

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARIO BUENROSTRO-LOPEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an individual's telephone call to law enforcement, in which he stated that a person was picked up by vehicle in an area known for alien smuggling, is sufficient to establish reasonable suspicion for an investigatory stop of a vehicle matching the caller's description even though the caller did not provide: (1) his name or contact number, nor call on a 911 emergency line that enabled tracing; (2) any information that suggested the person being picked up was an undocumented alien, or had just recently unlawfully crossed the border into the United States; or (3) any predictive information that would support that the caller knew the driver of the truck or the individual picked up were engaged in criminal activity?

STATEMENT OF RELATED CASES

United States v. Mario Buenrostro-Lopez, No. 3:17-cr-3825-JAH-1, United States District Court for the Southern District of California. District court proceeding in which Petitioner was convicted of offense related to this petition. Judgment was entered on August 16, 2018.

United States v. Mario Buenrostro-Lopez, No. 18-50273, United States Court of Appeals for the Ninth Circuit. Direct appeal deciding issue raised in this petition. Judgment was entered on October 25, 2019.

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ORDER AND OPINION BELOW

On March 20, 2018, the district court denied Petitioner Mario Buenrostro-Lopez's motion to suppress the fruits of an unlawful investigatory stop. A copy of the portion of the transcript with that oral ruling is attached in the appendix.

On October 25, 2019, a Ninth Circuit panel filed an unpublished opinion affirming the district court's order. *See United States v. Buenrostro-Lopez*, 781 Fed. App'x 678 (9th Cir. 2019) (attached in appendix).

JURISDICTION

The Ninth Circuit opinion that is the focus of this petition was filed on October 25, 2019. Accordingly, this Petition is timely, and jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”

STATEMENT OF THE CASE

I. Proceedings In The Southern District Of California

A. Pre-Trial Suppression Motion

Mario Buenrostro-Lopez was charged with illegal entry under 8 U.S.C. §1326. During pretrial proceedings, he filed a motion to suppress fruits of an unlawful Border Patrol investigatory stop, including incriminating statements he made following his detention. *See* ER 5-9.¹ In its response in opposition, the government relied on a citizen's telephone “tip” to Border Patrol to

¹ The ER cites in this petition are to the Excerpts of Record that Buenrostro filed in the Ninth Circuit, at docket #8, in Case No. 18-50273.

supports its claim that there was reasonable suspicion for the stop. *See* ER 10-16. At the initial hearing on the motion, the district court ordered an evidentiary hearing so defense counsel could challenge the reliability of the citizen's tip. *See* ER 25-26. At that point, government counsel told the court he was "not sure that we can have the tipster here because we're not certain who they are." ER 27-28. The court suggested the government at least present testimony from a Border Patrol agent who could explain "why the tip is considered to be reliable; and the agent responding to the dispatcher may have that information." ER 28.

B. Evidentiary Hearing

At the subsequent evidentiary hearing, the government presented testimony from Border Patrol Agent Robert Mendoza, who fielded the telephone "tip," and Border Patrol Agent Nathaniel Martinez, who made the stop. Their testimony is summarized below.

1. Robert Mendoza

Agent Mendoza testified that he was working at a Border Patrol station at about 11:00 am on October 18, 2017, when he received a telephone call from a citizen whom he understood to be a security guard. *See* ER 35. The caller said "he had observed an individual coming out of some brush on a phone" near the intersection of Paseo de la Fuente and Alta Roads, which is a few miles from the California-Mexico border. ER 37. Agent Mendoza testified that the terrain in that area is a "little hilly," with tall brush, and nearby there are several businesses, a power plant, and a home. *See* ER 37, 51, 53-54. Agent Mendoza also said undocumented immigrants are regularly picked up in that area. *See* ER 39-41.

According to Agent Mendoza, the caller said that "later on," after the man walked out of the brush, he was picked up by a person driving a white Ford F-150 pickup truck with tinted windows, a large antenna, and Baja California Mexico licence plate. *See* ER 34, 42. Mendoza immediately

broadcast that information to Border Patrol agents working in the field. *See* ER 42, 47. He did not, however, get the caller's name or telephone number, nor any other identifying information, and he had only a vague idea that the caller was a security guard "around that area."² ER 35, 47. Agent Mendoza also did not learn from the caller: (1) how much time elapsed between the events the caller allegedly witnessed and when he telephoned the Border Patrol; (2) how long the man waited until he was picked up by the F-150; or (3) what direction the F-150 drove after the man got in.³ ER 34-35, 43, 46.

2. Nathaniel Martinez

Agent Martinez testified that at about 11:00 a.m. on October 18, 2017, he heard a report over his Border Patrol radio that a "white F-150 [with] dark tinted windows, Baja plate, and a large antenna on the roof" had "picked up a suspected illegal alien that was coming out of the brush on the phone." ER 58-59. Agent Martinez drove to the area identified in the dispatch report, hoping to intercept the F-150. As Agent Martinez drove west on Otay Mesa Road, he noticed that another Border Patrol agent had pulled over a white Honda pickup truck. *See* ER 59-60. Agent Martinez stopped to tell the agent that the dispatcher had referred to a Ford, not a Honda, and then began walking back to his marked Border Patrol sedan. *See* ER 60. As he was doing so, Agent Martinez saw a white Ford F-150 driving south on La Media Road, about a 100 yards from him. *See* ER 60.

² Agent Mendoza testified that "eventually it was – there was gained his information, his name and phone number." ER 25. Neither he, nor any other witness, said when that happened. *See* ER 48. Furthermore, prior to the evidentiary hearing, the prosecutor told the district court that the government was "not certain" who the caller was, so it stands to reason that the agents never got the caller's identifying information. *See* ER 27-28.

³ Agent Mendoza testified that it was his understanding that the truck "proceeded out," and he said "[t]here is only one way out from that area." ER 44. A map shows there are three directions a vehicle could have gone from that intersection, as well as off-road, and Agent Mendoza admitted that on cross examination. *See* ER 45, 55, 79-81.

At that point, Agent Martinez was about three miles from where his dispatcher reported the F-150 was seen. *See* ER 61.

Agent Martinez got into his patrol car and drove after the F-150, which he saw entering Highway 905 westbound, from La Media Road. Agent Martinez testified that as the F-150 entered the highway, it “accelerat[ed] at a very high rate of speed,” but he did not note the truck’s speed. *See* ER 61, 65. Shortly thereafter, Agent Martinez entered Highway 905 and accelerated quickly to catch up to the F-150. When Agent Martinez caught up and got behind the F-150, it “slowed down quite a bit slower than the speed of traffic,” to about 50 miles per hour. ER 61. Agent Martinez then pulled up next to the driver’s side of the F-150. There he could see the driver’s silhouette through the tinted side windows, but he could not see a passenger inside. *See* ER 62, 64. Agent Martinez also saw “removable sun visors on both windows, the front passenger and the front driver’s side.”⁴ *See* ER 62. He thought that was “unusual” because the F-150’s windows were tinted, but he did not say that factored into his decision to make a stop. *Id.* Instead, he said he proceeded to activate his car’s emergency lights, and stop the F-150, because of “how fast [the driver] accelerated onto the freeway then he slowed decelerated once I got up to him, along with matching the dispatch call.” ER 62.

After the F-150 pulled over, Agent Martinez questioned Buenrostro, who was in the passenger seat. Buenrostro admitted that he was not a United States citizen and was in the United States without documentation. *See* ER 94-95.

⁴ Agent Martinez did not explain what he meant by “sun visors,” but apparently he was not referring to the sun visors that are usually attached to the ceiling of a vehicle, directly in front of the driver and passenger. During the trial he said he “noticed that there was removable sunshades on the front windows. It just seemed odd.” ER 93.

C. District Court’s Order Denying Suppression Motion

Following the testimony, the district court made oral findings that tracked the Agents’ testimony, and found there was reasonable suspicion for the stop. Thus, the court denied Buenrostro’s suppression motion. *See* ER 71-75. A copy of the portion of the transcript with that oral order is included in the appendix.

During trial – in opening statement, during Agent Martinez’s testimony, and during closing argument – the government relied on Buenrostro’s post-detention statements to prove that he was not a United States citizen, and that he knowingly entered the United States without permission to do so. *See* ER 84, 86, 94-95, 98, 100-01.

II. Proceedings In The Ninth Circuit

On appeal, the Ninth Circuit held that there was reasonable suspicion to support the investigatory stop of the F-150, giving determinative weight to the telephone tip:

Telephone tips may serve as the basis for establishing reasonable suspicion for an investigatory stop if they evince “sufficient indicia of reliability.” *United States v. Edwards*, 761 F.3d 977, 983 (9th Cir. 2014) (citation omitted). Here, several factors contribute to the call’s reliability: a security guard called into Border Patrol, gave a first-hand account of a potential illegal-alien pickup in an area known for such activity, and then called back to provide his contact information. Additionally, the short timespan between the tipster’s report and stop, the agent’s confirmation of the various details of the truck, the driver’s behavior, and the sun visor placement further support the reasonableness of the stop.

Buenrostro-Lopez, 781 Fed. App’x at 657 (attached in appendix).

REASONS FOR GRANTING THE PETITION

The question presented deals with whether reasonable suspicion for an investigatory stop may be established based on an anonymous telephone call to law enforcement in which the caller does not provide anything but the vaguest suggestion that illegal activity may be afoot. Because the Ninth

Circuit’s holding on this issue conflicts with this Court’s case law, and because this is an issue of exceptional importance, the Court should grant review to consider the question presented.

The Fourth Amendment permits an investigative traffic stop when an officer has “a particularized and objective basis for suspecting the particular person stopped of criminal activity.”⁵

United States v. Cortez, 449 U.S. 411, 417-18 (1981). The “reasonable suspicion” necessary to justify such a stop depends “upon both the content of information possessed by police and its degree of reliability.” *Alabama v. White*, 496 U.S. 325, 330 (1990).

“[I]n addressing the issue of telephone tips and investigatory stops,” this Court “has focused on whether the tips ‘exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.’” *United States v. Edwards*, 761 F.3d 977, 983 (9th Cir. 2014) (quoting *White*, 496 U.S. at 326-27). *White* was the first case to address that issue. There, a caller reported that a woman named Vanessa White would be leaving a particular apartment, at a particular time, in a particular vehicle, on her way to a particular motel, and in possession of cocaine. *Id.* at 327. Officers followed White as she left the apartment identified by the caller, in the car identified by the caller, to the motel identified by the caller, and when they stopped her they found marijuana and cocaine in the car. *See id.* The Court held that the telephone tip exhibited sufficient indicia of reliability to justify the stop because the details provided showed “special familiarity with [White’s] affairs,” which officers were then able to corroborate by following White. *See id.* at 330-32; *see also Navarette v. California*, 572 U.S. 393, 406 (2014) (Scalia, J., dissenting) (“reliability of the tip [in *White*] was established by the fact that it predicted the target’s behavior in the finest detail – a detail that could be known only by someone familiar with the target’s business”).

⁵ As a passenger in the F-150, Buenrostro was detained when the stop was made and thus may challenge the legality of the stop. *See Brendlin v. California*, 551 U.S. 249 (2007).

The Court next dealt with a telephone tip in *Florida v. J.L.*, 529 U.S. 266 (2000). There a caller told police “that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.” *Id.* at 268. Officers went to the bus stop, frisked J.L – who was black and was wearing a plaid shirt – and seized a gun from his pocket. *See id.* The Court found the tip “lacked the moderate indicia of reliability” that were “essential to the Court’s decision in” *White*, because the caller in *J.L.* “provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility.” *Id.* at 270–71. The Court held the tip was therefore insufficient to support reasonable suspicion because it was nothing more than “[a]n accurate description of a subject’s readily observable location and appearance,” and “d[id] not show that the tipster ha[d] knowledge of concealed criminal activity. . . . [R]easonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” *Id.* at 272.

The Court’s most recent treatment of this issue was in *Navarette v. California*, 572 U.S. 393 (2014), which involved a woman who called 911 and claimed a truck had run her off the road. *See id.* at 395. A 911 dispatcher relayed the tip – including the nature of the incident, its location, and a specific description of the offending vehicle – and officers pulled over the truck and found thirty pounds of marijuana. *See id.* at 395-96. The Court stated that four things were key to its conclusion that the tip established reasonable suspicion for an investigatory stop: (1) the caller claimed eyewitness knowledge of the alleged dangerous activity, lending “significant support to the tip’s reliability;” (2) the caller made a statement about an event “soon after perceiving” it, which is “especially trustworthy;” (3) the caller used 911, which “has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity;” and (4) the tip created reasonable suspicion of an ongoing and dangerous crime – drunk driving –

rather than “an isolated episode of past recklessness.” *Id.* at 399-401. The Court in *Navarette* distinguished the “bare-bones tip” in *J.L.*, “where the tip provided no basis for concluding that the tipster had actually seen the gun,” and where “[t]here was no indication that the tip . . . was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event.” *Id.* at 400-01, 404.

With this precedent in mind, Buenrostro turns to assessing the lawfulness of the investigatory stop in this case. As mentioned above, in considering whether a telephone tip establishes reasonable suspicion for a stop, courts consider its content and reliability. *See White*, 496 U.S. at 330. On both measures, the “tip” involved in this case was weak, for several reasons.

First, the caller didn’t use the 911 system, nor did he provide Agent Mendoza with his name or callback number. *See Edwards*, 761 F.3d at 983-85.

Second, the caller didn’t tell Agent Mendoza when he saw the man emerge from the brush relative to when he called Border Patrol, much less that he was reporting the events contemporaneously. *See Navarette*, 572 U.S. at 399-400; *Edwards*, 761 F.3d at 984.

Third, the caller didn’t tell Agent Mendoza the route the F-150 would be traveling, nor provide any other predictive information that would allow officers to “test the [caller’s] knowledge or credibility.” *J.L.*, 529 U.S. at 270-71.

Fourth, and relatedly, one of the key facts that the caller provided was that the “suspect” was picked up by someone driving a white F-150. Yet when Agent Martinez later pulled up alongside a white F-150, he could see only the driver, not a passenger. That cut against the reliability of the caller’s “tip,” or against Agent Martinez’s suspicion that he was following the F-150 identified by the caller.

Fifth, the caller didn't say that the alleged suspect was engaged in even "general criminality" like that alleged in *J.L.*, much less the sort of dangerous crime claimed in *Navarette*. *See Edwards*, 761 F.3d at 984-85.

Which segues to the other major deficiency with the "tip" – its weak content. "Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that 'criminal activity may be afoot.'" *Navarette*, 572 U.S. at 401 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Here, the caller told Agent Mendoza that a person walked out of some brush in an area in which undocumented aliens have been known to be picked up, and that some time "later" he was picked up by an F-150. "An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). And that is really all the "tip" in this case amounted to. Notably, Agent Mendoza didn't testify that the caller said the person who was picked up did anything to suggest he was in the United States unlawfully, such as concealing himself in the brush until the F-150 arrived, or running out of the brush and getting into the F-150 quickly. Nor did Agent Mendoza report that the caller said there was anything about the appearance of the person who was picked up that suggested he had recently crossed into the United States unlawfully and was being spirited away from the border. Common sense indicates that a person who has scaled two border fences standing eight and fifteen feet tall, and braved rough desert terrain while evading Border Patrol agents, will show some wear, tear, and dirt from the experience. *See* ER 89-90.

Accordingly, the content and reliability of the "tip" didn't support reasonable suspicion for the stop, and the district court and Ninth Circuit erred when they concluded otherwise. Furthermore, as the Ninth Circuit panel tacitly acknowledged, without the tip there was not reasonable suspicion to support the stop.

Because the Ninth Circuit's holding in this regard conflicts with this Court's case law, and because this is an issue of exceptional importance, review should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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