No. 17-696

In the Supreme Court of the United States

ALEXIS GONZALEZ-BADILLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a police officer exceeded the scope of petitioner's consent to search his travel bag when the officer, after notifying petitioner that work boots inside the bag that had been modified to function as containers were items of particular interest, pulled open the sole of one boot by enlarging a preexisting opening.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is unreported but is available at 693 Fed. Appx. 312. The order of the district court (Pet. App. 26a-27a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2017. On August 23, 2017, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 13, 2017, and the petition was filed on November 9, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to possess with intent to distribute 100 grams or more of a mixture or

substance containing a detectable amount of heroin, in violation of 21 U.S.C. 841(a) and (b)(1)(B), 846. C.A. ROA 147. The district court sentenced petitioner to 63 months of imprisonment, to be followed by five years of supervised release. *Id.* at 148-149. The court of appeals affirmed. Pet. App. 1a-25a.

1. On April 10, 2015, two local police officers were monitoring a bus station in Laredo, Texas, for contraband. C.A. ROA 188-189. As petitioner walked outside of the station lobby to stand in line for a bus to Houston, he commented to Officer Rogelio Nevarez, who was in uniform, that it was humid outside. *Id.* at 187, 190-192. Officer Nevarez agreed and inquired as to petitioner's destination. *Id.* at 192. Petitioner replied that he was traveling to Houston from California, but had boarded the wrong bus and ended up in Laredo. *Ibid.* Officer Nevarez found petitioner's answer suspicious, as he had never heard of someone taking the wrong bus and ending up in Laredo in the four years that he had been working at the bus station. *Ibid.* Petitioner was wearing his travel bag, which had a price tag attached to it, slung across his chest. *Id.* at 194-195.

Officer Nevarez asked petitioner to step out of the line to continue their conversation and petitioner complied. C.A. ROA 193-194. Officer Nevarez informed petitioner that he was seeking "anything illegal either going in or out of the city." *Id.* at 194. Petitioner produced a California identification card upon request, and Officer Nevarez conducted a dispatch check for any pending warrants for petitioner. *Id.* at 193, 195. Petitioner verbally consented to a request to search his bag and handed the bag to Officer Nevarez. *Id.* at 195, 232. Petitioner did not place any limits on his consent to the search. *Id.* at 195, 198.

Upon opening the bag, Officer Nevarez smelled a strong chemical odor that he recognized as a masking agent used in drug smuggling. C.A. ROA 196, 218. Inside the bag was a pair of work boots wrapped in translucent plastic shopping bags. *Id.* at 196, 219. Officer Nevarez pulled the bagged boots out of petitioner's bag and noticed that the soles of the boots felt lumpy, as if they were full of sand. *Id.* at 196, 219, 229. As the officer brought the bagged boots closer to his face, the chemical odor grew stronger. *Id.* at 196. Officer Nevarez told petitioner that he was "99% sure" that drugs were inside the boots, and he held the boots up for petitioner to smell. *Id.* at 197; see *id.* at 231. Officer Nevarez noticed that petitioner began to sweat profusely. *Id.* at 197.

While waiting for a canine officer to arrive, Officer Nevarez removed the boots from the translucent plastic bags. C.A. ROA 197, 220. He observed a small opening on the side of one boot where the sole was "not glued all the way shut, so you could see inside." *Id.* at 197. He described the opening as wide enough that "you could put a quarter in it." *Id.* at 220. By manipulating the boot without increasing the size of the opening, Officer Nevarez observed plastic inside the sole of the boot. *Id.* at 198, 221, 230. He then used his fingers to pull open the sole by widening the opening, which revealed a plastic bag containing a brown rocky substance that was later identified as heroin. *Id.* at 198-199, 221, 230-231. Petitioner was arrested. *Id.* at 198.

2. a. A federal grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of conspiracy to possess with intent to distribute 100 grams or more of a mixture or substance containing a detectable amount of heroin, in violation of

21 U.S.C. 841(a)(1) and (b)(1)(B), 846; and one count of knowingly possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). C.A. ROA 19-20.

b. Petitioner moved to suppress the heroin found inside his boot. Pet. App. 5a. Following an evidentiary hearing, a magistrate judge recommended that the motion be denied. *Id.* at 28a-57a. The magistrate judge found that petitioner voluntarily consented to a search of his bag and that Officer Nevarez did not exceed the scope of petitioner's consent in manipulating the boot so that he could see inside the sole. *Id.* at 42a-46a. The magistrate judge further determined that Officer Nevarez, upon seeing plastic inside the boot through the existing opening, smelling the chemical masking agent, feeling the lumpy texture of the sole, and observing petitioner begin to sweat, had probable cause to believe that the boot contained drugs. *Id.* at 46-47a. The magistrate judge concluded that the existence of probable cause supported application of the exigent-circumstances exception to the warrant requirement, *id.* at 47a-48a, an "extension of the consent search" that allowed Officer Nevarez to remove the drugs from the boot, *id.* at 48a, and application of the plain-view exception to the warrant requirement, *id.* at 49a-50a.

The district court adopted the magistrate judge's report and recommendation and denied petitioner's motion to suppress the heroin found in his boot. Pet. App. 26a-27a. The court reasoned that "[e]ven if the scope of [petitioner]'s consent did not extend to searching inside the boots that contained the drugs, that latter search was

supported by probable cause in part due to the police officer smelling a chemical masking agent." *Id.* at 27a.[1]

c. Petitioner entered a conditional guilty plea to one count of conspiracy to possess with intent to distribute 100 grams or more of a mixture or substance containing a detectable amount of heroin, in violation of 21 U.S.C. 841(a) and (b)(1)(B), 846. C.A. ROA 147, 367. Petitioner reserved the right to appeal the district court's denial of his motion to suppress. *Id.* at 367. The court sentenced petitioner to 63 months of imprisonment, to be followed by five years of supervised release. *Id.* at 148-149.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-25a.

a. The court of appeals observed that petitioner did not dispute that he had consented to a search of his bag, but argued only that Officer Nevarez "exceeded the scope of his consent when the officer, while searching a travel bag, opened the sole of a boot to find illegal drugs." Pet. App. 1a. The court determined that Officer Nevarez would reasonably have understood that the search of the boot was within the scope of petitioner's consent. *Id.* at 5a-7a. The court reasoned that petitioner's conduct indicated that his consent extended to opening the boot sole because petitioner did not revoke or limit his consent, even after Officer Nevarez explicitly indicated that he thought the boots contained

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[1] Petitioner had also moved to suppress inculpatory statements he made to the officers after his arrest. The magistrate judge concluded that petitioner did not validly waive his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and recommended that the motion be granted with respect to petitioner's statements. Pet. App. 50a-56a. The district court adopted that recommendation and suppressed petitioner's statements. *Id.* at 27a.

drugs and held the boots up for petitioner to smell. *Id.* at 5a-7a.

Citing *Florida* v. *Jimeno*, 500 U.S. 248 (1991), the court of appeals agreed with petitioner that general consent to search a bag does not include consent to open locked containers within the bag, which would require additional consent or a warrant. Pet. App. 8a. The court concluded, however, that unlike a police officer's opening of a sealed can of tamales in *United States* v. *Osage*, 235 F.3d 518, 520 (10th Cir. 2000), on which petitioner had relied, Officer Nevarez's widening of an existing opening in petitioner's boot did not destroy the "already damaged boots or render[] them any less useful than they had been before the sole was pulled open from a pre-existing hole." Pet. App. 9a. The court noted that Officer Nevarez "inflicted minimal damage on the boot, the sole of which had previously been pried open and glued down to insert drugs." *Ibid.*

b. Judge Elrod dissented. Pet. App. 10a-25a. In her view, widening the opening in the sole of petitioner's boot was outside the scope of petitioner's consent to search his bag, and neither the plain-view nor exigent-circumstances exceptions to the warrant requirement applied. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 13-29) that Officer Nevarez exceeded the scope of petitioner's consent to search his bag for drugs because the officer caused damage to petitioner's boot when he enlarged an existing opening to pull open the boot's sole. The court of appeals correctly rejected that contention, and its nonprecedential opinion does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. a. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey* v. *T. L. O.*, 469 U.S. 325, 340 (1985). A search conducted pursuant to valid consent is not an "unreasonable" search within the meaning of the Fourth Amendment. See, *e.g.*, *Georgia* v. *Randolph*, 547 U.S. 103, 120-122 (2006); *United States* v. *Matlock*, 415 U.S. 164, 171 (1974); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973).

In *Florida* v. *Jimeno*, 500 U.S. 248 (1991), this Court held that where a suspect consents to a search of a car, the Fourth Amendment permits an officer to open containers within the car "when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container." *Id.* at 249. "The scope of a search is generally defined by its expressed object." *Id.* at 251. Accordingly, this Court held in *Jimeno* that where an officer asked for consent to search a car for narcotics and the suspect consented without "plac[ing] any explicit limitation on the scope of the search," it was objectively reasonable for the officer to conclude that the suspect's general consent "included consent to search containers within that car which might bear drugs." *Ibid.* The Court noted, however, that although the suspect's general consent permitted the officer to open a paper bag inside the car, it "is very likely unreasonable to think that a suspect, by consenting to the search of his vehicle, has agreed to the breaking open of a locked briefcase" inside the car. *Id.* at 251-252.

The courts of appeals applying *Jimeno* have generally concluded that an individual's consent to search a bag or area includes the search of a closed container

found inside, so long as officers do not destroy the container or render it useless for its intended purpose. In *United States* v. *Marquez*, 337 F.3d 1203 (2003), for example, the Tenth Circuit held that officers did not exceed the scope of a driver's consent to search his recreational vehicle for drugs and guns when they removed a nailed-down piece of plywood that was covering a storage bench inside the vehicle. *Id.* at 1207-1208. The driver argued that the officers had exceeded the scope of his consent by damaging his property, but the court reasoned that any damage was "de minimis in nature, and well short of the type of complete and utter destruction or incapacitation" that would have been an unreasonable understanding of what the driver had agreed to when he gave consent to search his vehicle. *Id.* at 1209 (citation and internal quotation marks omitted).

Similarly, in *United States* v. *Jackson*, 381 F.3d 984, (2004), cert. denied, 544 U.S. 963 (2005), the Tenth Circuit held that an officer's use of a Leatherman blade to remove the lid on a bottle of baby powder inside the defendant's bag was within the scope of the defendant's consent because the lid could be placed back on the bottle, and any loss or contamination of baby powder was de minimis. *Id.* at 988-989. The D.C. Circuit reached the same conclusion in *United States* v. *Springs*, 936 F.2d 1330 (1991), holding that forcibly removing the lid of a container of baby powder did not exceed the scope of the defendant's consent to search her bag because the container was not destroyed or "render[ed] * * * useless." *Id.* at 1335. And the Third Circuit endorsed that approach in *United States* v. *Kim*, 27 F.3d 947, 950, 956-957 (1994), cert. denied, 513 U.S. 1110 (1995).

The courts of appeals have also held, however, that officers cannot reasonably believe that a defendant who has consented to a search of his bag has given consent for the officers to destroy items inside the bag or render them useless. In *United States* v. *Osage*, 235 F.3d 518 (2000), the Tenth Circuit concluded that "the opening of a sealed can [of tamales], thereby rendering it useless and incapable of performing its designated function" of keeping perishable food in an airtight container, was akin to breaking open a locked briefcase and thus exceeded the defendant's consent to search his bag. *Id.* at 521, 522 n.2; see, *e.g.*, *Jackson*, 381 F.3d at 988-989 (officers exceed scope of general consent when they engage in "complete and utter destruction" of personal property or "render [it] useless") (citation omitted).

The courts of appeals have, in addition, placed weight on a defendant's failure to limit or modify general consent when an officer arrives at a specific closed container during the search. In particular, they have recognized that if the defendant does not withdraw or limit his consent before the officer opens that container, then it is reasonable for the officer to believe that the individual's general consent covers the search. See *Jackson*, 381 F.3d at 988 ("A defendant's failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication that the search was within the scope of consent."); *Marquez*, 337 F.3d at 1208 ("[A]t no time did Mr. Marquez limit the scope of his consent to search the vehicle or otherwise indicate that he did not wish the officers to search the compartment[.]"); *Kim*, 27 F.3d at 957 (noting that

suspect did not limit his consent after the officer inquired twice about the contents of a container in the suspect's bag).

b. In petitioner's case, the court of appeals recognized *Jimeno* as controlling authority and correctly determined that, based on the specific facts presented here, it was objectively reasonable for Officer Nevarez to understand the scope of petitioner's consent to search his bag for contraband to include consent to enlarge an opening in the sole of a boot that was already coming unglued. Pet. App. 5a-9a. Officer Nevarez straightforwardly explained to petitioner that his role at the bus station was to look for "anything illegal either going in or out of the city," C.A. ROA 194, and petitioner consented to a search of his bag, *id.* at 195, 232. The characteristics of the boot perceived by Officer Nevarez—the smell of a chemical masking agent coming from the boot, the lumpy texture of the sole, and plastic visible inside the boot through the opening in its sole—would have indicated to a reasonable officer that the boots were capable of functioning as containers that could conceal drugs. Pet. App. 5a-7a. And even after Officer Nevarez told petitioner that he was 99% sure the boot contained drugs and had noticed plastic inside the sole of the boot, petitioner did not object or place any limits on the continuation of the search. *Id.* at 7a & n.2.

Furthermore, the court of appeals correctly determined that petitioner's boot was not destroyed or rendered useless for its designated function and that any damage inflicted by Officer Nevarez was "minimal." Pet. App. 9a. It was apparent to Officer Nevarez, based on the lumpy feel of the boot's sole and the opening in the sole through which he could see plastic, that "the sole of [the boot] had previously been pried open and

glued down to insert drugs." *Ibid.* The boot had thus already been damaged and was not rendered meaningfully less useful as a boot after Officer Nevarez enlarged the opening in the sole to remove the bag of heroin. *Ibid.*

Thus, in the specific circumstances presented here, it was reasonable for Officer Nevarez to understand petitioner's consent to search his bag for contraband to include consent to open the sole of petitioner's boot. And no need exists for this Court to review the court of appeals' factbound application of the Court's decision in *Jimeno*.

2. Petitioner contends (Pet. 14-24) that the courts of appeals are divided on whether damage to personal property is permitted during a consent search and, if so, how much damage is permitted. Petitioner has not identified any conflict that warrants review of the unpublished per curiam opinion in this case.

a. Petitioner cites no case adopting the categorical rule he advocates (Pet. 27-29), *i.e.*, that a consensual search is invalid under the Fourth Amendment if there is any damage to personal property. None of the cases on which petitioner relies from the Sixth, Seventh, Eighth, and Eleventh Circuits (Pet. 15-18) hold that even minimal damage to a container necessarily exceeds the scope of general consent to search the area where the container is located.[2]

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[2] Petitioner contends (Pet. 18) that the United States "has routinely acknowledged" that those circuits "do not permit intentional damage based upon general consent." All of the briefs petitioner cites, however, described the prohibition of *destructive* searches conducted pursuant to general consent. See U.S. Br. at 13-14, *United States* v. *Calvo-Saucedo*, 409 Fed. Appx. 21 (7th Cir. 2011) (No. 10-3019) (stating that Seventh Circuit has not permitted "destructive" opening of containers); U.S. Br. at 11, *United States* v. *Zamora-Garcia*, 831 F.3d 979 (8th Cir. 2016) (No. 15-2994) (general

In *United States* v. *Martinez*, 949 F.2d 1117 (1992) (see Pet. 17), the Eleventh Circuit determined that the defendant's general consent to search a storage unit included consent to "pry open" the locked trunk of a car. *Id.* at 1120. The court distinguished its prior decision in *United States* v. *Strickland*, 902 F.2d 937, 942 (11th Cir. 1990), in which it had held that a suspect's consent to the search of a vehicle did not extend to cutting open a spare tire, on the ground that prying open the trunk did not "involve[] the same kind of damage to the automobile as 'mutilation' of the spare tire in *Strickland*." *Martinez*, 949 F.2d at 1121 (quoting *Strickland*, 902 F.2d at 942). The court thus recognized, consistent with the opinion in this case, that some degree of damage does not automatically render a consent search of an area unreasonable.

The cases petitioner cites from the Sixth and Seventh Circuits (Pet. 15-18) do not apply a contrary approach, but instead simply find particular searches in which no damage occurred to be within the scope of a defendant's consent. See *United States* v. *$304,980.00 in U.S. Currency*, 732 F.3d 812, 820 (7th Cir. 2013) (using screwdriver to pry open lid of secret compartment in vehicle without causing damage was within scope of consent); *United States* v. *Saucedo*, 688 F.3d 863, 866 (7th Cir. 2012) (using a screwdriver to unscrew molding was not so invasive that it was outside scope of consent

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consent does not permit a "destructive search"); U.S. Br. at 26, *United States* v. *Lee*, 220 F.3d 589 (11th Cir. 2000) (Tbl.) (No. 98-6746) (citing *United States* v. *Strickland*, 902 F.2d 937 (11th Cir. 1990), in which police had destroyed a spare tire during a consent search of a vehicle (see p. 12, *infra*), for the proposition that general consent does not permit police to inflict intentional damage to property during a consent search).

to search a car); *United States* v. *Calvo-Saucedo*, 409 Fed. Appx. 21, 25 (7th Cir. 2011) (finding no damage to property where an officer pried off a strip of interior molding in a car using a pocket knife to reveal a recess filled with cocaine); *United States* v. *Garrido-Santana*, 360 F.3d 565, 576 (6th Cir.) (search of defendant's gas tank that resulted in no damage to the vehicle was within scope of consent to search the car), cert. denied, 542 U.S. 945 (2004); *United States* v. *Smith*, 67 F.3d 302, 1995 WL 568345, at *3-*4 (7th Cir. 1995) (pulling open a door panel and puncturing a package inside the panel were within the scope of consent to search the car for drugs); *United States* v. *Torres*, 32 F.3d 225, 231-232 (7th Cir 1994) (finding no damage where officers used a screwdriver to remove screws from the cover of a wooden compartment of a truck bed), cert. denied, 513 U.S. 1116 (1995).

Neither the Sixth nor the Seventh Circuit has adopted any categorical rule that any amount of damage to personal property during the course of a general consent search would render the search unreasonable. Indeed, in *Calvo-Saucedo*, the Seventh Circuit, in determining that prying interior molding off a car door was "within the scope of what a reasonable motorist would expect after giving general consent to search a car for contraband," cited a case that upheld the search of a drain pipe using a wire probe "because any damage caused was de minimis." 409 Fed. Appx. at 25 (citing *United States* v. *Siwek*, 453 F.3d 1079, 1085 (8th Cir. 2006)). And in *Torres*, the Seventh Circuit stated that an officer conducting a consent search may open locked containers so long as the search does not involve "the *unnecessary* infliction of damage," 32 F.3d at 232 (emphasis added), and cited the Eleventh Circuit's decision

in *Martinez* for the proposition that police could engage in "reasonable, *nondestructive* removal of impediments" to search for contraband, *ibid.* (emphasis added) (quoting *Martinez*, 949 F.2d at 1121).

The cases petitioner cites from the Eighth Circuit (Pet. 16-17) likewise do not hold that officers cannot remain within the scope of a defendant's consent if they cause some minimal amount of damage to personal property during a consent search. Instead, in each case, the court determined that a particular search in which property was destroyed—or damaged beyond simple repair—was outside the scope of the defendant's consent. See *United States* v. *Zamora-Garcia*, 831 F.3d 979, 984 (8th Cir. 2016) (drilling holes into the trunk of a car was outside defendant's general consent to search the car); *United States* v. *Santana-Aguirre*, 537 F.3d 929, 932-933 (8th Cir. 2008) (stating that "[c]utting or destroying an object during a search" would require additional consent), cert. denied, 556 U.S. 1209 (2009); *United States* v. *Alverez*, 235 F.3d 1086, 1089 (8th Cir. 2000) (cutting into spare tire "likely exceeded the scope of the consensual search"), cert. denied, 532 U.S. 1031 (2001).[3] As with the other circumstance-specific cases that petitioner cites, those cases do not show any conflict in the courts of appeals that would warrant further review here.

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[3] The Eighth Circuit has held that a destructive search that is outside the scope of the defendant's general consent can nevertheless be upheld based on probable cause. *Zamora-Garcia*, 831 F.3d at 984-985; *Santana-Aguirre*, 537 F.3d at 932-933; *Alvarez*, 235 F.3d at 1089. The court of appeals in petitioner's case did not rely on a probable-cause rationale, and any questions about the Eighth Circuit's rationale in those cases are therefore not implicated here.

b. To the extent petitioner suggests (Pet. 18-21) that the Second and Third Circuits have held that officers may completely destroy personal property when conducting a consent search so long as the object of the search could be found within that item of personal property, any such approach would not conflict with the result in this case. Furthermore, it is far from clear that those circuits have adopted such a rule. In *United States* v. *Mire*, 51 F.3d 349 (1995), the Second Circuit did not address whether removing the sole of a sneaker that was one inch thicker than the sole of the other sneaker in the pair rendered those sneakers useless or whether a destructive search that rendered property useless would be outside the scope of a general consent search. And in *Kim*, *supra*, the Third Circuit incorporated the D.C. Circuit's reasoning in *Springs*, *supra*, to reach the apparent conclusion that the opening of particular sealed cans did not render them useless. See 27 F.3d at 957. Although *Kim* could be read to be in tension with the Tenth Circuit's conclusion in *Osage* that the opening of the specific cans in that case did render them useless, see 235 F.3d at 520-521, any disagreement about the proper approach to cans is not presented on the facts of petitioner's case here.[4]

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[4] To the extent petitioner implies (Pet. 21) that the United States has acknowledged in previous briefs that the Second and Third Circuits have permitted destructive searches so long as the object of the search could be found inside the property that is destroyed, he is incorrect. See U.S. Br. at 20, *United States* v. *Santana-Aguirre*, 537 F.3d 929 (8th Cir. 2008) (No. 07-3706) (acknowledging, in a brief citing *Kim*, that a consent search cannot be destructive); U.S. Br. at 26, *United States* v. *Pinock*, 194 F.3d 175 (D.C. Cir. 1999) (Tbl.) (No. 96-3062) (arguing that "slight physical intrusions" into containers short of destruction can be within the scope of general consent and

3. This Court's review of the question presented is especially unwarranted because the search of petitioner's boot was valid in any event as a search incident to petitioner's arrest. This Court has recognized that "the same probable cause to believe that a container holds drugs will allow the police to arrest the person transporting the container and search it" incident to the arrest. *California* v. *Acevedo*, 500 U.S. 565, 576 (1991). In this case, the evidence that created probable cause to believe that petitioner's boot contained drugs also created probable cause to arrest petitioner before the boot was searched.[5]

This Court has held that a lawful custodial arrest justifies a warrantless "full search" of the person arrested, *United States* v. *Robinson*, 414 U.S. 218, 235 (1973), and of containers and other "personal property * * * immediately associated with the person of the arrestee." *United States* v. *Chadwick*, 433 U.S. 1, 15 (1977), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991); see *Riley* v. *California*, 134 S. Ct. 2473, 2484 (2014) ("*Robinson*'s categorical rule strikes the appropriate balance" for permissible scope of search incident to arrest "in the context of physical objects"). In this case, Officer Nevarez's personal observations made clear that petitioner's boots were capable of functioning as containers for contraband, which justified taking

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citing *Mire* for the proposition that general consent extended to peeling sole from a shoe).

[5] Although the government did not rely on the search-incident-to-arrest exception in the lower courts, it is well settled that a decision may be affirmed on any valid theory supported by the record. See *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

steps to find out what was inside of the boots as an incident to petitioner's arrest.

It does not matter for purposes of the search-incident-to-arrest exception "that the search preceded the arrest," because Officer Nevarez had probable cause to arrest before the search and "the formal arrest followed quickly on the heels of the * * * search." *Rawlings* v. *Kentucky*, 448 U.S. 98, 111 (1980); see, *e.g.*, *United States* v. *Lawlor*, 406 F.3d 37, 41-42 & n.4 (1st Cir. 2005); *United States* v. *Smith*, 389 F.3d 944, 952 (9th Cir. 2004), cert. denied, 544 U.S. 956 (2005); *United States* v. *Han*, 74 F.3d 537, 541 (4th Cir.), cert. denied, 517 U.S. 1239 (1996). Nor does it matter that Officer Nevarez had to enlarge the opening in the sole of petitioner's boot to find the drugs. Courts have repeatedly held that the search-incident-to-arrest exception extends to locked suitcases and briefcases within the arrestee's reach, even in situations where officers must force or pry open the container in order to gain access to its contents. See *United States* v. *Vinton*, 594 F.3d 14, 20-22 (D.C. Cir.), cert. denied, 562 U.S. 847 (2010); *United States* v. *Clemon*s, 72 F.3d 128, 1995 WL 729479, at *3 (4th Cir. 1995) (per curiam) (Tbl.); *United States* v. *Tavolacci*, 895 F.2d 1423, 1428 (D.C. Cir. 1990); *United States* v. *Nevarez-Alcantar*, 495 F.2d 678, 682 (10th Cir.), cert. denied, 419 U.S. 878 (1974); *United States* v. *Howe*, 313 F. Supp. 2d 1178, 1182, 1184 (D. Utah 2003), aff'd, 139 Fed. Appx. 61 (10th Cir. 2005); *Fillmore* v. *Ordonez*, 829 F. Supp. 1544, 1558 (D. Kan. 1993), aff'd on other grounds, 17 F.3d 1436 (10th Cir. 1994) (Tbl.). Based on either the court of appeals' consent rationale or a search-incident-to-arrest rationale, the search of petitioner's boot was reasonable and further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2018