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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Darius Lee Johnson,

13 Defendant.
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No. CR-24-05610-001-TUC-JCH (BGM)

REPORT AND RECOMMENDATION

15 Before the Court is Defendant Darius Lee Johnson's Motion to Suppress. (Doc.
16 27.) Under Local Rule of Criminal Procedure 5.1, this matter was referred to Magistrate
17 Judge Bruce G. Macdonald for an evidentiary hearing and a report and recommendation.
18 The motion has been fully briefed and an evidentiary hearing on the motion has been held.
19 (Docs. 33, 38, 40.) The Magistrate Judge recommends that the District Court, after its
20 independent review, deny Defendant's motion.

21 **FACTUAL FINDINGS¹**

22 On Tuesday, July 30, 2024, at approximately 6:49 p.m., Cochise County Sheriff's
23 Deputy Austin Shaw stopped a silver 2023 Ford F-150 pickup truck bearing a
24 Massachusetts license plate off of Highway 90 in Huachuca City, Arizona. (Doc. 33 at 1.)
25 The truck was stopped after Deputy Shaw noticed that the driver failed to use his turn signal
26 properly and that he was using his cellphone while driving. (Def.'s Ex. 11 at 18:50:56-
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¹ The material facts are not in dispute.

1 18:51:03.²) The driver was identified as Defendant Darius Lee Johnson. (Doc. 33 at 1.)

2 After briefly speaking with Johnson, confirming the truck was a rental car, and
3 learning that Johnson's front-seat passenger was an illegal alien, Deputy Shaw arrested
4 Johnson on suspicion of alien smuggling. (Def.'s Ex. 11 at 18:57:44.) During the stop,
5 Shaw also requested assistance from local Border Patrol agents. (Doc. 27 at 3.)

6 At approximately 7:06 p.m., Deputy Shaw read Johnson his *Miranda* rights.³
7 (Def.'s Ex. 11 at 19:06:35.) Shaw then asked Johnson whether he wanted to answer some
8 questions that Shaw had, to which Johnson replied "no." (*Id.* at 19:06:55.) Shaw did not
9 ask Johnson any further incident-related questions. (Doc. 33 at 2.)

10 At approximately 7:23 p.m. agents from the United States Border Patrol arrived at
11 the scene. (Def.'s Ex. 11 at 19:23:29.)

12 At approximately 7:36 p.m., Agent Travis Lusk read Johnson his *Miranda* rights,
13 again. (Tr. 13:13-15.⁴) Johnson again declined to answer any questions. (*Id.* at 16-24.)

14 At approximately 8:14 p.m., Agent Lusk started to ask Johnson if this was Johnson's
15 third time smuggling aliens, but he cut himself off and told Johnson that he did not have to
16 answer that question. (Doc. 33 at 2.) Johnson did not respond to the question. (*Id.*) Ten
17 minutes later, Lusk took custody of Johnson and transported him to the Bisbee Border
18 Patrol station. (Def.'s Ex. 11 at 20:24:11.)

19 At 9:34 p.m., in an interview room at the station, Agent Adam Tinoco read Johnson
20 his *Miranda* rights a third time. (Tr. 14:6-23; Gov't's Ex. 1 at 00:18-00:44.⁵) This time,
21 Johnson agreed to answer questions and signed a *Miranda* waiver acknowledgement form.
22 (Gov't's Ex. 1 at 01:10-01:25; Gov't's Ex. 6.) Agent Tinoco interviewed Johnson and
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24 ² Defendant's Exhibit #11 is video footage from Deputy Shaw's body-worn camera. The
25 Court uses an hour:minute:second format when referencing the footage.

26 ³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

27 ⁴ The abbreviation "Tr." is used to designate the official transcript of Defendant's
28 December 21, 2024 suppression hearing. The Court uses a page:line number format.

⁵ The Government's Exhibit #1 is video footage of Defendant taken in an interview room
at the Bisbee Border Patrol station. The Court uses a minute:second format when
referencing the footage.

1 Johnson admitted his involvement in transporting aliens. (Gov't's Ex. 1 at 01:38-07:54.)
 2 The interview concluded at approximately 9:42 p.m. (Doc. 33 at 3.)

3 **LEGAL STANDARD**

4 A suspect who is subject to custodial interrogation has the right to remain silent.
 5 *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A valid waiver of the right to remain silent
 6 involves a two-part inquiry. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). First, the waiver
 7 must have been “voluntary in the sense that it was the product of a free and deliberate
 8 choice rather than intimidation, coercion, or deception.” *Id.* Second, the waiver must have
 9 been “made with a full awareness of both the nature of the right being abandoned and the
 10 consequences of the decision to abandon it.” *Id.* In evaluating the voluntariness of a
 11 confession, the court must determine, under the totality of the circumstances, whether “the
 12 government obtained the statement by physical or psychological coercion or by improper
 13 inducement so that the suspect’s will was overborne.”⁶ *United States v. Leon Guerrero*,
 14 847 F.2d 1363, 1366 (9th Cir. 1988). The totality of the circumstances involves the
 15 “particular facts and circumstances surrounding [the] case,” *North Carolina v. Butler*, 441
 16 U.S. 369, 374-75 (1979), including “the duration and conditions of detention ..., the
 17 manifest attitude of the police toward [the accused], [the accused’s] physical and mental
 18 state, [and] the diverse pressures which sap or sustain [the accused’s] powers of resistance
 19 and self-control,” *United States v. Preston*, 751 F.3d 1008, 1016 (9th Cir. 2014). There is
 20 a presumption against waiver, which the government must overcome by a preponderance
 21 of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

22 **DISCUSSION**

23 Johnson asserts that his Fifth Amendment waiver was involuntary because there was
 24 no break in his custodial status when he was questioned by Agent Tinoco less than two
 25 hours after invoking his right to remain silent. (Doc. 27 at 6.) Johnson argues that allowing

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 27 ⁶ “The test for whether a *Miranda* waiver is voluntary is essentially the same as the test for
 28 whether a confession is voluntary.” *United States v. Binford*, 818 F.3d 261, 271 (6th Cir.
 2016) (citation omitted).

agents to attempt to interrogate him multiple times runs against the Supreme Court’s guidance that police officers must scrupulously honor a suspect’s invocation of his right to remain silent. (Tr. 32:9-19.) Johnson warns that condoning the officers’ actions in this case would have the effect of vitiating the right to remain silent entirely. (*Id.* at 19-21.) Johnson concludes that courts prefer bright line rules and asks the Court to adopt the rule concerning a suspect’s invocation of his Sixth Amendment right to counsel established in *Edwards v. Arizona*, 451 U.S. 484 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988), and apply it to the situation at hand.⁷ (*Id.* at 34:2-10.) The Court declines Johnson’s invitation and recommends that his motion to suppress be denied.

I. Johnson’s Waiver and Confession Voluntary

The United States Court of Appeals for the Ninth Circuit has reiterated that in determining the voluntariness of a confession, a court must consider “all the surrounding circumstances,” and that there is “no talismanic definition of ‘voluntariness,’ mechanically applicable to the host of situations where the question has arisen.” *Preston*, 751 F.3d at 1017. Courts are to consider all the circumstances because there is no “single controlling criterion,” such as length of interrogation, that can be dispositive. *Id.* Additionally, it is insufficient for a court to “list the circumstances of an interrogation separately on a piece-meal basis,” to fulfill the voluntariness inquiry. *Id.* (cleaned up). Rather, courts are to weigh the “circumstances of pressure against the power of resistance of the person confessing.” *Doody v. Ryan*, 649 F.3d 986, 1016 (9th Cir. 2011) (citation omitted).

As it concerns Johnson’s contention that his *Miranda* waiver was involuntary because he was subject to interrogation attempts that were less than two hours apart, the Ninth Circuit answered an analogous argument in *United States v. Hsu*, 852 F.2d 407 (9th Cir. 1988). In *Hsu*, a DEA agent had read the defendant, Cecil Hsu, his *Miranda* rights

⁷ In *Edwards v. Arizona*, 451 U.S. 477, 485 (1981), the Supreme Court adopted a bright line rule forbidding further interrogation of a criminal suspect, when the suspect invokes his right to counsel, unless the suspect initiates communication. In *Arizona v. Roberson*, 486 U.S. 675, 687 (1988), the Court extended the *Edwards* rule to situations where an attempt is made to reinterrogate a suspect about an unrelated offense after the suspect has invoked his right to counsel.

1 from a preprinted card shortly after his arrest in a department store. *Id.* at 409. After
2 answering a few questions, Hsu asked if he could remain silent, and the agent stopped the
3 interview. *Id.* Shortly thereafter, Hsu was driven to his codefendant's house, where agents
4 were conducting a search. *Id.* After participating in the search, a different DEA agent,
5 who was unaware that Hsu was previously Mirandized, approached Hsu, advised him of
6 his *Miranda* rights, and asked him if he would answer some questions. *Id.* Hsu agreed and
7 confessed to his participation in the crime. *Id.* The amount of time between Hsu's
8 interrogations was, at most, thirty minutes. *Id.* at 411.

9 In addressing Hsu's allegation that police failed to "scrupulously honor" his right to
10 remain silent, the Ninth Circuit observed that it had never suggested that any specific length
11 of time was necessary to find that the right to cut off questioning was honored. *Id.* at 410.
12 The court went on to reject "a bright line rule barring any questioning that takes place
13 within an hour of an invocation of *Miranda* rights." *Id.* The court observed that *Michigan*
14 *v. Mosley*, 423 U.S. 96 (1975), required it to consider all of the relevant factors to determine
15 whether a suspect's rights had been violated. *Id.* at 411. The court instructed that neither
16 *Mosley* nor the Ninth Circuit's more recent cases suggested that the period of time between
17 interrogations was the most important factor to be considered. *Id.* at 410. Rather, the
18 court's focus was on the validity of the second waiver and it had been most concerned with
19 "the provision of a fresh set of warnings." *Id.* at 410 (citation omitted).


20 Here, the Court lacks the authority to adopt a bright line rule when the Ninth Circuit
21 has repeatedly reiterated that the voluntariness of a confession is based on the totality of
22 the circumstances. *See, e.g., Cook v. Kernan*, 948 F.3d 952, 968 (9th Cir. 2020); *Preston*,
23 751 at 1016; *Brown v. Horell*, 644 F.3d 969, 979 (9th Cir. 2011); *Hsu*, 852 F.2d at 411 n.3.
24 Moreover, similar requests have been addressed and denied by the Supreme Court. *See*
25 *Mosley*, 423 U.S. at 102-03 (ruling that there is no passage in *Miranda* that "can sensibly
26 be read to create a per se proscription of indefinite duration upon any further questioning
27 by any police officer on any subject, once the person in custody has indicated a desire to
28 remain silent"). Finally, there is no evidence in the record that Johnson was coerced into

1 confessing or that his will was overborne by the police. The evidence demonstrates that
2 after the passage of nearly two hours, Johnson was interrogated by a separate Border Patrol
3 agent, at a different location, in a separate interview room, where he was given a fresh
4 *Miranda* warning, he expressly waived his *Miranda* rights both verbally and in writing,
5 and Agent Tinoco acted in a professional and constitutional manner when conducting his
6 interview. (See Gov't's Ex. 1 at 00:00-07:54; Gov't's Ex. 6; Def.'s Ex. 11.) As such, the
7 Court recommends that Johnson's motion to suppress be denied.

8 RECOMMENDATION

9 For the foregoing reasons, the Magistrate Judge recommends that the District Court
10 DENY Defendant's Motion to Suppress (Doc. 27). Pursuant to Federal Rule of Criminal
11 Procedure 59, any party may serve and file written objections within 14 days of being
12 served a copy of this Report and Recommendation. Fed. R. Crim. P. 59(b)(2). A party
13 may respond to the other party's objections within 14 days. LRCiv 7.2(c). No reply shall
14 be filed unless leave is granted by the District Court. If objections are filed, the following
15 case number should be used: **CR-24-5610-JCH-1**. Failure to file timely objections to any
16 factual or legal determination of the Magistrate Judge may result in waiver of the right of
17 review. Fed. R. Crim. P. 59(b)(2).

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19 Dated this 6th day of January, 2025.

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23 Honorable Bruce G. Macdonald
24 United States Magistrate Judge
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