SUPREME COURT OF THE UNITED STATES

October Term, 2019

MARIO GARCIA-ZAVALA,	)	
	)	
Petitioner,	)	
	)	**NO.** _____
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

NOW COMES the Petitioner/Defendant, Mario Garcia-Zavala, by counsel, pursuant to Supreme Court Rule 39, and requests leave to proceed *in forma pauperis*. In support this motion, Petitioner provides the following:

1. Petitioner stands convicted, following a bench trial in United States District Court for the District of Maine with Reentry after order of removal, a violation of 8 U.S.C. § 1326(a). A timely appeal was filed with the First Circuit Court of Appeals, which appeal was denied.

2. Petitioner is petitioning the Supreme Court for a Writ of Certiorari.

3. Petition was found to be indigent on September 22, 2017 and undersigned counsel, Robert C. Andrews, Esq., was appointed by the District Court pursuant to the Criminal Justice Act to represent Mr. Garcia-Zavala at trial in Maine. Counsel was also appointed by the First Circuit Court of Appeals to represent Mr. Garcia-Zavala regarding an appeal. Attorney Andrews remains Mr. Garcia-Zavala's appointed counsel of record.

4. As counsel was appointed pursuant to the Criminal Justice Act at both the trial and appellate level, leave to proceed *in forma pauperis* has not previously been sought.

WHEREFORE, it is requested that Petitioner's motion for leave to proceed *in forma pauperis* be granted.

Dated at Portland, Maine on this 27th day of August, 2019.

Robert C. Andrews, Esq.
Attorney for Mario Garcia-Zavala, Petitioner
117 Auburn Street Suite 201
Portland, Maine 04103
(207) 879-9850

CERTIFICATE OF SERVICE

I, Robert C. Andrews, attorney for Petitioner Mario Garcia-Zavalas, hereby certify that I have caused, pursuant to Supreme Court Rule 39.2, one original of Petitioner's Motion for Leave to Proceed *In Forma Pauperis* to be served upon the following:

Clerk of the Court
United States Supreme Court
1 First Street, NE
Washington, DC 20543

And

Julia Lipez, AUSA
100 Middle Street, East Tower, Suite 6
Portland, ME 04101

Said Motion having been sent to the above addresses by first class mail, postage prepaid, this 27th day of August 2019.

Robert C. Andrews, Esq.
Attorney for Mario Garcia-Zavala, Petitioner
117 Auburn Street Suite 201
Portland, Maine 04103
(207) 879-9850

Docket No:

UNITED STATES SUPREME COURT

United States,
Plaintiff-Respondent,

v.

Mario Garcia-Zavala,
Defendant-Petitioner.

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED

1. Does the booking information exception to the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), apply to evidence of identity in prosecutions for immigration crimes?

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United States v. Mario Garcia-Zavala, 2:17-CR-140-GZS, Docket Entry 54, Order on Motion to Suppress, United States District Court for the District Maine February 28, 2018. *United States v. Mario Garcia-Zavala*, 919 F.3d 108 (1st Cir. 2019).

JURISDICTIONAL STATEMENT

Review on Petition for Writ of Certiorari. The Petitioner makes this petition based on the jurisdiction conferred by Article III Section 1 of the United States Constitution and Rule 10 of the Supreme Court Rules. The Decision in the United States Court of Appeals for the First Circuit deals with an important federal question and conflicts with other decisions of the Supreme Court of the United States. This petition has been timely filed by August 27, 2019 from the opinion released on March 25, 2019 and the order denying Petition for Panel Rehearing and Rehearing En Banc issued on June 12, 2019.

Appellate Jurisdiction. The Petitioner takes this appeal as of right in a criminal prosecution under 28 U.S.C. § 1291 and the jurisdiction established by Federal Rule of Appellate Procedure 4. Pursuant to Fed. R. App. P. 4(b), the notice of appeal must be filed in the district court within 14 days after entry of the order or judgment appealed. The notice of appeal in this matter was timely filed on April 20, 2018.

Original Jurisdiction. District Courts of the United States have original jurisdiction of all offenses against the laws of the United States. See 18 U.S.C. § 3231. The indictment in this matter resulted in convictions of Mr. Garcia-Zavala for violations of 8 U.S.C.§ 1326(a).

PROVISIONS OF LAW

U.S.C.A. Const. Amend. IV (West 2019)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend. V (West 2019)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. 1326(a) (West 2019)

(a) In general Subject to subsection (b), any alien who—(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was

not required to obtain such advance consent under this chapter or any prior Act, shall be fined under title 18, or imprisoned not more than 2 years, or both.

STATEMENT OF FACTS

On April 18, 2018, United States District Court Judge for the District of Maine George Z. Singal sentenced Mario Garcia-Zavala to time served. (Mario Garcia-Zavala's Appendix Below *hereinafter* A at 8.) Mr. Garcia-Zavala's sentence was the result of charges brought against him when he was discovered as a passenger in a van on September 9, 2017. (A at 84.) Mr. Garcia-Zavala had a bench trial when the Government refused to enter into an agreement for a conditional plea. (A at 9.) At his trial, the Government introduced evidence of his identity and statements he made to an Immigration and Customs Enforcement Officer when he was taken into custody. (A at 88.) Mr. Garcia-Zavala challenged all the evidence against him during a Motion to Suppress that alleged his Fourth Amendment rights were violated.

MR. GARCIA-ZAVALA PRESENTATION OF THE FACTS.

On September 9, 2017 Maine State Trooper Robert Burke was parked beside a building monitoring traffic before it entered onto Interstate 295 in Portland Maine. Sometime between 12:15 and 12:20 Trooper Burke observed a white van with a Hispanic passenger. (A at 163.) Trooper Burke decided to make a traffic stop of the van. (A at 36.) Trooper Burke explained, "I noticed that the passenger wasn't wearing a seat belt, and I also noticed that the windshield had a crack in it." Trooper Burke explained his legal theory for the cracked windshield, "[w]ell, under Maine law that -- that would be a violation of inspection standards that cracked windshield, and I would have discretion to determine if that vehicle is safe or unsafe to operate." (A at 44.) Trooper Burke also explained his seatbelt theory, "[a]nd because of the van I knew that they all had to have shoulder seat belts on, and I didn't see any shoulder seat belts on." (A at 39.)

The traffic stop of the van in which Mario Garcia-Zavala was a passenger was recorded

by a video camera mounted in Trooper Burke's state police sport utility vehicle. (A at 36.) That video starts recording a short time before the stop is made and before Trooper Burke activated his emergency lights. (A at 37.) The van is shown in the video pulling over to the side of the highway at one minute and twenty-three seconds into the video. (Gov't Ex. 1.) The video then shows Trooper Burke approaching the van asking for license, registration, and proof of insurance. (Gov't Ex. 1.) Trooper Burke then asks if they have their seatbelts on and if anyone speaks English, who owns the van, and where they are coming from. (Gov't Ex. 1.) Trooper Burke asks if they speak English several times. (Gov't Ex. 1.)

Trooper Burke then goes back to his State Police sport utility vehicle. At four minutes and three seconds, Trooper Burke places a call over his personal cellular telephone to Deportation Officer Elliot Arsenault. Once Officer Arsenault answers the call, Trooper Burke says, "Elliot, you're not going to fuckin believe this but---All right I gotta van load of fuckin I don't even know what of about thirteen that nobody speaks English, nobody has I.D.s, its and there all not wearing seatbelts and that's why I stopped them." Officer Arsenault then begins inquiring about identification of any of the men in the van, which prompts Trooper Burke to say, "can you hang on the phone for one a minute, I am in the same spot as last time just so you know." Trooper Burke is then shown approaching the van getting identification cards and telling the people in the van to just stay here. Trooper Burke then returns with identification cards. Officer Arsenault tells Burke he will call him back once he has booted up his computer. (Def's Ex. 6.)

The report Trooper Burke wrote explained, "I also attempted to identify all the occupants of the vehicle and nobody returned with an active license or American identification card[.] All

passengers in the van spoke Spanish only[.] Due to the fact that that the occupants of the van appeared to be undocumented aliens, I contacted US Homeland Security I.C.E (sic) Arsenault and informed him of the situation." (Def's Ex 5). When pressed on cross, Trooper Burke agreed that the first thing he did when he got back to his State Police sport utility vehicle was call immigration and he asserted that his "training and education and experience leads me to believe that this traffic stop is going to lead to people from out of this country. (A at 53-54.)

At six minutes and five seconds, Trooper Burke calls the van into his dispatch. Trooper Burke tells the Maine State Police dispatch that it is a Homeland Security number and that he needs 239 down here. 239 is the code number for Maine State Trooper Justin Cooley. Trooper Burke then approaches the van again asking for identification and if anyone has any weapons, and again he returns to his State Police sport utility vehicle. For the next twenty minutes, Trooper Burke conducted inquiries into the identification, length of time they have been in the country, and residency of the men in the van and communicates that information to Officer Arsenault through text messages. Trooper Burke can be seen taking pictures of the identification cards at about eighteen minutes into the video. Trooper Burke also chats with Trooper Cooley and takes a telephone call from his wife. (Def's Ex. 6.)

At twenty-nine minutes and twenty-nine seconds, Trooper Burke makes his first inquiry into the license status of the driver. Trooper Burke, tells the dispatcher that he addresses as Jeffrey, that he has14 illegal aliens from South America and that they need to try to find a license on the driver. Trooper Burke tells Jeffrey to limit the search to Maine and Virginia. Trooper Burke tells the dispatcher to "start Stewarts" the company that will come and tow the van from the roadside.

At thirty-one minutes and four seconds into the video, Trooper Burke tells Trooper Cooley that they have one illegal re-entry. At thirty-two minutes in to the video the illegal re-entry suspect is identified as Zavala. Trooper Burke then asks Trooper Cooley how many pairs of handcuffs he has. (Def's Ex. 6.)

Deportation Officer Arsenault testified that he thought he had identified Mr. Garcia-Zavala as a suspect when he texted Deportation Officer Lenotte. Officer Arsenault testified, "[t]he only reference that I have is the text message that I sent to Deportation Officer John Lenotte which would have been at 12:41. (A at 13.) Officer Arsenault explained, I ran him through CIS, "I checked out -- which gave me his alien registration number. So then at that point I also checked Planet which is a system that gives us our court updates, and there was nothing in that…I checked a system called Claims which would have told me if he had applied for anything through USCIS or if he had came in possibly legally…I also called what's called the Law Enforcement Support Center which is based out of Vermont. They are --so I guess in layman's terms they are our dispatch center for immigration. So I called them and had them run him by name and date of birth as well. They have the ability to run numerous databases simultaneously and they can come back with a quicker response." (A at 14.)

Officer Arsenault believed that checking the computer systems gave him probable cause to arrest Mr. Garcia- Zavala either criminally or administratively. A at 15. Officer Arsenault testified, "[a]t that point I knew that we had an individual roadside with Maine State Police that had reentered the United States illegally without admission or parole." (A at 15.) Officer Arsenault testified that he then called Trooper Burke and explained the plan. (A at 15).

At thirty-two minutes and twenty-two seconds into the video, Officer Arsenault calls

Trooper Burke. Officer Arsenault tells Trooper Burke, “that they have several agents headed your way location and will get there in twenty or thirty minutes,” and asks, “is that something you can hold them for.” Officer Arsenault told them three of them may be in the country illegally. Trooper Burke tells Officer Arsenault that he thought “we could hold them as long as it takes for you to get here.” Trooper Burke again told Officer Arsenault it was the same place as last time. At thirty-five minute and five seconds into the video, Trooper Burke told Maine State Police dispatch that he was waiting for ICE to come and take at least six. (Def’s Ex. 6.)

Officer Arsenault disputed that he told Trooper Burke to hold the men in the van. Officer Arsenault testified, “I was not asking Trooper Burke to hold him specifically for our cause, so he was -- he was -- he was -- he was at a traffic stop at that point, and I reiterated to him if he was able to hold them during the traffic stop, and if he wasn't then the subjects would be released.” After being played the recording of the traffic stop, Officer Arsenault acknowledged that he told Trooper Burke to hold them and that he did not actually tell him they should be let go. (A at 32-33.)

At thirty-six minutes and seventeen seconds into the video Trooper Burke tells Trooper Cooley that here is no way Flanagan is going to beat me this month. At one hour, seventeen minutes and sixteen seconds into the video, Trooper Burke tells Trooper Cooley, “this is what it is like to win.” Trooper Burke then tells Trooper Cooley, that he will make sure he sends Trooper Flanagan a nice picture of this. Trooper Burke then claims that rules are one removal is one Uniform Summons and Complaint at one hour and eighteen minutes and eight seconds into the video. Trooper Burke claims that he was in a contest with Trooper Flanagan for issuing Uniform Summons and Complaints. Trooper Burke implies winning entitles him to beer from

Trooper Flanagan. (Def's Ex. 6.)

Trooper Burke testified that he had two or three other stops during which he called Immigration Customs Enforcement. (A at 164.) In the video at forty-four minutes and fifty-four seconds Trooper Burke discusses the first time he had I.C.E., involved in a Stop on Forest Avenue in Portland. (Def's Ex. 6.) At fifty-five minutes he discusses a second stop up the street where I.C.E. agents told him to call every time if he wanted. (Def's Ex. 6.) Trooper Burke also mentioned a atop in the same place when he first called Officer Arsenault. (Def's Ex. 6.) Trooper Burke had also stopped Francisco Arguiza. (T at 50.) Trooper Burke refused to acknowledge the racial component of the contest. (A at 47.)

At thirty-nine minutes and thirty-five seconds into the video, Trooper Burke tells Trooper Cooley he might as well start writing tickets and he is going to go tell the men in the van he is writing seatbelt tickets. Trooper Burke is then shown approaching the van and he told the men that he is writing seat belt tickets and it is going to take him "a half hour." When he returns to the State Police sport utility vehicle, Trooper Burke tells Trooper Cooley, "they bought that hook line and sinker." Trooper Burke and Trooper Cooley then kill time until one hour and twenty-three minutes and seven seconds when deportation officers arrive. (Def's Ex. 6.)

Deportation Officer John Lenotte did not provide Miranda Warnings to Mr. Garcia-Zavala at roadside even though he did ask him questions. (A at 66.) Officer Lenotte did not formally read Miranda like warnings until September 11, 2017 at which time Mr. Garcia Zavala invoked his right not to incriminate himself. (A at 70.) Trooper Burke did not provide Miranda warnings to Mr. Garcia-Zavala. (A at 165.) Beth Stickney did not provide Miranda warnings to Mr. Garcia-Zavala. (A at 74.)

Officer Lenotte testified to the timeline for bringing Mr. Garcia-Zaval to the initial appearance before the magistrate on September 22, 2017. (T at 166.) Officer Lenotte provided testified, "I believe I requested it on the 9th, the day of the arrest. That being a Saturday there is nobody responding, so they would have gotten that request that Monday the 11th…South Portland received the file I believe it was on the 13th, they go through their auditing process…Friday which would have been the 15th, that morning, as soon as I arrived to work it was -- it was waiting for me on my desk…that was on Monday, September 18th." (A at 73-74.)

THE DISTRICT COURT'S FINDINGS OF FACT

These facts are taken directly from the District Court's order included in the Appendix. On the afternoon of Saturday, September 9, 2017, Maine State Trooper Robert Burke III was on patrol in Portland, Maine. While parked perpendicular to Washington Avenue, he observed a white passenger van traveling down the roadway and proceeding to merge onto I-295. From his vantage point, he could see the front seat passenger, who appeared to not be wearing a seat belt, which would be a violation of 29-A M.R.S.A. § 2018(3-A). Burke decided to conduct a traffic stop. After activating his blue lights, he pulled the van over on the highway in the area of Tukey's Bridge. At approximately 12:20 PM, Trooper Burke approached the van and asked to see a license, registration, and proof of insurance. Trooper Burke then moved to the passenger side of the van and asked, "You have your seat belt on?" As captured on the videotape (Gov't Ex. 1) and transcript (Gov't Ex. 1T), someone in the vehicle answered, "yeah." Burke asked a couple of other questions and, based on the minimal responses, asked if anyone in the van spoke English. He then returned to the driver's side of the van repeating his request to see the driver's identification. Before returning to his vehicle, Trooper Burke remarked at least two additional

times that multiple people in the van did not appear to be wearing seat belts and did not appear to speak English.

Upon returning to his vehicle with only a vehicle registration for the van, Trooper Burke placed a call to Elliot Arsenault, a Deportation Officer for Enforcement Removal Operations with Immigration and Custom Enforcement ("ICE"). Arsenault answered this call at approximately 12:22 PM. Burke told Arsenault he had stopped a van for a seat belt violation and now had "a van load of fucking I don't even know what . . . of about 13 that nobody speaks English. Nobody has IDs." (Gov't Ex. 1T at 2). Burke indicated he thought Arsenault should "come out." (Gov't Ex. 1T at 2). At that point, based on his training and twenty-seven years of law enforcement experience, Burke believed that the traffic stop would "lead to people from out of this country" and, as a result, he would need ICE assistance in identifying the van occupants, who Burke then intended to summons for seat belt violations. (12/20/17 Tr. (ECF No. 42), PageID # 184.) Arsenault asked Burke if he could get any IDs or consulate cards. Burke then left Arsenault on hold while he returned to the van. At that point, the driver of the van produced identification. Burke returned to his vehicle and reported to Arsenault that he now had a "Mexico Consular ID card." (Gov't Ex. 1T at 3). In response, Arsenault indicated he would call Burke back once he had booted his computer up.

While waiting for the return call, Trooper Burke called the van registration into the Gray Regional Communication Center and requested back-up. He then went back to the van and obtained identifications from some passengers, including the Defendant, who produced a Honduran Consulate card with the name, "Mario Ernesto Garcia Zavala." (Gov't Ex. 2.) At that time, Burke told the van occupants, "You gotta stay here. Don't leave." (Gov't Ex. 1T at 4.) He

then returned to his vehicle and photographed the identification cards provided and sent those photographs to Arsenault at approximately 12:25 PM. Burke also attempted to determine whether any of the van passengers had a valid driver's license that would allow them to drive the van from the scene since it appeared the current driver was unlicensed.

Trooper Jason Cooley arrived on the scene to provide Trooper Burke's requested back-up at approximately 12:32 PM, twelve minutes after the traffic stop was initiated. Upon Cooley's arrival, Trooper Burke described the van's occupants as an "ICE motherload" and "sketchy as hell." (Gov't Ex. 1T at 5.) Both Cooley and Burke inspected the IDs that had been presented. At this point, both troopers were unsure of whether ICE officers would respond to the scene and Trooper Burke indicated that the ICE was "just getting started." (Gov't Ex. 1T at 7.) At approximately 12:40 PM, the Troopers returned to the van to gather further information and identify the two passengers that had not produced any identification. Five minutes later, Trooper Burke called dispatch to run driver's license checks based on the identifying information gathered. He also asked dispatch to begin the process of calling a tow truck to the scene if dispatch confirmed that the driver did not have a valid driver's license.

By 12:41 PM, Deportation Officer Arsenault had determined that Garcia-Zavala was suspected of reentry after removal. He communicated that information to his colleague, ICE Officer John Lenotte, who was in Maine and potentially able to go to the scene. Upon receiving confirmation that Lenotte, along with ICE Officer Patrick Mullen, were responding to the scene of the stop, he communicated the reentry information to Burke via text. He then called Burke and told him that it would take another 20-30 minutes to get ICE officers to the scene. Trooper Burke indicated he could hold the van occupants "as long as you want." (Gov't Ex. 1T at 11.) Burke

also explained that it was his intention to arrest the driver of the van for driving without a license and have the van towed, since it did not appear that any occupant of the van was a licensed driver.

By 12:57 PM, Trooper Burke explained to the occupants of the van that he planned to write each occupant a ticket for failing to wear a seat belt and that this process of issuing tickets would take half an hour. After telling the van occupants that they would have to wait for these tickets, Burke returned to his cruiser and told Cooley, "They bought that. Hook, line and sinker." (Gov't Ex. 1T at 15.) Trooper Burke returned to the van with the first ticket approximately five minutes later. At approximately the same time, two local attorneys, Elizabeth Stout and Elisabeth Stickney, began observing the traffic stop from the Tukey's Bridge walkway and attempting to communicate with the occupants of the van for the purpose of informing the van occupants about their legal rights. At approximately 1:19 PM, the tow truck arrived, and Trooper Burke indicated to the tow truck driver that they would await the arrival of ICE before towing the vehicle. Approximately ten minutes later, Trooper Burke texted Officer Arsenault for an estimated arrival time and, in response, was told five to ten minutes. Ten minutes later, in response to inquiries from Attorney Stickney, Trooper Burke represented that the scene was "an ongoing investigation." (Gov't Ex. 1T at 33.) In the colloquy that followed between Burke and Stickney, Burke gave conflicting representations about the status of the van occupants.

At 1:39 PM, Officer Patrick Mullen, the local ICE supervisor, arrived on the scene. Lenotte arrived a few minutes later, having traveled to the scene with his blue lights and siren activated. By the time both ICE officers arrived at the scene, they had received information from Arsenault that Garcia-Zavala was subject to detention for illegal reentry. Lenotte approached

Garcia-Zavala in the van. Although no *Miranda* warning was administered, Lenotte asked Garcia-Zavala for his name and date of birth; in response, Garcia-Zavala provided answers matching the information on the Honduran consulate card that had already been provided to Trooper Burke in connection with the traffic stop. Trooper Burke ultimately arrested the driver of the van for operating without a license. However, he ultimately did not issue citations to the van passengers for seat belt violations. (12/20/17 Tr., PageID # 154.)

At approximately 1:56 PM, the dashboard video shows the ICE officers taking Garcia-Zavala into custody. Lenotte followed their standard process of placing Garcia-Zavala in administrative custody and transporting him to the ICE office in South Portland for booking. Fingerprints and additional record checks conducted at the office confirmed Garcia-Zavala's prior 2014 removal. After the booking was complete, Garcia-Zavala was transported to Cumberland County Jail, where ICE paid to house him.

On the following Monday, September 11, 2017, Lenotte transported Garcia-Zavala from the jail back to the ICE office. At that time, Lenotte administered a *Miranda* warning with the assistance of a telephonic interpreter. Garcia-Zavala invoked his right to remain silent and was returned to the Cumberland County Jail. Lenotte continued his investigation of Garcia-Zavala by obtaining his alien file, which Lenotte did not receive until Friday, September 15, 2017. By the following Monday, September 18, 2017, Lenotte had transmitted the necessary paperwork to the U.S. Attorney's Office with a recommendation for criminal prosecution and the U.S. Attorney's Office accepted that recommendation. As a result, a criminal complaint was prepared and presented to the Magistrate Judge on September 19, 2017. On that same day, a criminal arrest warrant was issued for Garcia-Zavala, who remained in custody at the Cumberland County Jail.

Garcia-Zavala made his initial appearance before the Court on September 22, 2017 (ECF No. 8) and, on that same day, was transferred to the custody of the U.S. Marshal. Although the entity holding Garcia-Zavala changed, he remained housed in a local jail. All told, Garcia-Zavala was in custody for thirteen days before making his initial appearance on the pending charge.

THE DISTRCT COURT ORDER

The District Court rejected Mr. Garcia-Zavala's assertion that the stop was unreasonable because probable cause existed prior to the time it took to resolve the traffic stop. In the District Court's view, it did not matter that Trooper Burke was intentionally delaying the stop:

> In light of the fact that it took one hour for Trooper Burke to determine that there was no licensed driver for the van and to have a tow truck respond to the scene, the Court readily concludes that probable cause to arrest Garcia-Zavala was developed within the time a reasonably diligent officer would have needed to complete this traffic stop.

United States v. Mario Garcia-Zavala, 2:17-CR-140-GZS, Docket Entry 54, Order on Motion to Suppress at 11-12. The District Court was as equally unmoved by the component parts of the unreasonable search: the inception of the search was suspect because it was pretextual, that the Immigration and Custom Enforcement data bases were unreliable, and that reasonable suspicion did not mature into probable cause until Mr. Garcia-Zavala confirmed his identity when he spoke to Agent Lenotte.

The District Court's conclusion was informed by the refusal to accept that identity information could be suppressed at all. Relying on First Circuit precedent from the immigration removal context, the District Court incorrectly ruled the exclusion remedy did not apply at all:

> In *Lopez-Mendoza*, the Supreme Court explained that "[t}he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *Lopez-Mendoza*, 468 U.S. at 1039. Citing this precedent, the

> First Circuit refused to suppress the identity of an alien in connection with its review of a removal proceeding. *See Navarro-Challan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004) ("Navarro's name is not information even subject to being suppressed. The identity of an alien, or even a defendant, is never itself suppressible . . ." (internal quotations omitted)); *see also Garcia-Aguilar v. Lynch*, 806 F.3d 671, 676-77 (1st Cir. 2015) (affirming denial of a request to suppress a birth certificate in the context of a removal proceeding.)

Id. at 13-14. In the District Court's view, *Lopez-Mendoza* was conclusive on the issue. Although the Circuit split had been identified and argued, the District Court refused to acknowledge both the Supreme Court decisions that under cut this interpretation and the Fourth Circuit's holding otherwise controlled. Even the First Circuit's cases suggested the Lopez-Mendoza was not conclusive.

Although the District Court did not address the booking information exception specifically, it was enough that the Government conceded that some of Mr. Garcia-Zavala's response to Agent Lenotte would not be used by the Government. The district Court relegated this issue to footnotes:

> Garcia-Zavala also admitted that he was in the country illegally in response to Lenotte's questioning. (12/20/17 Tr.,PageID # 219.) However, the Government has indicated that it would not attempt to use this admission in connection with this case.

Id. at 6 Note 9. The District Court adopted the Government's position that Mr. Garcia-Zavala's identity was not subject to the requirements of Miranda Warnings or their equivalent. The District Court concluded that the totality of the circumstances completely legitimized the detention and collection of Mr. Garcia-Zavala's identity.

THE COURT OF APPEALS FOR THE FIRST CIRCUIT'S OPINION

The First Circuit Panel found that there was no Miranda violation because the Government agreed not to admit some statements that were not routine booking information.

The Panel's holding cited a case that had no relationship to immigration inquiries:

> There was no Miranda violation. The government agreed not to use Garcia-Zavala's incriminating responses against him. And Garcia-Zavala's statements identifying himself, his date of birth, and his country of origin are not subject to Miranda. See United States v. Sanchez, 817 F.3d 38, 45 (1st Cir. 2016)(noting the Miranda exception for routine booking questions not seeking to elicit incriminating responses).

United States v. Garcia-Zavala, 919 F.3d 108, 113 (1st Cir. 2019). Although there is a First Circuit case that suggests a routine immigration inquiry alone does not require Miranda, those circumstances do not apply in Mr. Garcia-Zavala's case. See *United States v. Nai Fook Li*, 206 F.3d 78, 83 (1st Cir. 2000) boarding a vessel for routine inspection does not amount to custody for Miranda Purposes. More recently, the First Circuit has expressly applied the warning required by Miranda to the immigration context.

There is nothing about the reasoning of *Sanchez* that suggest there is an exception for routine booking questions in the immigration context. While there is a recognized exception to the warning requirement for routine booking questions, such exceptions do not extend to the immigration context:

> Interrogation for *Miranda* purposes includes "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *accord United States v. Davis,* 773 F.3d 334, 339 (1st Cir.2014); *cf. generally Miranda,* 384 U.S. at 478, 86 S.Ct. 1602 (making the commonsense point that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence"). An exception exists for routine booking questions seeking background info, such as the "suspect's name, address, and related matters." *See United States v. Doe,* 878 F.2d 1546, 1551 (1st Cir.1989); *accord United States v. McLean,* 409 F.3d 492, 498 (1st Cir.2005); *see also United States v. Reyes,* 225 F.3d 71, 76-77 (1st Cir.2000) (noting that questions asked at booking regarding a defendant's date of birth and social-security number fit comfortably within the purview of this exception, given the circumstances of that case). Driving this "booking exception" (as the cases call it) is the idea that questions of this sort

> "rarely elicit an incriminating response"—"even when asked after an arrest." *See Doe,* 878 F.2d at 1551; *see also Pennsylvania v. Muniz,* 496 U.S. 582, 601, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (plurality opinion) (noting that the booking exception "exempts from *Miranda's* coverage questions to secure the biographical data necessary to complete booking or pretrial services" (internal quotation marks omitted)). There is an exception to this exception, however: the booking exception does not apply "where the law enforcement officer, in the guise of asking for background information, seeks to elicit information that may incriminate." *Doe,* 878 F.2d at 1551. Ultimately, the booking exception's applicability turns on an "objective" test that asks "whether the questions and circumstances were such that the officer should have reasonably expected the questions to elicit an incriminating response," *see Reyes,* 225 F.3d at 77—meaning "the officer's *actual* belief or intent," though "relevant," is in no way "conclusive," *see Doe,* 878 F.2d at 1551.

United States v. Sanchez, 817 F.3d 38, 44, 45 (1st Cir. 2016). Officer Lenotte, knew that he was investigating a criminal immigration offense and that identity was a critical aspect of proving that offense. The Panel's decision does not explain why *Sanchez* supports a general exception and the holding seems contrary to the weight of a line of decisions that suggest otherwise. Even *Sanchez* recognized that the kind of questions Officer Lenotte asked Mr. Garcia-Zavala may not fall within the exception.

Mr. Garcai-Zavala filed a petition for rehearing an d rehearing Enbanc with the United States Court of Appeals. The Petition identified both the internal split within the First Circuit and the split between the Circuits on the booking exception and warning requirement. The Court of Appeals for the First Circuit issued an order denying the petition on June 12, 2019.

ARGUMENT

I. The United States Court of Appeals for the First Circuit has decided an important question of federal law that has not, but should be, settled by this Court that the booking exception to the warning requirements of *Miranda* apply in the context of immigration crimes.

This Court articulated the standards that define what law enforcement conduct constituted custodial interrogation. Decades ago, the Court broadly defined interrogation as conduct that was likely to illicit an incriminating response:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. 291, 301 (1980). The conduct of the immigration and customs enforcement officers meets the definition for custodial interrogation in this case. The Government conceded as much when it pledged not to use some of Mr. Garcia-Zavala's statements at trial.

The Government, though, asserted that identification was excepted and could be used despite the failure to provide Miranda warnings. Despite the assertions of the Government, this Court has only recognized a limited exception:

> As *amicus* United States explains, "[r]ecognizing a `booking exception' to *Miranda* does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." Brief for United States as *Amicus Curiae* 13. See, *e.g., United States* v. *Avery*, 717 F. 2d 1020, 1024-1025 (CA6 1983); *United States* v. *Mata-Abundiz*, 717 F. 2d 1277, 1280 (CA9 1983); *United States* v. *Glen-Archila*, 677 F. 2d 809, 816, n. 18 (CA11 1982).

Pennsylvania v Muniz, 496 U.S. 582, 601 n.14 (1990). The Court has never recognized that the booking exception applies to the immigration context. Rather, the Court has implied that there is no exception in the immigration context by citing the Ninth Circuits holding as an example of

what is not booking information. Mr. Garcia-Zavala continues to assert that there was no exception to Miranda that applied to him as he remained detained on the side of a highway in Maine.

This Court could not have meant to extend the booking information exception to the immigration context because it cited *United States v. Mata-Abundiz* with approval when defining the limits of the exception. The Ninth Circuit has expressly required immigration officials to provide Miranda warnings during custodial interrogation:

> We hold that in-custody questioning by INS investigators must be preceded by *Miranda* warnings, if the questioning is reasonably likely to elicit an incriminating response. Investigator DeWitt's question regarding Mata's citizenship was very likely to produce an incriminating response. DeWitt had a duty to warn Mata before questioning him about his citizenship.

United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983). Immigration offenses are status crimes to which identity is central to guilt. There is nothing more incriminating when you are a person like Mr. Garcia-Zavala than providing your identity. A fact made clear by officer Arsenault's initial request to Trooper Burke, and Officer Lenotte's first questions to Mr. Garcia-Zavala.

The closest the First Circuit has come to recognizing the routine booking exception in the immigration context is the assumption that it may exist for simple identification information. However, the Panel in *Doe* was unwilling to apply that exception to facts very similar to Mr. Garcia-Zavala's case:

> Assuming the existence of a Miranda exception for "simple identification information of the most basic sort (e.g., name, address, marital status)," United States ex rel. Hines v. La Vallee, 521 F.2d at 1113 n. 2, we do not believe that exception applies here. For one thing, the administrative need for initial background questioning seems less great here than typically present at a police station, where one officer may book a suspect in one room before another

> questions the suspect at greater length elsewhere. Here, the same officer asked the identification questions as the substantive questions, and the record suggests that he could easily have offered a Miranda warning before asking about citizenship. For another thing, questions about citizenship, asked on the high seas, of a person present on a foreign vessel with drugs aboard, would (in our view) seem "reasonably likely to elicit an incriminating response." United States v. Mata-Abundiz, supra. When, or whether, the United States can prosecute a person found on such a ship is not immediately obvious; and the possibility that prosecution will turn upon citizenship is great enough (and should be well enough known to those in the drug enforcement world) that Coast Guard officers ought to know that answers to such questions may incriminate. In this particular case, the likelihood of an incriminating response was rather evident.

United States v. Doe, 878 F.2d 1546, 1551(1st Cir. 1989). The *Doe* Panel's explanation applies with equal force to the facts of Mr. Garcia-Zavala's case. The Government admitted that some of the questions and responses were subject to suppression and pledged not to use those statements. Officer Lenotte asked both the substantive questions and the identification questions at the same time. The circumstances of Mr. Garcia-Zavala's case and the defendant in *Doe* defies any real distinction.

Moreover, a 2015 First Circuit decision suggests that any booking information exception was wrongly applied to Mr. Garcia-Zavala. The focus should be on the custodial interrogation because there was nothing about the encounter with Mr. Garcia-Zavala that lends itself to routine customs questioning:

> Being in custody, however, is only half the equation. Molina must still prove that he was subject to interrogation. "Interrogation refers to both express questioning and its 'functional equivalent,' which includes 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " Id. at 711 (quoting Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)). At the same time though, "questions from [Customs] officials are especially understood to be a necessary and important routine for travelers arriving at American entry points." Id.; see also Pratt, 645 F.2d at 90 (explaining that individuals "approach official [airport Customs inspections] inquiry knowing of its greater necessity and routine"). "This

> understanding cuts against the potentially coercive aspect of the Customs inquiry, and [thus] lessens the need for Miranda warnings." Fernández–Ventura I, 85 F.3d at 711; see also Long Tong Kiam, 432 F.3d at 529 ("We now reaffirm the well-established authority of border inspectors to ask questions of those entering the United States."). As a result, a "careful examination of all the circumstances" is needed in order to distinguish between "routine Customs questioning and custodial interrogation." Fernández–Ventura I, 85 F.3d at 711.

United States v. Molina-Gomez , 781 F.3d 13, 23 (1st Cir. 2015). Mr. Garcia-Zavala was not at a border crossing, he was not detained voluntarily, and there was no reason beyond his non-white appearance and language that justified the presence of anyone from Immigration and Customs Enforcement. Had Trooper Burke simply written the ticket for not wearing a seatbelt based on his consular identification card, there would have been no reason for the detention at all. The very fact that Trooper Burke called someone he knew at Immigration and Customs Enforcement, conducted an unrelated immigration search, and deliberately extended the roadside detention for the purpose of making it possible for Immigration and Customs Enforcement officers to arrive made Mr. Garcia-Zavala's circumstances non-routine and custodial.

Officer Lenotte's questions were designed to illicit responses that would make it possible for Mr. Garcia-Zavala to be prosecuted. Even applying the principles of routine, requiring information about identity was itself designed to be incriminating:

> The CBP officers' questioning into Molina's involvement with drug activity, however, is more problematic. This line of questioning had nothing to do with whether or not to admit Molina into the country. Instead, these questions "symbolize[d] a high and evident degree of suspicion" by the CBP officers. Cf. Pratt, 645 F.2d at 90–91 (finding that limited questioning seeking an explanation as to why the traveler possessed a ticket issued for another person was routine and did not "create or symbolize a high and evident degree of suspicion about the appellant"). The officers were already leery that Molina may have been involved in drug trafficking, and this line of questioning was clearly aimed at eliciting an incriminating response. See Innis, 446 U.S. at 301; Fernández–Ventura I, 85 F.3d at 710–12 (finding that questions by Customs agents into "whether [the defendants were] carrying any money" would "quite clearly . constitute[ ]

> interrogation" if the defendants were in custody); see also Long Tong Kiam, 432 F.3d at 530 (explaining that interrogation begins once "the inspector's questions objectively cease to have a bearing on the grounds for admissibility and instead only further a potential criminal prosecution"). The questions regarding Molina's drug trafficking activities, therefore, constituted interrogation.

Id. at 24. The Panel in Mr. Garcia-Zavala's case simply did nothing to explain what made the exception apply. Mr. Garcia-Zavala had been detained on the roadside for an hour and twenty minutes, the first person that could speak to him in a language he understood was Officer Lenotte, and Officer Lenotte began interrogating him without any kind of warning. There is no doubt that Officer Lenotte subjectively believed that he had probable cause to believe that Mr. Garcia-Zavala had illegally re-entered the United States after removal.

The Panel's decision in this matter not only creates inconsistent holdings within the First Circuit but is also at odds with other circuits. Prior to this case, the First Circuit had expressly adopted the rule that the exception did not apply in immigration cases where nationality and identity were incriminating:

> The cases that create this exception, however, note that it does not apply where the law enforcement officer, under the guise of asking for background information, seeks to elicit information that may incriminate. United States v. Mata–Abundiz, supra ("If, however, the questions are reasonably likely to elicit an incriminating response in a particular situation, the exception does not apply."); United States v. Disla, 805 F.2d at 1347; United States v. Glen–Archila, 677 F.2d at 816; United States v. Booth, 669 F.2d at 1238. The question is an objective one; the officer's actual belief or intent is relevant, but it is not conclusive. United States v. Disla, supra; United States v.Mata–Abundiz, supra; United States v. Booth, supra.

United States v. Doe, 878 F.2d 1546, 1551 (1st Cir. 1989). There is simply no reason that the Immigration and Customs Enforcement Officer in this case should have ignored Mr. Garcia-Zavala's rights. Mr. Garcia-Zavala had been held on the road side for more than an hour. The Trooper had communicated that he was not free to leave by telling them it was going to take at

least a half an hour to write tickets and by seizing his identification. Mr. Garcia-Zavala asserts there is no exception to the requirement of Miranda warnings of the kind described by the First Circuit.

II. The District Court incorrectly concluded that there was an exception to the exclusionary rule for evidence of identity and that it had no authority to suppress evidence of identity.

In 1984, the United States Supreme Court explained that the illegality of an arrest did not affect civil deportation proceedings. The Court offered an explanation that suggested identity was also not subject to exclusion in the criminal context:

> The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. *See Gerstein v. Pugh,* 420 U. S. 103, 420 U. S. 119 (1975); *Frisbie v. Collins,* 342 U. S. 519, 342 U. S. 522 (1952); *United States ex rel. Bilokumsky v. Tod, supra,* at 263 U. S. 158. A similar rule applies in forfeiture proceedings directed against contraband or forfeitable property. *See, e.g., United States v. Eighty-Eight Thousand, Five Hundred Dollars,* 671 F.2d 293 (CA8 1982); *United States v. One (1) 1971 Harley-Davidson Motorcycle,* 508 F.2d 351 (CA9 1974); *United States v. One 1965 Buick,* 397 F.2d 782 (CA6 1968).

INS v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984). Since the promulgation of this rule, the Circuits have remained divided. The Tenth, Eighth, and Fourth Circuits hold that evidence of identity is subject to suppression. The Third, Fifth and Sixth Circuits hold that identity is excluded from suppression. The Ninth Circuit has not provided a clear position. The First Circuit has not addressed exclusionary rule for identity in the context of criminal proceedings and has provided contradictory guidance in the administrative context of removal proceedings.

Like the Circuits, a First Circuit has also been unclear on its position with respect to

evidence of identity. The First Circuit has so far been inconsistent on the rule prohibiting the suppression of identity evidence:

> This court has noted that Lopez–Mendoza provides "only a 'glimmer of hope of suppression.'" *Kandamar v. Gonzales*, 464 F.3d 65, 70 (1st Cir. 2006) (quoting *Navarro–Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004)). Specifically, Corado–Arriaza must have established that the search and seizure at issue amounted to an "egregious violation [ ] of [the] Fourth Amendment" that so "transgress[ed] notions of fundamental fairness and undermine[d] the probative value of the evidence obtained," as to constitute a Fifth Amendment violation of the right to due process. *Lopez–Mendoza*, 468 U.S. at 1050–51 & n.5, 104 S.Ct. 3479.

Corado-Arriaza v. Lynch, 844 F.3d 74, 78 (2016). *Corado-Arriaza*, focused on statements made during an interview by Immigration and Customs Enforcement Agents and Mr. Corado-Arriaza's place of work. The First Circuit's willingness to consider exclusion in the civil context suggests a willingness to allow suppression of identity evidence in the criminal context. The problem of course is that another First Circuit Panel has opted for the narrower interpretation of *Lopez-Mendoza*.

A prior Panel interpreted *Lopez-Mendoza* as having a broader effect on the exclusion of evidence of identity in immigration proceedings. In a 2004 opinion, the Court seemingly adopted an exception to the exclusionary rule for evidence of identity:

> Navarro's name is not information even subject to being suppressed. The identity of an alien, or even of a defendant, is "never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *INS v. Lopez–Mendoza,* 468 U.S. 1032, 1039, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984).

Navarro-Chalan v. Ashcroft, 359 F.3d 18 (1st Cir. 2004). *Navarro-Chalan* also focused statements made to Agents of Immigration and Customs Enforcement that were used against Mr. Navarro-Chalan in deportation proceedings. Neither of the First Circuits statements regarding

Lopez-Mendoza have occurred in the context of criminal proceedings where the exclusion remedy has long been applied. The distinction between criminal proceedings and administrative deportation proceedings has not so far been recognized by the District Courts within the First Circuit.

The District Court cases also treat identity as an exception to the remedy of exclusion. The reported cases interpret *Lopez-Mendoza* as providing an exception to the exclusionary rule for identity evidence. See *United States v De Los Angeles*, 863 F.Supp.2d 106 (2012), *United States v. Sandoval-Vasquez*, 519 F.Supp.2d 198 (2007). In 2011, Judge Stearns recognized the split between the circuits in an unreported decision. *United States v. Cuevas*, 2011 WL 3627300. None of these District Court cases have given any serious consideration to the distinction between the administrative context of the First Circuits statements on Lopez-Mendoza and the criminal context where they applied the exception despite the circuit split.

The Court never meant to create a broad exception to the exclusionary rule. Such a broad exception would have made that separate treatment of the case involving Mr. Sandoval-Sanchez unnecessary:

> Respondent Sandoval-Sanchez has a more substantial claim. He objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding. The general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated. *Wong Sun v. United States,* 371 U. S. 471 (1963). The reach of the exclusionary rule beyond the context of a criminal prosecution, however, is less clear. Although this Court has once stated in dictum that "[i]t may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings," *United States ex rel. Bilokumsky v. Tod, supra,* at 263 U. S. 155, the Court has never squarely addressed the question before. Lower court decisions dealing with this question are sparse.

Lopez-Mendoza, at 1040-1041. This separate treatment has resulted in the First Circuit's willingness to consider exclusion as a remedy in reviewing deportation orders and other Circuits use of the exclusion remedy in immigration proceedings. This sperate treatment has also resulted in the current circuit split over identity being subject to exclusion on a motion to suppress. Mr. Garcia-Zavala asserts that evidence of his identity collected as result of his illegal detention and arrest is subject to the exclusion remedy on a motion to suppress.

The Supreme Court had explicitly affirmed the application of the exclusionary rule to fingerprint evidence long before Lopez-Mendoza's vague statements about its application to evidence of identity. The creation of an exception to the exclusionary rule would almost certainly require an involved explanation of prior precedent directly contrary to such an exception:

> Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes. Thus, in Mapp v. Ohio, 367 U.S. 643, 655 (1961), we held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (Italics supplied.) Fingerprint evidence is no exception to this comprehensive rule.

Davis v. Mississippi, 394 U.S. 721, 724 (1969). Both the petitioner in *Davis* and the respondent Sandoval-Sanchez in *Lopez-Mendoza* share this application of the exclusionary rule to evidence of identity. Mr. Garcia-Zavala, among other types of evidence, sought to have his fingerprints that resulted from his arrest suppressed. Moreover, the Court did not recognize this exception to the exclusionary rule in a decision after *Lopez-Mendoza*.

The Supreme Court has explicitly affirmed Davis the year after deciding Lopez-Mendoza. No such exception to the exclusionary rule for identity evidence was even mentioned:

> We agree with petitioner that Davis v. Mississippi, 394 U.S. 721 (1969), requires reversal of the judgment below. In Davis, in the course of investigating a rape, police officers brought petitioner Davis to police headquarters on December 3, 1965. He was fingerprinted and briefly questioned before being released. He was later charged and convicted of the rape. An issue there was whether the fingerprints taken on December 3 were the inadmissible fruits of an illegal detention. Concededly, the police at that time were without probable cause for an arrest, there was no warrant, and Davis had not consented to being taken to the station house. The State nevertheless contended that the Fourth Amendment did not forbid an investigative detention for the purpose of fingerprinting, even in the absence of probable cause or a warrant.

Hayes v. Florida, 470 U.S. 811, 813-814 (1985). Again, the Court suppressed evidence of identity, the petitioner's fingerprints, after an investigative detention that was not based on probable cause. The Court did intimate that an investigative detention that did not remove a person from their home might be permissible under appropriate procedures but again there was no discussion of any exception to the exclusionary rule for evidence of identity. Hayes is the cornerstone of the split between the circuits over the meaning of *Lopez-Mendoza's* exception to the exclusionary rule.

As the Fourth Circuit points out, the Supreme Court has endorsed the exclusion of the kind of evidence for which *Lopez-Mendoza* is supposed to make an exception. The Supreme Court has suppressed evidence of identity even after the decision in Lopez-Mendoza:

> Finally, other Supreme Court precedent, both prior and subsequent to *Lopez–Mendoza,* offers definitive support for our interpretation of its "identity statement." Twice the Court has specifically held that in some circumstances the exclusionary rule *requires* suppression of the very kind of identity evidence at issue here—fingerprint evidence. *See Hayes v. Florida,* 470 U.S. 811, 816, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) (holding fingerprints properly suppressed when defendant was arrested without probable cause, taken to police station without consent, and detained and fingerprinted for an investigative purpose); *Davis v. Mississippi,* 394 U.S. 721, 727, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (same). These cases fatally undermine the Government's contention that *Lopez–Mendoza* bars suppression of all identity evidence in criminal proceedings.

United States. v. Oscar-Torres, 507 F.3d 224, 229-230 (4th Cir. 2007). There is no broad exception for the kind of evidence sought to be suppressed in Mr. Garcia-Zavala's case. The Fourth and Tenth Circuits have suppressed consular identity cards, fingerprint cards, and A-Files. Mr. Garcia-Zavala asserts that the Court should do the same here.

The Fourth Circuit has endorsed the correct standard that should be applied to Mr. Garcia-Zavala. The consular card, the fingerprints cards, the statements, and the A-file should be suppressed because the illegal investigatory detention here was used to secure the evidence of his identity:

> Our sister circuits, when confronted with cases involving § 1326 offenses, like the one at hand, have read *Hayes* and *Davis* to permit a sensible rule as to when fingerprints will constitute fruit of an unlawful arrest, and so be inadmissible. When police officers use an illegal arrest as an investigatory device in a criminal case "for the purpose of obtaining fingerprints without a warrant or probable cause," then the fingerprints are inadmissible under the exclusionary rule as "fruit of the illegal detention." *Olivares–Rangel,* 458 F.3d at 1114–16 (citing *Hayes,* 470 U.S. at 817–18, 105 S.Ct. 1643, and *Davis,* 394 U.S. at 727–28, 89 S.Ct. 1394); *see also United States v. Garcia–Beltran,* 389 F.3d 864, 868 (9th Cir.2004), *Guevara–Martinez,* 262 F.3d at 756. But when fingerprints are "administratively taken ... for the purpose of simply ascertaining ... the identity" or immigration status of the person arrested, they are "sufficiently unrelated to the unlawful arrest that they are not suppressible." *Olivares–Rangel,* 458 F.3d at 1112–13. Thus, fingerprints do not constitute suppressible fruit of an unlawful arrest or detention unless the unlawful arrest "was purposefully exploited in order to develop critical evidence of criminal conduct to be used against [the d]efendant" in a criminal proceeding. *Id.* at 1113.

Id. at 230-231. Arguendo, the only possible reason that Trooper Burke could lawfully hold Mr. Garcia-Zavala was the crime encompassed by 8 U.S.C 1326. In this case, the arrest of Mr. Garcia-Zavala was to prosecute him for "illegal reentry." This is what was reported by Officer Arsenault to Trooper Burke, when Trooper Burke told him that he could be held there for "as long as it takes" for immigration to arrive. Without suspicion of criminal activity Trooper Burke

had no authority to hold Mr. Garcia-Zavala because Trooper Burke is not authorized to administratively enforce 8 U.S.C. 1326.

III. This case is an opportunity for the Court to establish certainty and provide guidance to the Circuits of the Court of Appeals that the booking information exception is not a means of avoiding the Court's warning over the use of stop and identify tactics especially in the immigration context.

The Court has specifically warned that law enforcement officers like Trooper Burke cannot enforce immigration laws without special training and cannot extend traffic stops to make identifications. Immigration law makes the power of arrest by non-immigration officers contingent on training:

> A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government. See § 1357(g) (1); see also § 1103(a)(10) (authority may be extended in the event of an "imminent mass influx of aliens arriving off the coast of the United States"); § 1252c (authority to arrest in specific circumstance after consultation with the Federal Government); § 1324(c) (authority to arrest for bringing in and harboring certain aliens). Officers covered by these agreements are subject to the Attorney General's direction and supervision. § 1357(g)(3). There are significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable. See *Padilla v. Kentucky,* 559 U.S. 356, 379–380, 130 S.Ct. 1473, 1488–1490, 176 L.Ed.2d 284 (2010) (ALITO, J., concurring in judgment). As a result, the agreements reached with the Attorney General must contain written certification that officers have received adequate training to carry out the duties of an immigration officer. See § 1357(g)(2); cf. 8 CFR §§ 287.5(c) (arrest power contingent on training), 287.1(g) (defining the training).

Arizona v. United States, 567 U.S. 387, 408-409 (2012). The Government has produced no evidence that such an agreement existed with the State of Maine or that Trooper Burke had any training required by 8 CFR § 287.5(c). The audio recording of Trooper Burke's activities during the stop include him explaining the rules of a contest that he was engaged in with another

Maine State Trooper over a six pack of beer for the highest number of uniform summons and complaints issued. According to Trooper Burke statements in the recorded audio, he got credit for immigration detainers. The training envisioned by immigration law is meant to minimize the risk that it will be misused in this way.

Allowing identity information in the context of immigration crimes to remain as part of the booking information exception will deprive members of the public from any real remedy for this kind of law enforcement conduct. The Court explicitly identified its concern with the very type of law enforcement activity exemplified by the Maine State Police in this case:

> Detaining individuals solely to verify their immigration status would raise constitutional concerns. See, *e.g., Arizona v. Johnson,* 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009); *Illinois v. Caballes,* 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission"). And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision.

Id. at 413. Trooper Burke was not justified in holding Mr. Garcia-Zavala on the side of the highway for over one hour and twenty minutes while he waited for officers from Immigration and Customs Enforcement to arrive. The video evidence in this case shows that Trooper Burke did very little to pursue any of the reasons that justified the stop at its inception. The Maine State Police and Immigration and Customs Enforcement officers simply disregarded their training and violated the Fourth Amendment of the United States Constitution.

Because the analysis used by the District Court and the analysis used by the Court of Appeals for the First Circuit diverge, the Court should resolve the confusion over the availability of the exclusion remedy for identification information. The split is significant and the confusion

evident in the analysis: in either analysis the circuits disagree on how the issue of identification information should be resolve. Mr. Garcia-Zavala asks this Court to resolve the problem.

CONCLUSION

The Supreme Court Should review the conclusion of the United States Court of Appeals for the First Circuit and Grant this petition for writ of certiorari.

Dated at Portland, Maine this 27th day of August 2019.

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