No. 04-1467

In the Supreme Court of the United States

ALFREDO ROMAN-ROMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
KIRBY A. HELLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals was required to consider petitioner's claim, not raised in the district court, that he did not voluntarily consent to the search of his vehicle because he did not understand English.

2. Whether petitioner was unlawfully detained following a traffic stop after the state trooper returned travel documents to him and the driver, told them that they were free to leave, and then asked if they would answer some additional questions.

3. Whether state troopers exceeded the scope of petitioner's and the driver's consent to search when they removed loose molding and a side panel on the inside of the car.

4. Whether, in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005), the district court erred by enhancing petitioner's sentence under a mandatory application of the Sentencing Guidelines, based on facts that were not specifically found by the jury.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statute: Page

In the Supreme Court of the United States

No. 04-1467

ALFREDO ROMAN-ROMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-32) is not published in the *Federal Reporter* but is available at 116 Fed. Appx. 994. The opinion of the district court (Pet. App. 14-25) is not reported in the *Federal Supplement* but is available at 2002 WL 31928487.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2004. A petition for rehearing was denied on January 10, 2005. The petition for a writ of certiorari was filed on April 11, 2005 (a Monday). 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 District of Kansas, petitioner was convicted of conspiring to possess in excess of 30 kilograms or more of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 135 months of imprisonment, to be followed by five years of supervised release. 8/23/03 Judgment 1-3. The court of appeals affirmed. Pet. App. 26-32.

1. On October 17, 2002, while on routine patrol duty, Kansas State Trooper Andrew Dean stopped a minivan after observing a traffic violation. Trooper Dean approached the driver, Rosa Florez, and asked for her relevant documentation. Florez complied. She explained that the minivan was rented and that she and petitioner were driving from California to Alabama to visit friends. According to the rental agreement, petitioner had rented the minivan two days earlier. Although petitioner appeared to understand some English, Florez told Trooper Dean that petitioner did not speak it. Both occupants appeared nervous. Pet. App. 15-16, 30 n.1.

Trooper Dean reviewed the documentation and criminal history reports and prepared a warning citation. He then returned to the minivan, questioned Florez further about their travel plans and route, returned the documentation, and issued the warning citation. Pet. App. 16. At the conclusion of the traffic stop, he stated to Florez and petitioner: "Well you guys are free to go—thanks for your time, O.K." *Ibid.* Trooper Dean then asked whether they minded if he asked a few more questions before they left, to which Florez responded that she did not. In response to Trooper Dean's question, Florez stated that there were no guns or drugs in the car. Trooper Dean then asked, "Do

you mind if we take a look?" Petitioner and Florez looked at each other and nodded their heads in assent. *Id.* at 16, 36.

The troopers asked petitioner, Florez, and the two children who were traveling in the back seat to step out of the minivan, and the troopers began their search. Petitioner never objected to the search. Trooper Richard Jimerson noticed that the molding near the roof line was "curled up," indicating that it had been recently removed. Because the vehicle was brand new and a rental, Trooper Jimerson believed, based on his experience, that the molding had been removed to secrete contraband. He removed the loose molding, pulled the back side panels out, and found approximately 69 pounds of methamphetamine hidden in the wall panels of the minivan. Gov't C.A. Br. 3-4.

2. Petitioner moved to suppress the drugs. As the sole ground for suppression, he argued that he was unlawfully detained because the trooper continued to interrogate him and Florez after informing them that they were free to leave, and because their consent was not "sufficiently attenuated" from the unlawful detention. Pet. C.A. App. 33. Before the evidentiary hearing began, petitioner claimed, for the first time, that the troopers' search of the vehicle exceeded the scope of the consent to search. *Id.* at 53, 63. At the hearing, Troopers Dean and Jimerson testified to the facts described above. As to petitioner's ability to speak and understand English, Trooper Dean testified that, in response to his request to petitioner for his license, petitioner had said "sure," and handed the license to the trooper. *Id.* at 75. In light of that exchange, Trooper Dean inferred that petitioner understood some English. *Id.* at 83-84. Trooper Dean also noted that, in response to his request for their consent to search the minivan, Florez and petitioner looked at each; she said something softly in Span-

ish to him; and they shook their heads in agreement. *Id.* at 84. Trooper Dean was not cross-examined about petitioner's English-speaking ability.

The district court denied petitioner's motion to suppress. It found that, once Trooper Dean returned all the documents and told petitioner and Florez that they were free to leave, the further encounter between petitioner and Trooper Dean was consensual. Because petitioner had objected to the consent search solely on the ground that it was the fruit of an unlawful detention, the district court did not further analyze the voluntariness of the consent and rejected his challenge to the search. Pet. App. 20. The district court also found that the troopers reasonably interpreted petitioner's general consent to search and his failure to limit the search by objecting during its execution as authorizing them to remove the molding in the minivan. *Id.* at 21, 24.

Petitioner subsequently entered a conditional plea of guilty to conspiring to possess in excess of 30 kilograms or more of methamphetamine with the intent to distribute it, reserving the right to appeal "the search and seizure issue litigated in the district court." Pet. C.A. App. 167.

3. The court of appeals affirmed in an unpublished order. The court declined to consider petitioner's argument, raised for the first time on appeal, that he did not sufficiently understand English to validly consent to further questioning or to the search, because he did not raise that contention below. As to the scope of the search, the court held that under the totality of the circumstances, a reasonable individual in petitioner's circumstances would have understood that a general consent to search authorized a full search of the entire minivan and "every place inside the vehicle where illegal drugs or contraband could be stored or hidden." Pet. App. 31-32.

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the court of appeals was required to consider his claim that his inability to speak English prevented him from voluntarily consenting to the search of the minivan despite the fact that he did not raise that claim in the district court. This case does not implicate a conflict in the federal courts of appeals or raise an important question of federal law. For that reason and because the result in this case does not depend in any event on whether petitioner understood English, further review by this Court is not warranted.

a. The courts of appeals have generally agreed that a new theory of suppression may not be raised for the first time on appeal. See, *e.g.*, *United States* v. *Luciano*, 329 F.3d 1, 9 (1st Cir. 2003) (court would not consider new argument not made in district court in support of motion to suppress); *United States* v. *Yousef*, 327 F.3d 56, 126 (2d Cir.) (defendant waived coercion argument not raised in district court), cert. denied, 540 U.S. 933 (2003); *United States* v. *Quintanilla*, 218 F.3d 674, 678 (7th Cir. 2000) (new claim not included in motion to suppress is reviewed for cause, which is more stringent standard than plain error); *United States* v. *Wright*, 215 F.3d 1020, 1026 (9th Cir.) ("just as a failure to file a timely motion to suppress evidence constitutes a waiver, so too does a failure to raise a particular ground in support of a motion to suppress") (internal quotation marks and citation omitted), cert. denied, 531 U.S. 969 (2000); *United States* v. *Woodall*, 938 F.2d 834, 836 (8th Cir. 1991) (because specific suppression issue was not raised before the district court, defendant cannot raise it on appeal).

In this case, petitioner did not challenge the voluntariness of his consent to the search below other than to con-

tend that it was the fruit of an unlawful detention. For that reason, the district court made no findings on petitioner's ability to understand English or the effect of that factor on his consent. Because his theory on appeal was never presented to the district court, the court of appeals correctly held that he waived the issue.

Petitioner's claim that the court of appeals should have considered his new argument is especially unavailing, where, as here, he has pleaded guilty and his plea agreement limited the issue preserved for appeal. See, *e.g.*, *United States* v. *Anderson*, 374 F.3d 955, 957-958 (10th Cir. 2004) (new theory of suppression raised for the first time on appeal was not properly preserved by conditional plea agreement); *United States* v. *Doherty*, 17 F.3d 1056, 1058 (7th Cir. 1994) (appeal fell outside scope of appellate right defined by plea agreement because defendant challenged indictment on grounds not raised in district court); *United States* v. *Ramos*, 961 F.2d 1003, 1005-1006 (1st Cir.) (a defendant "conditionally preserves for appellate review only the district court's adverse rulings on specified pretrial motions"), cert. denied, 506 U.S. 934 (1992). Because petitioner's conditional plea agreement specifically limited his appeal to "the search and seizure issue litigated in the district court," the issue of his ability to speak English was not properly preserved.

b. Petitioner contends (Pet. 6-7) that the court of appeals' decision conflicts with this Court's decisions in *Blackburn* v. *Alabama*, 361 U.S. 199 (1960), and *Brown* v. *Mississippi*, 297 U.S. 278 (1936). That contention is mistaken.

Blackburn involved petitioner's challenge to the admission of his confession based upon his claim that he was mentally ill at the time that he committed the crime and confessed. Based on nearly uncontradicted evidence in the

record, the Court held that the confession was involuntary, and stated, in dicta, that it was not limited only to considering evidence introduced before the admission of the confession. That case, which was premised on a due process violation, provides no authority for the proposition that a defendant may raise a new theory for suppression for the first time on appeal. *Brown* similarly involved the issue of whether a conviction based solely on a confession induced by torture violated due process.

c. In any event, the evidence in this case was lawfully seized. Even if petitioner did not understand Trooper Dean's questions, the record plainly demonstrated that Florez did. The police may obtain consent from a third party who possesses common authority over the area or item to be searched. *United States* v. *Matlock*, 415 U.S. 164 (1974). In addition, third-party consent is effective if the police reasonably believe that the third party had common authority over the area to be searched. *Illinois* v. *Rodriguez*, 497 U.S. 181 (1990).

Applying these principles, the courts of appeals have repeatedly held that the driver of a car has apparent authority to consent to a search of the vehicle. See, *e.g.*, *United States* v. *Crain*, 33 F.3d 480, 484 (5th Cir. 1994) ("A person who has joint control over an automobile may give valid consent to its search."), cert. denied, 513 U.S. 1169 (1995); *United States* v. *Eldridge*, 984 F.2d 943, 948 (8th Cir. 1993) (driver of vehicle has authority to consent to full search of vehicle); *United States* v. *Garcia*, 897 F.2d 1413, 1419 (7th Cir. 1990) (same); *United States* v. *Morales*, 861 F.2d 396, 399 (3d Cir. 1988) (driver of vehicle, rented in passenger's name, has authority to consent to search of vehicle). The troopers therefore reasonably relied on Florez's consent to search the minivan. For the same reason, even if petitioner did not understand that he was free to leave

after Trooper Dean returned the documents and issued the warning, Florez willingly engaged in a consensual encounter with the troopers and the search was the result of her consent.

Finally, while petitioner may have been unable to speak English, there was evidence in the record that he understood it. See Pet. App. 30 n.1. Not only did he appropriately respond to Trooper Dean's request for his driver's license, but he also nodded his head in assent after Trooper Dean asked for permission to search the car.

2. Petitioner next contends (Pet. 9-11) that he was unlawfully detained after Trooper Dean returned the documentation and warning citation to Florez. Petitioner's claim in the court of appeals was primarily limited to whether, in light of his inability to speak English, he understood that he was free to leave. Pet. C.A. Br. 11. For that reason, the court of appeals did not review the district court's finding that petitioner was not unlawfully detained. Review by this Court under those circumstances is unwarranted. Cf. *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) (this Court "generally do[es] not address arguments that were not the basis for the decision below").

In any event, petitioner's fact-bound challenge to the stop is without merit. As this Court has explained, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991), the encounter is consensual and no reasonable suspicion is required." *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991). The test the Court has developed to distinguish seizures from consensual encounters is whether, "in view of all of the circumstances surrounding the inci-

dent, a reasonable person would have believed that he was not free to leave." *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). The police are not required to inform the vehicle's occupants that they are free to leave before seeking their consent, *Ohio* v. *Robinette*, 519 U.S. 33, 35, 40 (1996), although in this case Trooper Dean did precisely that.

The district court correctly concluded that Trooper Dean's statements made clear that petitioner and Florez were free to leave after he returned their documents to them. Moreover, the record contained no evidence of coercion. In those circumstances, the encounter was consensual and the consent was not the product of an unlawful detention.

3. Petitioner also contends (Pet. 11-12) that this Court's review is necessary to settle the question whether the scope of a general consent to search encompasses removing molding and paneling from a vehicle. Petitioner's arguments lack merit and involve only the application of well-established legal principles to the particular facts of this case.

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness." *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) (internal quotation marks and citations omitted). The proper question is "what would the typical reasonable person have understood by the exchange between the officer and the suspect." *Ibid.* It is generally reasonable for police officers to conclude that a motorist's general consent to search his car includes all areas that might contain drugs when the officers have told the motorist that they are looking for drugs. *Id.* at 251-252.

Courts of appeals have approved searches in which a motorist consents generally to the search and the police remove, without destroying, components of the vehicle. See, *e.g.*, *United States* v. *Zapata*, 180 F.3d 1237, 1243 (11th Cir. 1999) (holding that the search of a vehicle's interior door panel was within the scope of the defendant's general consent to search for narcotics, weapons, or money because the door panel could contain such items); *United States* v. *Flores*, 63 F.3d 1342, 1362 (5th Cir. 1995) (unscrewing two screws and removing two vent covers from the interior panels was within scope of general consent), cert. denied, 519 U.S. 825 (1996); *United States* v. *Martel-Martines*, 988 F.2d 855, 858 n.3 (8th Cir. 1993) (using screwdriver to puncture small hole in metal compartment hidden underneath truck bed in order to remove it was reasonable); but see *United States* v. *Garcia*, 897 F.2d 1413, 1419-1420 (7th Cir. 1990) (opening door panels exceeded scope of consent, but evidence not suppressed because officers had probable cause to search).[*]

The Tenth Circuit correctly determined that the search in this case fell within the scope of Florez's consent. Trooper Dean first asked Florez whether there were drugs or guns in the car, and then obtained her consent to search the car. It was therefore reasonable for the officers to search all areas in which drugs could be hidden. See *Zapata*, 180 F.3d at 1243 ("Numerous cases in our sister circuits demonstrate that money and drugs are frequently

---

[*] Petitioner also cites (Pet. 11) *United States* v. *Strickland*, 902 F.2d 937 (11th Cir. 1990), to support his position that the police may not destroy property during a general consent search. Because property was not destroyed in the case below, *Strickland* is inapposite. The Eleventh Circuit distinguished *Strickland* in *Zapata*, 180 F.3d at 1243, in which the court upheld the opening of a secured compartment in a car that did not damage the interior door panel.

stored behind interior panels in an automobile."). Although the Seventh Circuit found to the contrary, *Garcia*, 897 F.2d at 1419, its observation that police may not reasonably expect to find drugs behind door panels is belied by the experience of law enforcement officers referenced in cases from other circuits. Indeed, cases originating in the Seventh Circuit confirm the same point. See *Ornelas* v. *United States*, 517 U.S. 690, 692-693 (1996) (describing officer's discovery in Milwaukee of two kilograms of cocaine hidden behind a door panel in an older model General Motors car of the type that is "a favorite of drug couriers because it is easy to hide things in them").

Petitioner also contends (Pet. 11-12) that this Court should consider whether a motorist's inability to observe the actions of the police during the search constitutes a Fourth Amendment violation. This case does not present the proper vehicle to resolve that question because petitioner did not press that issue below and the district court made no factual finding on whether either petitioner or Florez could view the search from their vantage points.

4. Lastly, petitioner argues for the first time in this Court (Pet. 12-13) that his sentence should be vacated because the district court sentenced him in violation of *United States* v. *Booker*, 125 S. Ct. 738 (2005). In *Booker*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 542 U.S. 296 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant the writ of certiorari, vacate the judgment of the court of

appeals, and remand the case for further consideration in light of *Booker*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error. See *id.* at 769.

CONCLUSION

On the fourth question presented, the petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005). In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
KIRBY A. HELLER
Attorney

SEPTEMBER 2005