

No.

The Supreme Court of the United States

Ivan Cruz-Rivera,
Petitioner,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the First Circuit

Petitioner's Motion for Leave to Proceed *In Forma Pauperis*

The petitioner Ivan Cruz-Rivera, through undersigned counsel, respectfully moves this Court for leave to proceed *in forma pauperis* in the above-captioned matter. Petitioner Cruz-Rivera was represented by appointed counsel pursuant to the Criminal Justice Act, 18 U.S.C. §3006A, and undersigned counsel was also appointed by the United States Court of Appeals for the First Circuit to represent petitioner in the proceeding below pursuant to the Criminal Justice Act. A copy of the order of the Court of Appeals appointing undersigned counsel is appended to this motion.

Wherefore, for the reason set forth above, counsel for the petitioner respectfully requests that this motion for leave to proceed *in forma pauperis* be granted.

Respectfully submitted,

/s/ Syrie D. Fried
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CERTIFICATE OF SERVICE

I, Syrie D. Fried, do hereby certify that copies of the foregoing motion have been served upon Ms. Elizabeth Prelogar, Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 by mailing copies of the same via U.S. Mail, postage prepaid, to the above address on February 28, 2022.

/s/ Syrie D. Fried
Syrie D. Fried
Counsel of Record

United States Court of Appeals For the First Circuit

No. 19-1465

UNITED STATES,

Appellee,

v.

IVAN CRUZ-RIVERA,

Defendant - Appellant.

ORDER OF COURT

Entered: June 11, 2019
Pursuant to 1st Cir. R. 27.0(d)

Appellant's request for appointment of counsel on appeal is granted. Attorney Syrie Davis Fried is appointed as counsel for defendant-appellant under the guidelines of the Criminal Justice Act, 18 U.S.C. § 3006A nunc pro tunc to May 7, 2019.

By the Court:

Maria R. Hamilton, Clerk

cc:

Syrie Davis Fried

Ivan Cruz-Rivera

Cynthia A. Young

Michelle L. Dineen Jerrett

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PETITION FOR WRIT OF CERTIORARI

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February 28, 2022

Question Presented

Whether It Is Not Necessary To Evaluate The Basis Of Knowledge
Underlying An Informant's Tip If The Informant Is A Police Officer.

Parties To Proceedings Below

The parties to the proceedings in this matter were: the United States of America, plaintiff and Ivan Cruz-Rivera and Carlos Jimenez, defendants.

Prior Judicial Proceedings

In the United States District Court for the District of Massachusetts: United States v. Ivan Cruz-Rivera and United States v. Carlos Jimenez; docket no. 4:16-cr-40025-TSH; judgment entered against both defendants on May 6, 2019.

In the United States Court of Appeals for the First Circuit: United States v. Ivan Cruz-Rivera; docket no. 19-1465; judgment entered on September 15, 2021; order denying petition for rehearing and for rehearing *en banc* entered on November 29, 2021. United States v. Carlos Jimenez; docket no. 19-1509; judgment entered on September 15, 2021.

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Official Citations

United States v. Ivan Cruz-Rivera and Carlos Jimenez, 335 F.Supp.3d 81 (D.Mass. 2018); *United States v. Ivan Cruz-Rivera*, 14 F.4th 32 (1st Cir. 2021).

Statement of Jurisdiction

The date of the judgment in the United States Court of Appeals for which petitioner is seeking review was September 15, 2021. Petitioner's petition for rehearing was denied on November 29, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Relevant Constitutional Provision

The constitutional provision pertaining to this petition is the Fourth Amendment to the Constitution. That Amendment provides:

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.

Statement of the Case

Ivan Cruz-Rivera and his co-defendant Carlos Jimenez were indicted in the District of Massachusetts on charges of conspiracy to distribute heroin and distribution of heroin, in violation of 21 U.S.C. §§841(a)(1) and 846. The District Court had jurisdiction over this case pursuant to 18 U.S.C. §3231, as the petitioner and his co-defendant were charged with violations of the United States laws.

At a pretrial suppression hearing, the government presented evidence of its

investigation of a drug trafficking operation in the vicinity of Fitchburg, Massachusetts. Fitchburg Police Department Sergeant John Maki testified about a series of controlled purchases of heroin from a man named Miguel Rivera that were made by a confidential source working under the supervision of a DEA Task Force. Seven heroin purchases from Rivera were made between May 30, 2012 and September 5, 2013.¹ In none of those deals were Ivan Cruz-Rivera, Carlos Jimenez, or Jimenez's Lexus automobile implicated in any way, i.e., there is nothing in the motion record that the defendants were observed, audio-recorded, or telephoned by anyone connected with Rivera or Segundo Gutierrez, who became the government's cooperating witness at trial.

The investigators decided to attempt a transaction with Rivera's "uncle," a man named Segundo Gutierrez, directly. They made this decision because they believed that Gutierrez was Rivera's supplier, based on the course of the earlier transactions. A surveillance team was put in place surrounding an auto body repair garage at 105-107 Union Street in Leominster, Massachusetts some time before 12:00 noon on October 4, 2013. This garage was Gutierrez's place of business. Just after 12:00 p.m., the source who had previously bought heroin from Rivera made contact with Gutierrez directly by going to the garage, seeking him out, and speaking to him. After a short conversation with Gutierrez, at around 12:15 p.m. the source left the garage returned to the car he arrived in with police his handler.

¹ The purchases occurred on May 30, August 30, October 4, 2012, January 14, 2013, May 17, July 12, and September 5, 2013.

The source informed his handler that Gutierrez had said that they had a deal and that drugs would be ready by around 1:30 that day. About three minutes after the source left the garage, Gutierrez was seen to come out of the garage and direct Jimenez's Lexus, which was on the roadway, into the driveway. The vehicle was unknown to the investigators watching the garage. After it pulled into the furthest bay from the street, the occupants got out and went into the garage. According to Sgt. Maki, the surveillance officers never saw anything that the occupants of the car did after they got out of the Lexus until the agents began following the car almost two hours later when it left the garage at 2:09 p.m. Nor did surveillance agents overhear any conversations between the men and Gutierrez. A pickup truck registered to Gutierrez that had been seen at the garage at 10:00 that morning had apparently been driven away in the interim, because it was seen to return to the garage at 12:34 p.m.

There was no evidence that the agents had any previous knowledge of Cruz-Rivera, Jimenez, or Jimenez's Lexus. The agents did not see the occupants of the Lexus do *anything* at the garage. They saw the car arrive and they saw it leave two hours later. They saw other cars come and go from the garage during this period. They only knew that the Lexus arrived at the garage on the same date and during the hours when they were attempting to make a drug purchase. They surmised that Gutierrez was acquainted with the people in the Lexus. They did not know of any connection between Rivera and the people in the Lexus, other than their presence at the garage. The officers had no knowledge of drugs in the car, never

saw drugs in the car, never overheard any conversations about drugs involving the car's occupants, had never seen these people before. Their observed actions were entirely innocent and no different from the actions of any of other members of the public who came and went from the businesses operating at the garages that day.

Maki testified that he wanted only to have the occupants of the Lexus identified, and he told Trooper Jamie Vitale to arrange this. Maki did not request a search of the car, and Vitale saw nothing of the Lexus himself that would give him an independent basis to authorize a motor vehicle search. Yet Vitale, on his own initiative, suggested a more intrusive seizure of the defendants and their automobile than Maki had directed.

Reasons To Issue The Writ

Petitioner states that the First Circuit effectively announced a new rule, *i.e.*, that a tip from a police officer need not be subjected to any analysis of whether it had a sufficient factual underpinning to justify a Fourth Amendment seizure. This new rule appears to be in conflict with controlling precedent from this Court. Namely, the decision conflicts with *United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675 (1985), and *Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031 (1971). The First Circuit's decision risks anit44# extreme break from precedent and undermines important Fourth Amendment principles.

The Circuit noted that the district court relied upon the collective knowledge doctrine to uphold Trooper DiCrescenzo's stop and ensuing search of Jimenez's car and Cruz-Rivera's luggage, as well as his interrogation of Cruz-Rivera. However,

the Circuit determined that application of the collective knowledge doctrine was not necessary to uphold DiCrescenzo's search. The Circuit clearly sidestepped any attempt to analyze the stop in this case under the collective knowledge rule, stating, "we find no reason to reach the applicability of the collective knowledge doctrine." App. 28. Instead, it held that, "[r]egardless of the collective knowledge of all the officers involved, Trooper DiCrescenzo *alone* had reasonable suspicion of a drug offense from the outset of the traffic stop *because Vitale specifically told him* that the vehicle had come from Leominster and likely had been involved in a drug transaction." App. 25.

Trooper Jamie Vitale, as will be seen from his suppression hearing testimony, *post* at App. 47-131, had an extremely minor role in the investigation. On October 4, 2013 he worked solely as a surveillance team member and saw nothing of the petitioner at all until he and Jimenez left Leominster to drive back to New York.² Yet, he "tipped Trooper DiCrescenzo that the Lexus had probably just been involved in a drug transaction.

The Circuit decision did not subject Vitale's information to DiCrescenzo to any *Terry* or probable cause analysis. This analytical approach runs afoul of *Whiteley, supra*, and *Hensley, supra*. *Hensley* involved the arrest of a suspect by police in Covington, Kentucky based on a wanted flyer for robbery suspects issued by police from St. Bernard, Ohio. In discussing the import of *Whiteley* to this

scenario, the Court in *Hensley* said, “*Whiteley* supports the proposition that, when evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, its admissibility turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest.” 469 U.S. at 231; emphasis in original. The *Hensley* Court concluded that “if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions, or to detain the person briefly while attempting to obtain further information.” *Id.* at 232.

It is remarkable is that the Circuit Court decided that it was unnecessary to determine whether Vitale was acting on sufficient facts to support reasonable suspicion for a stop when he enlisted DiCrescenzo’s help. The Circuit determined that once Vitale told DiCrescenzo there had been a drug deal involving Jimenez’s car, the basis for Vitale’s information was irrelevant to the validity of the stop.

This approach is inconsistent with this Court’s precedent. The panel’s approach effectively turned Vitale into an identified tipster. The analysis of his information as akin to a tip requires an inquiry into the reliability of the information he passed along and the factual basis for it. The problem with the panel decision is that in bypassing an evaluation of the basis for Vitale’s information, that information could have been completely unreliable, or even fabricated.

CONCLUSION

Wherefore, for the reasons stated above, counsel respectfully requests that this petition for a writ of certiorari to the First Circuit Court of Appeals be issued.

Respectfully submitted,

IVAN CRUZ-RIVERA

By his attorney,

/s/ Syrie D. Fried

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CERTIFICATE OF SERVICE

I, Syrie D. Fried, do hereby certify that the above document was filed electronically via this court's electronic case-filing system ("ECF"), and will be served upon the Solicitor General, Department of Justice, Room 5616, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 via U.S. Mail, first-class, postage prepaid, this 28th day of February, 2022.

/s/ Syrie D. Fried