

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 24 2026

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDRES BARRON,

Defendant - Appellant.

No. 25-2586

D.C. No.

3:23-cr-02620-AGS-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Andrew George Schopler, District Judge, Presiding

Argued and Submitted June 22, 2026
Pasadena, California

Before: FRIEDLAND, FORREST, and DESAI, Circuit Judges;
Dissent by Judge FRIEDLAND.

Andres Barron appeals the denial of his motion to suppress evidence obtained from his vehicle during a traffic stop. Barron argues that the officer conducted an unlawful search by demanding Barron reveal what was located under his seat and ultimately finding three bags of methamphetamine, which triggered a larger search

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

of the vehicle.

In the district court, the government claimed that the search was justified because the drugs under the seat cushion were in the officer's plain view when he directed Barron to lift the seat cushion. The district court found that the drugs were not in the officer's plain view but denied the motion to suppress because it found that Barron voluntarily consented to a search underneath his seat cushion. Barron was tried and convicted of possession of methamphetamine with intent to distribute. He timely appealed.

We have jurisdiction under 28 U.S.C. § 1291. We review the denial of a motion to suppress de novo and factual findings for clear error. *United States v. Barnes*, 895 F.3d 1194, 1199 (9th Cir. 2018). A district court's determination that a defendant voluntarily consented to a search is a question of fact reviewed for clear error. *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007). We vacate Barron's conviction and remand for further proceedings.

1. The government bears the burden to prove that a defendant voluntarily consented to a search by a preponderance of the evidence.¹ *United States v. Bautista*, 362 F.3d 584, 589 (9th Cir. 2004). To evaluate whether consent was voluntary, we analyze the totality of the circumstances, including "(1) whether the defendant was

¹ We note that the government did not even advance a voluntary consent theory before the district court, which belies the conclusion that it met its burden to prove that Barron voluntarily consented.

in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified that she had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained.” *See United States v. Jones*, 286 F.3d 1146, 1152 (9th Cir. 2002). These factors serve as guideposts, and no one factor is determinative. *United States v. Brown*, 563 F.3d 410, 415 (9th Cir. 2009). Here, the relevant factors weigh against a finding of voluntary consent.

First, Barron was in custody when the officer requested that he reveal what was under his seat and he lifted the seat cushion. A defendant is considered “in custody” for the purpose of voluntary consent if “the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Id.* (citation modified); *see also Reynaga Hernandez v. Skinner*, 969 F.3d 930, 937 (9th Cir. 2020) (explaining that *Terry* stops are seizures under the Fourth Amendment); *United States v. Cormier*, 220 F.3d 1103, 1109–10 (9th Cir. 2000) (when a person is “seized at the time he consented to the . . . search,” it is “less likely that his consent was voluntary under the totality of the circumstances test”). Second, the officer had his gun “out of its holster” and “pointed at Mr. Barron” during the encounter, which makes it “extremely doubtful that [Barron] would have believed that he was free to” decline the officer’s requests. *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985) (quoting *United States*

v. Johnson, 626 F.2d 753, 755–56 (9th Cir. 1980)). And lastly, the officer did not tell Barron that he was free to refuse any request to reveal what was under the seat cushion. *See United States v. Mendenhall*, 446 U.S. 544, 558–59 (1980) (explaining that this factor is highly relevant because “the fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive”).² In fact, the officer used commanding language to direct Barron to reveal what was under his seat.

Taken together, these facts demonstrate that Barron did not voluntarily consent to a search. In other words, Barron’s actions reflect mere “acquiescence to a claim of lawful authority” and are not “the product of freely given consent.” *See Bautista*, 362 F.3d at 593. The district court thus clearly erred by concluding that Barron’s voluntary consent justified the warrantless search. *See United States v. Pope*, 686 F.3d 1078, 1082 (9th Cir. 2012) (“[A] Fourth Amendment search occurs when police command a person to reveal something in which he would otherwise have a reasonable expectation of privacy *and* that thing or that area is revealed.”

² To the extent the remaining two factors have any relevance in this case, they are neutral. *See Washington*, 490 F.3d at 776 (explaining that the *Miranda* warning factor is not necessary when suspect is not subject to custodial interrogation); *Cormier*, 220 F.3d at 1112 (explaining that the relevance of whether a suspect is told officers could obtain a search warrant “hinges on whether a suspect is informed about the possibility of a search warrant in a threatening manner”).

(citation modified)).

2. On appeal, the government asserts a new justification for the warrantless search, arguing that it was a lawful protective sweep for weapons. *See Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983) (explaining the protective sweep exception under the Fourth Amendment). We lack a sufficient factual record to analyze this claim because it was never raised below. *See Shirk v. U.S. ex rel. Dep’t of Interior*, 773 F.3d 999, 1008 (9th Cir. 2014) (remanding for “first instance factfinding” when “the district court was never presented with an argument for which additional factfinding was relevant”). We thus remand for the district court to consider whether the government forfeited the protective-sweep argument, and if not, to conduct sufficient factfinding to analyze the claim on the merits.

On this record, the warrantless search that led to the discovery of the methamphetamine is not justified by voluntary consent, and the district court erred by denying Barron’s motion to suppress on that ground.

VACATED and REMANDED for further proceedings consistent with this decision.

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FRIEDLAND, Circuit Judge, dissenting:

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The majority reverses on the theory that the district court clearly erred in finding that Barron voluntarily moved his seat cushion or otherwise consented to a search. I see things differently. Based on my reading of the district court’s order and my review of Officer Truong’s body camera footage, I would affirm the district court’s denial of suppression. I therefore respectfully dissent.

The district court determined that Officer Truong “ask[ed] [Barron] what the item was hidden behind or under the seat cushion.” The district court then found that Barron—spontaneously and of his own volition—“voluntarily removed the towel and seat cushion on the driver’s seat.”

The majority approaches this encounter through a consent-search framework, essentially asking whether Barron voluntarily authorized Officer Truong to search under the cushion. But the district court never found that Truong requested consent to search, nor does Barron point to any moment in the video when Truong asked to look under the cushion. What the video shows, and what the district court found, is that Barron himself moved the cushion, at most in response to a question rather than to any command.

On that factual premise, this appeal presents the straightforward question whether the district court clearly erred in its findings. Watching the body camera footage video, I cannot say that the district court clearly erred in determining that Officer Truong asked Barron a question, “wait, what is that?”, and then clarified what he meant with that question, “under the seat,” rather than commanding Barron to do anything or requesting consent to conduct a search. As the district court concluded, the only relevant order was Officer Truong’s ordering Barron to step out of the vehicle. But Barron rightfully does not argue that this order was improper. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (per curiam) (“[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures.”).

With no request for consent to search Barron’s person or his car, nor any order to that effect, none of Officer Truong’s actions ran afoul of the Fourth Amendment. And once Barron voluntarily moved the seat cushion and exposed the baggies of powder that Officer Truong recognized as methamphetamine, there was probable cause to detain Barron and to search the car. *See United States v. Fowlkes*, 804 F.3d 954, 971 (9th Cir. 2015) (holding that a warrantless search of a vehicle lawfully stopped for a traffic violation was justified because officers saw an apparent controlled substance in plain view on the driver’s seat).

The Government’s representation in the district court that Officer Truong “order[ed]” Barron to move the cushion does not change my assessment. Nothing requires a district court to accept the government’s framing of the facts if that framing seems inaccurate, which the video shows it to be here. *See United States v. Mirabal*, 98 F.4th 981, 986-87 (9th Cir. 2024) (treating a prosecutor’s factual statement as a party admission that was admissible, but not as dispositive of the factual question or binding on the factfinder); *United States v. 4,432 Mastercases of Cigarettes, More or Less*, 448 F.3d 1168, 1175 (9th Cir. 2006) (“[W]e accept the district court’s underlying findings of fact in the absence of clear error.”).

Because the district court did not clearly err in finding that Barron voluntarily moved the cushion, there was no Fourth Amendment violation here. I would therefore affirm the denial of suppression.