vigorously defend their clients' rights. To this end, NAPD hosts annual conferences where suppression advocacy is addressed, conducts frequent webinars on Fourth Amendment topics, and otherwise provides training to its members with respect to challenging

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[1] Pursuant to Rule 37, counsel note this brief was not authored by counsel for either party, and neither the parties nor their counsel have made any monetary contributions to the preparation or submission of this brief. The law firm of Nixon Peabody LLP undertook the printing and filing of this brief on a pro bono basis. After timely notice, the parties have consented to the filing of this brief.

warrantless searches through motions to suppress both at the trial level and on appeal. Accordingly, NAPD has a strong interest in the issues raised in this case.

SUMMARY OF THE ARGUMENT

NAPD submits this brief in support of the Petition which seeks to clarify the appellate standard of review that applies to a trial court's conclusion that an individual voluntarily consented to a warrantless search. Criminal defense lawyers and their clients face real and systemic problems arising from the lack of a consistent, articulable standard of review for evaluating consent searches. Some appellate courts treat a determination that the defendant voluntarily consented to a search as a finding of fact and subject it only to clearly erroneous review, while other appellate courts view that determination as a mixed question of law and fact and review it *de novo*. In a close case, the difference in the standard of review may dictate the outcome.

The question of whether the accused or someone else voluntarily consented to a warrantless search arises with regularity in criminal proceedings and often assumes a central or even dispositive role in the case. Where the lawfulness of the search is objectively brought into question, a well-taken suppression motion may translate into materially more lenient plea offers. In some cases, the decision to accept a plea or go to trial, as well as the decision to appeal after a trial, will be tied directly to defense counsel's evaluation of the strength of the suppression motion. This includes how the trial court's findings will be treated on appeal. For example, in jurisdictions where the appeals court reviews the trial court's ruling for clear error, rather

than *de novo*, defense counsel is likely to view the suppression motion as rising or falling solely in the trial court. This is so because appellate courts looking for clear error will rarely disturb a trial court's finding that an individual voluntarily consented to a search. In these cases, public defenders may compensate for less robust review on appeal by more vigorous advocacy in the trial court. On the other hand, in jurisdictions where suppression motions are reviewed *de novo* on appeal, defense attorneys may be more likely to enter into conditional pleas, permitting an appeal if they are unsuccessful at challenging consent searches. Thus, on a pragmatic level, the consequences of disparate standards of review are tangible, and the lack of a consistent appellate standard impacts the advice and advocacy public defenders provide their clients.

This Court should provide defense counsel—and the accused, whose life and liberty are at stake—with a clear, uniform standard of review that can guide these important decisions. The adjudication of suppression motions gives concrete meaning to the promise of constitutionally-protected liberty interests under the Fourth Amendment. It is only through such motions that our justice system ensures freedom from unreasonable searches and seizures.

In the case of our Fifth Amendment rights to be free of coerced confessions, the nation's appellate courts speak with one voice: they all apply *de novo* review to any determination that the defendant voluntarily confessed. That makes sense. The same uniform standard of review logically should apply to the determination that an individual voluntarily consented to a search.

But that is not the case. Unfortunately, state and federal courts do not speak with one voice when it comes to appellate review of decisions regarding the consent to search. The judicial variability in the standard of review exists across state and federal courts, with some courts issuing decisions that are either obtuse or self-contradictory, as different panels within the same court disagree as to the correct appellate standard. For NAPD's members, this uncertainty presents a great challenge in advising clients about the likelihood of a suppression motion being granted either by the trial court or on appeal. By clarifying the standard of review applicable to consent searches, the Court would also in a sense preserve the protected Sixth Amendment right to counsel, by equipping public defenders with the clarity they need to adequately advise, represent, and advocate for their clients. As such, this case commands the Court's review.

ARGUMENT

I. The Impact on Representation: How The Murkiness of the Standard of Review Impairs Representation and Hurts Defendants.

Public defenders around the country regularly encounter warrantless searches where the government relies on voluntary consent to overcome the absence of a search warrant. In each such case where the standard of review is unsettled on its face or in its application, the lack of clarity has a major impact on: (1) the public defender's ability to counsel clients, and (2) the client's ability to make an informed decision.

This has both Fourth Amendment and Sixth Amendment implications.

Public defenders owe a duty of competent representation to their clients. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984); ABA Criminal Justice Standards for the Defense Function 4-1.2(b) (4th Ed.) ("[t]he primary duties that defense counsel owe to their clients…are to serve as their clients' counselor and advocate with courage and devotion [and] to ensure that constitutional and other legal rights of their clients are protected."). Indeed, the client's right to effective assistance of counsel means nothing if the attorney assigned is not adequately equipped, with both knowledge and resources, to represent the client. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1986). To be sure, the right to counsel is fundamental because it ensures that our adversarial criminal legal proceedings are fair and that resulting judgements are viewed as having legitimacy. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1984). As this Court's Chief Justice rightly observed, "[P]rosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers—one at a time." *Kaley v. United States*, 134 S. Ct. 1090, 1114 (2013) (Roberts, C.J., dissenting).

The Court has insisted that criminal defense lawyers have a Sixth Amendment "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. That "skill and knowledge" includes identifying, investigating, and litigating motions to suppress illegally seized evidence. *Kimmelman*, *supra*; *see also* National Legal Aid and Defender Assn.,

Performance Guidelines for Criminal Defense Representation § 5.1-5.3 (1995) (emphasizing importance of pretrial motions, including suppression motions). The same interests are protected by the due process right to present a complete defense, that is, to confront and contest the prosecution case at every phase of the proceedings and through all available legal avenues. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Equally crucial to the fairness and legitimacy of criminal proceedings are counsel's duties to advise the client "with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome," ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a) (3d Ed. 1993). This duty is closely related to counsel's obligation of keeping the client abreast of developments in the case. This includes issues related to the litigation of suppression motions, that will help the client "to make informed decisions" about his or her case. *Id*.; ABA Standard 4.3-8; *Padilla v. Kentucky*, 559 U.S. 356, 366-367 (2010) ("[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides" to defining the substantive meaning of the right to counsel (internal citations omitted)).

The Court should grant certiorari in the instant case because the fulfillment of these fundamental rights and duties is being hindered unnecessarily by the deep divisions across the country regarding the applicable standard of review on appeal of Fourth Amendment suppression claims. The need for clarity is heightened by empirical analysis revealing that, despite the marginal success rates of suppression

motions at trial, *see* Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. Ill. L. Rev. 223, 226 (1987), these motions nevertheless play a crucial role in defendants' exercise of their fundamental right to go to trial versus pleading guilty and underscore the need for accurate advice on the implications of filing, litigating, and appealing such motions. *See id*. at 237-238.

The need for clarity on the issue before this Court is particularly keen in the vast majority of criminal cases that involve public defenders. *See, e.g.*, Caroline Wolf Harlow, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=772 [http://perma.cc/54XC-TNMS] (estimating that eighty-two percent of criminal defendants facing felony charges cannot afford to hire counsel). This is so because, in fulfilling client rights and reciprocal duties to offer sound advice about the prospects for success in litigating a suppression motion, and on the crucial implications of that litigation for the decision to plead guilty or go to trial, public defenders face enormous hurdles in establishing and building the trust and open communication that serves as a foundation for providing that advice and ensuring that indigent defendants can hear and act upon it. To put it bluntly, a "Public Pretender" stereotype taints far too many relationships between indigent defendants and their lawyers. *See* Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 Yale Rev. L. & Soc. Action 4 (1971). Empirical research documents the distrust that many indigent defendants have toward state-provided

counsel, whether those lawyers are viewed as being partners in the prosecution, as simply being incompetent, or as being so overworked and underresourced that they cannot fulfill the basic duties to communicate, investigate, and advocate. *See, e.g.,* Christopher Campbell et al., *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of their Public Defenders*, 33 Behav. Sci. Law 751, 762-764 (2015); *see also* Marla Sandys & Heather Pruss, *Correlates of Satisfaction Among Clients of a Public Defender Agency*, 14 Ohio State J. Crim. L. 431, 455 (2017) (demonstrating importance to defendants of core rights to communication, investigation, and advocacy by public defense lawyers). Client concerns about the competency and effectiveness of public defenders are heightened if the appointed attorney cannot explain the standard of appellate review or offer a reasonable prediction of the outcome of the appeal.

Regrettably, the judicial morass that exists with respect to the standard of review for consent searches (*see* Petitioner Murat Aksu's Petition for a Writ of Certiorari at 15-25) leaves public defenders ill-equipped to offer advice. Take, for example, a federal public defender in the Fourth Circuit who must explain to a client the standard of review that will be applied by the court of appeals after the district court rules on the client's suppression motion challenging a consent search. The law in the Fourth Circuit is incredibly fractured as to how appellate panels treat appeals of consent searches. *Compare United States v. Robertson*, 736 F.3d 677, 680 (4th Cir. 2013), and *United States v. Carter*, 300 F.3d 415, 423 (4th Cir. 2002). *See* Argument Point II, *infra*. Some judges in that circuit apply a variation of the "clearly erroneous" standard

that recognizes a legal element in the analysis, and will in effect (if not in name) apply a deferential standard to the historical facts and *de novo* review to the ultimate legal question of "voluntariness." *See Robertson,* 736 F.3d at 680 (majority). A defense attorney in the Fourth Circuit would have no way to predict how the standard of review will be applied. In this way, the failure of the courts to articulate and apply a consistent standard of review leaves lawyers poorly equipped to advise their clients, and leaves clients without important information that should be available to them in order to make an informed decision about accepting a plea, going to trial, or appealing. Saying to a client "it's a crap shoot" is a poor excuse for legal advice. But it may be the best a public defender can do with the unsettled, conflicting, and unclear standards of review that many appellate courts now apply to voluntariness findings.

Granting the Petition will allow the Court to clarify the legal test for the voluntariness of consent to search and allow state and federal courts to adopt clear and consistent standards of appellate review. This will enable state and federal public defenders to do their jobs, advising clients about an often crucial part of the case, and allow clients to make informed choices. The Court should accordingly accept review of this case to clarify the standard of review that applies to consent searches.

II. A Practical Example: The Fourth Circuit's Split Panel Decision in *United States v. Robertson*

The Fourth Circuit's decision in *United States v. Robertson*, 736 F.3d 677 (4th Cir. 2013), and the district court litigation that preceded it, provide a poignant example of just how disruptive the lack of a concise, defined standard of review for consent searches can be.

A. District Court Denial of Suppression Motion

In *Robertson*, the district court denied the defendant's suppression motion which sought to prevent admission into evidence of a firearm removed from the defendant's waistband during a warrantless search at a bus stop. *United States v. Robertson*, 2011 U.S. Dist. LEXIS 135526 (N.D.N.C. Nov, 22, 2011). The district court heard testimony from live witnesses, including the arresting officer and the defendant. *Id*. at *1-5. In finding the defendant had voluntarily consented to the search of his person, the district court credited the testimony of the arresting officer who conducted the search. *Id*. at *1. The court found the defendant's testimony was not credible. *Id*. at *6. The district court issued a thorough and well-reasoned opinion, according to the dissenting member of the Fourth Circuit panel. *United States v. Robertson*, 736 F.3d, 677, 681 (4th Cir. 2013) (Wilson, J., dissenting). The record established that police responded to a call of "a disturbance involving three black males in white t-shirts chasing another person with a firearm." *Robertson*, 2011 U.S. Dist. LEXIS 135526, at *1-2. The chase occurred in an urban, high crime area. *Id*. at *2,

22. Three police cars carrying four or five officers responded. The arresting officer is of short stature (5'2"). *Id*. at *23; *Robertson*, 736 F.3d at 679. He found the defendant (who is 6'1" tall) seated alone in a bus stop shelter. *Robertson*, 2011 U.S. Dist. LEXIS 135526, at *3. He was sitting apart from several African American men wearing white t-shirts. *Id*. The defendant had on a dark t-shirt. *Id*. The officer stood outside the shelter and said, "Do you have anything illegal on you?" *Id*. He then beckoned with his hand for the defendant to step outside the shelter and come toward the officer while at the same time asking if he could search him. *Id*. The defendant walked several feet toward the officer in response to the officer's hand motion and raised his arms. *Id*. at *4. He apparently did not say anything while doing so. The officer "regarded this as consent." *Id*. At no time did the officer advise the defendant he did not have to consent. *Id*.

The district court acknowledged that the government bore the "burden to prove by a preponderance of the evidence that it obtained the knowing and voluntary consent to search and that the "[g]overnment must shoulder the burden of proving an individual freely and intelligently [gave] unequivocal and specific consent to the search uncontaminated by any duress or coercion, actual or implied." *Id*. at *19.

Reciting the voluntariness standards in *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), and surveying numerous circuit and district court cases, the district court concluded, based on the totality of circumstances, that the government met its burden. *Robertson*, 2011 U.S. Dist. LEXIS 135526 at *7-29. The minimal police

contact was not coercive. The hand motion did not amount to a seizure (*id*. at *18-19) or strip the subsequent search of its consensual nature. *Id*. at *24. The defendant simply cooperated. *Id*. at *24 & n. 9.

These facts present a close question as to the voluntariness of the consent. The closeness of the call is reflected in the length and thoroughness of the district court's opinion, in particular with respect to the officer's non-verbal command with his hand—with the court emphasizing its "careful consideration" of the arguments and case law on this point. *See id*. at *4, 11-19, 24-26.

B. Fourth Circuit 2-1 Reversal

1. Majority opinion

The circuit court reversed the district court's ruling on the suppression motion. The majority purported to apply a clearly erroneous standard of review. *Robertson*, 736 F.3d at 680. The majority accepted the testimony of the arresting officer. The panel found, however, that the testimony did not establish lawful consent, but rather "begrudging submission to a command." *Id*. The majority observed that the "area around the bus shelter was dominated by police officers" (three police cars and five officers with holstered weapons) and the arresting officer was "immediately accusatory." *Id*. "When [the defendant] responded with silence, the officer waved [the defendant] forward and asked to conduct a search." *Id*. The office blocked his path. The majority of the panel believed these facts prevented voluntary consent to be given. *Id*. "[The] officer's initial, accusatory question, combined with the police-dominated atmosphere,

clearly communicated to [the defendant] that he was not free to leave or refuse [the] officer's request to conduct a search." *Id*. The defendant "never gave verbal or written consent but merely surrendered to a police officer's command." *Id*. His "behavior was not a clear-eyed voluntary invitation to be searched; it was a begrudging surrender to [an] Officer's order." *Id*. at 681. The majority therefore reached an altogether different conclusion than the district court based on the same pattern of facts.

2. Dissenting opinion

The dissenting member of the panel agreed that the record could be read as the majority did, but disagreed that such a reading was compelled. *Robertson*, 736 F.3d at 681-682. The dissent stated that "[t]he voluntariness of consent to search is a factual question, and as a reviewing court, we must affirm the determination of the district court unless its finding is clearly erroneous." *Id.* at 681 (quoting *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) (en banc)). The dissent found "the majority's findings and opinion . . . every bit as logical and plausible as . . . the district court's findings and opinion" but reasoned that the clear error standard of review "requires this court to defer to the district court's plausible findings." *Id*. at 682. As the dissent noted, "the question is not whether the court of appeal's 'interpretation of the facts (is) clearly erroneous, but whether the District Court's finding [is] clearly erroneous." *Id*. (citing *Anderson v. City of Bessemer,* 470 U.S. 564, 573-574 (1985)).

C. The Impact of *Robertson*

The Fourth Circuit's decision in *Robertson* highlights the need for a consistent standard of review regarding the factual underpinnings of consent search findings. As one scholar has noted, in *Robertson* and other cases involving consent to search, "there [are] two layers of facts: The facts of what happened, and then the fact of whether the consent was voluntary."[2]

The Fourth Circuit's various pronouncements on the standard of review, and its struggles to apply it, illustrate a broader problem, one that is found in many state and federal courts. The law/fact distinction confounds lawyers and judges alike. No appellate standard of review should be so hard to perceive, understand, and apply.

III. The Policy Choice Implicit In Deciding Suppression Motions Supports *De Novo* Review.

Determining whether consent to search was given voluntarily presents not only a mixed question of fact and law but in close cases offers a policy choice for the court, one that requires balancing liberty interests against public safety interests. See Brian A. Sutherland, *Whether Consent to Search was Given*

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[2] See "Voluntariness and the Law/Fact Distinction" by Orin Kerr (Law Professor at George Washington Law School), The Volokh Conspiracy, December 5, 2013 12:08 am in Fourth Amendment available at http://volokh.com/2013/12/05/voluntariness-lawfact-distinction/. The blog posts by Professor Kerr examined the circuit court's doctrinal confusion and presciently called for clarification from the Supreme Court.

Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Ruling of the Federal District Courts, 81 N.Y.U. L. REV. 2192, 2195 (2006)("The results of this study support the legal fiction hypothesis that 'voluntariness' is a 'placeholder for an analysis of the competing interests of order and liberty'")(hereafter "Statistical Analysis") (quoting Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. Crim. L. & Criminology 733, 738 (2000)).

According to the "Statistical Analysis," which offers an empirical study of federal suppression motion rulings, the finding that consent was given voluntarily amounts to a "legal fiction" that depends not on the totality of the circumstances, but rather, on whether police misconduct occurred. In this way the suppression motion serves as a proxy referendum on police behavior rather than a true evaluation of the person's ability to give voluntary consent, whether judged objectively or subjectively. *See* Sutherland, 81 N.Y.U L. REV. at 2194-2195. In short, this study concludes that "consent is voluntary in the absence of police misconduct." *Id*. at 2194-95 ("courts find consent voluntary if the evidence does not show police misconduct"). Factors not related to police misconduct have little or no bearing on the outcome of a suppression motion. *Id*. at 2195. The findings of the Statistical Study appear to be borne out by the increase in suppression motions being granted in response to aggressive policing activities. *See* Steven Brill, *An Uptick in Granting Suppression Motions: Is Stop-and-Frisk to Blame?*, Huffington Post (June 17, 2014) ("The common theme among the cases is the courts' finding of facts that indicate that police officers

testifying at hearings have been not credible or have been actually misleading in their representations to the court"), available at http://www.huffingtonpost.com/steven-brill/undefined.

Given the legal and policy implications of any determination that an individual consented to a police search, courts should apply *de novo* review. [3] This would bring Fourth Amendment jurisprudence in line with the Fifth Amendment case law holding that the voluntariness of a person's confession is a legal question that is reviewed *de novo*. See Petition for a Writ of Certiorari at 24-25, 30-32.

CONCLUSION

For the foregoing reasons, the National Association for Public Defense urges the Court to grant the Petition for a Writ of Certiorari in this case and to clarify the standard of review that applies to appeals of consent searches.

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[3] Moreover, *de novo* review permits consideration of nuances that otherwise may be missed in the district court's analysis and positions the appellate court to avoid inequitable results.

Respectfully submitted,

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Dated April 14, 2017