

No. 17-8073

IN THE SUPREME COURT OF THE UNITED STATES

NICOLAS COBO-COBO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's brief detention for questioning was supported by immigration officers' reasonable suspicion that he was an alien present in the United States unlawfully.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C6) is reported at 873 F.3d 613. The order of the district court (Pet. App. F1-F20) is not published in the Federal Supplement but is available at 2016 WL 4473443.

JURISDICTION

The judgment of the court of appeals (Pet. App. D1) was entered on October 12, 2017. A petition for rehearing was denied on December 7, 2017 (Pet. App. B1). The petition for a writ of certiorari was filed on March 7, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following entry of a conditional guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of misuse of a social security number, in violation of 42 U.S.C. 408(a)(7)(B). Judgment 1; Pet. App. F2. He was sentenced to three months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. C1-C6.

1. a. On December 20, 2011, two Department of Homeland Security (DHS) Homeland Security Investigations Special Agents were helping local police officers in Cedar Rapids, Iowa, investigate a stabbing. Pet. App. C2, F3. As part of that effort, the agents questioned a man named Elias Mendoza-Marcos. Id. at C2. Although the questioning revealed that Mendoza-Marcos was not involved in the stabbing, the agents started to suspect, based on his inability to produce a driver's license or other government-issued identification, that Mendoza-Marcos might be present in the United States unlawfully. Ibid. Mendoza-Marcos told the agents that he was from Guatemala and had no documentation authorizing him to live in the United States. Ibid. He also said that he lived in a nearby apartment and that other people lived with him. Ibid.

The agents arrested Mendoza-Marcos and accompanied him to his apartment, where they allowed him to retrieve personal items to bring with him to the immigration office. Pet. App. C2. "On their

approach to the apartment, one of Mendoza-Marcos's roommates spoke with him through a window"; the agents then entered the apartment with Mendoza-Martinez. Ibid. Upon entering, "the agents observed two other individuals sitting in a common area." Id. at F5. "The agents identified themselves and asked whether there were other persons in the apartment." Ibid. The men indicated that another person was sleeping in a bedroom. Ibid. The agents "requested that they wake him and gather everyone in the living room to speak with the agents." Id. at C2; see id. at F5. Once that had been done, the agents explained to the three men that they were looking for the stabbing suspect, and they asked for identification. Id. at F5-F6. All three provided identification, but none of it was government-issued. Id. at C2-C3, F5-F6. The agents then concluded that the occupants were not involved in the stabbing but might be aliens present in the United States unlawfully. Id. at F6.

Petitioner and the others admitted under questioning that they were in the United States unlawfully. Pet. App. C2-C3, F6. The agents arrested them and brought them to the immigration center for processing. Id. at C3; see id. at F6. As relevant here, as a result of this incident, the agents obtained petitioner's employment identification card from a building maintenance business and placed it in his "alien file" (A-file). Id. at C3, F6; see id. at F6 (petitioner had an A-file because he "had prior encounters with immigration officials").

b. More than four years later, an immigration officer reviewed petitioner's A-file and contacted the employer listed on the identification card to ask for a copy of petitioner's I-9 Employment Eligibility Verification Form. Pet. App. C3; see ibid. ("Federal law requires employers to verify the identity of their employees by checking certain documents to ensure they are eligible to work in the United States, which the employer, in an I-9 form, must attest to having done."). After receiving the form, the immigration officer learned that petitioner had provided his employer "with a social security number that did not belong to him." Ibid.

2. a. In March 2016, a federal grand jury in the Northern District of Iowa returned an indictment charging petitioner with misuse of a social security number, in violation of 42 U.S.C. 408(a)(7)(B). Indictment 1. Petitioner moved to suppress the relevant evidence as the fruit of a Fourth Amendment violation during the encounter on December 20, 2011. As relevant here, he asserted that even if the agents had lawfully obtained Mendoza-Marcos's consent to enter the apartment, he was unconstitutionally seized when agents gathered him and the others in the apartment's living room. See D. Ct. Doc. 20, at 1-2 (June 6, 2016). Petitioner contended, in particular, that he "was an innocent bystander" and that "[h]is proximity to another person accused of being in the country does not automatically transform him into a suspect, or provide either reasonable suspicion, or probable cause to seize,

or search him.” Id. at 5. He maintained that “[t]he only two possible factors that [the agents] could have used to believe he was in the country unlawfully were his race, and his language skills. However, those factors are not legitimate factors to conclude that [he] was in [the] country without permission.” Id. at 5-6.

A magistrate judge recommended that the motion be denied, Pet. App. G1-G18, and the district court adopted that recommendation and denied the motion, id. at F1-F20.

The district court determined that the agents had reasonable suspicion to believe that petitioner was in the United States illegally and that, as a result, his brief seizure in the living room was permissible under the Fourth Amendment. Pet. App. F15-F19. In making that determination, the court looked to this Court’s decision in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), which held that ancestry could be a factor, but not the sole factor, supporting reasonable suspicion for an immigration-related stop. See id. at F16-F17 (citing Brignoni-Ponce, 422 U.S. at 886-887). Relying on Brignoni-Ponce, the court rejected petitioner’s argument that the Fourth Amendment prohibits officers from ever considering an individual’s apparent ancestry as a relevant factor in the reasonable suspicion calculus. Ibid. The court observed that petitioner had “admit[ted] that the agents relied on several factors to explain their reasonable suspicion,” and it accordingly found that Brignoni-Ponce did not support his

position. Ibid. The court also cited circuit precedent holding that "factors such as the language a suspect speaks or his or her apparent nationality 'may be relevant factors in some instances' to support reasonable suspicion." Id. at F17 (quoting United States v. Garcia, 23 F.3d 1331, 1335 (8th Cir. 1994)).

The district court also rejected petitioner's argument, which relied on Ybarra v. Illinois, 444 U.S. 85 (1979), that his "mere proximity to Mendoza-Marcos * * * cannot create reasonable suspicion." Pet. App. F17. The court observed that "the agents relied on more than [petitioner's] mere propinquity to Mendoza-Marcos in determining that there was reasonable suspicion to believe that [petitioner] may be in the country illegally." Id. at F17-F18. "Both agents testified that they observed that all residents of the apartment appeared to be Latino and all spoke Spanish." Id. at F18. "The agents also testified that, in their experience, it is common for undocumented aliens to reside together and that males around the same age, with no apparent familial connection, further raise the suspicion that they may be in the country illegally." Ibid. The court thus explained that "it was not the mere fact that [petitioner] was in close proximity to Mendoza-Marcos, or even that he was physically in the apartment at the time that Mendoza-Marcos was seized, that aided the agents in developing reasonable suspicion with respect to [petitioner]." Ibid. "Rather, it was [his] relationship with Mendoza-Marcos, as

a non-familial co-occupant of the apartment, that roused suspicion in the agents." Ibid.

b. On July 28, 2016, petitioner entered a conditional guilty plea in which he reserved his right to challenge the denial of his motion to suppress. See Pet. App. F2. On October 20, 2016, the district court sentenced petitioner to three months of imprisonment, to be followed by three years of supervised release. Judgment 1-3.

3. The court of appeals affirmed. Pet. App. C1-C6. As relevant here, the court agreed with the district court that the agents "had reasonable suspicion to seize [petitioner] by adjuring him to sit in the living room for questioning." Id. at C5-C6. The court of appeals explained that petitioner's argument "that the agents' suspicion that he was in the country illegally was based solely on his Hispanic heritage * * * mischaracterizes the record." Id. at C5. The court instead found that "[t]he district court determined, on a sufficient record, that the agents' suspicion was based on a number of considerations in addition to [petitioner's] heritage." Ibid. In particular, the court of appeals noted the district court's findings that the agents, based on their experience, suspected petitioner was in the country illegally because (1) "it was common for unrelated illegal-alien males to live together, and * * * when [the agents] seized [him] they had already arrested one of his unrelated male roommates for being an illegal alien"; (2) "none of the men spoke English, a

circumstance that indicated that they had not been in the country for long"; and (3) one of the agents "had been to the same apartment several times and knew that the landlord rented to undocumented aliens." Id. at C5-C6. The court further reasoned that "[i]t is inconsequential that one or both of the agents also considered [petitioner's] heritage in seizing him since Brignoni-Ponce expressly recognizes that heritage may be a 'relevant factor,' among others, in forming a reasonable suspicion." Id. at C6.

Finally, the court of appeals found Ybarra "clearly distinguishable." Pet. App. C6. The court again observed that "other facts besides [petitioner's] propinquity to Mendoza-Marcos support a conclusion that the agents had reasonable suspicion to seize [petitioner]." Ibid. The court additionally observed that petitioner "was not merely near Mendoza-Marcos; he lived with him." Ibid. The court then explained that, because it had found the seizure to be supported by reasonable suspicion, it did not need to decide whether the introduction of the evidence would have been supported under the inevitable discovery doctrine. Ibid.

ARGUMENT

Petitioner contends (Pet. 9-22) that this Court's review is warranted to clarify the circumstances in which law enforcement may consider an individual's apparent ancestry or English-language abilities in the reasonable suspicion calculus. The court of appeals' decision here, however, is correct, limited to the facts

of this particular case, and does not conflict with any decision of another court of appeals. Further review is unwarranted.

1. The court of appeals correctly affirmed the denial of petitioner's motion to suppress.

a. The court of appeals correctly determined that the agents here had reasonable suspicion to believe petitioner was an alien present in the United States unlawfully when they briefly detained him for questioning in his apartment. The reasonable suspicion "standard takes into account the 'totality of the circumstances -- the whole picture.'" Navarette v. California, 134 S. Ct. 1683, 1687 (2014) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). Even a collection of factors that, if considered separately, might be consistent with innocence may, when taken together, provide reasonable suspicion. See United States v. Sokolow, 490 U.S. 1, 9 (1989); e.g., Terry v. Ohio, 392 U.S. 1, 22 (1968).

In Brignoni-Ponce, this Court held that "the apparent Mexican ancestry" of the occupants of a car was not enough, standing alone, to provide reasonable suspicion to perform a roving-patrol stop of a car in areas near the Mexican border. 422 U.S. at 885-886; see United States v. Martinez-Fuerte, 428 U.S. 543, 564 n.17 (1976) (describing Brignoni-Ponce). The Court did not apply the border-search doctrine, see United States v. Ramsey, 431 U.S. 606, 616 (1977), but instead applied ordinary Fourth Amendment rules to that stop. See Brignoni-Ponce, 422 U.S. at 884. The Court

explained that “[a]ny number of factors may be taken into account in deciding whether there is reasonable suspicion” to stop a car in the border area, and identified some of those factors. Ibid.; see id. at 884-885. The Court identified “the characteristic appearance of persons who live in Mexico” as one such factor. Id. at 885. “The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor,” the Court concluded, “but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.” Id. at 886-887. Similarly, in United States v. Ortiz, 422 U.S. 891 (1975), the Court explained that an individual’s “inability to speak English” is a factor that an officer “properly may * * * take[] into account in deciding whether there is a probable cause to search a particular vehicle” for concealed undocumented persons. Id. at 892, 897.*

b. The court of appeals correctly applied those principles to the particular facts of petitioner’s case in denying his motion to suppress. The court agreed with petitioner that “a person’s heritage alone cannot give rise to a reasonable suspicion that he is in the United States illegally.” Pet. App. C5. But the court rejected petitioner’s claim on the facts, determining that he “mischaracterize[d] the record” in asserting that his apparent

* The Equal Protection Clause (“not the Fourth Amendment”) independently “prohibits selective enforcement of the law based on considerations such as race.” Whren v. United States, 517 U.S. 806, 813 (1996). Petitioner has not raised an equal protection or selective-enforcement claim.

ancestry was the sole basis for the brief questioning here. Ibid. Rather, "[t]he district court determined, on a sufficient record, that the agents' suspicion was based on a number of considerations." Ibid.

In particular, the district court had identified several other relevant factors, including that (1) the agents had already arrested one of petitioner's unrelated male roommates for being an alien present in the United States unlawfully; (2) the agents' experience was that "it was common for unrelated illegal-alien males to live together"; (3) "none of the men spoke English, a circumstance that indicated that they had not been in the country for long"; and (4) one of the agents "had been to the same apartment several times and knew that the landlord rented to undocumented aliens." Pet. App. C5-C6. The court of appeals in turn correctly relied on the same set of factors likewise to determine that the agents here had reasonable suspicion to believe petitioner was present in the United States unlawfully. And in any event, any error in the lower courts' analysis would be highly factbound.

Petitioner appears to suggest (Pet. 13-14) that this Court should adopt a rule categorically prohibiting the consideration of "race and English speaking skills" as "relevant factor[s]" in determining whether reasonable suspicion exists to believe a person is an alien present in the United States unlawfully. Pet. 15. But this Court has "deliberately avoided reducing" the reasonable-suspicion inquiry to "'a neat set of legal rules.'"

United States v. Arvizu, 534 U.S. 266, 274 (2002) (quoting Ornelas v. United States, 517 U.S. 690, 695-696 (1996)). Rather, the Court's precedents make clear that the assessment of whether a reasonable suspicion exists depends on the totality of the circumstances, allowing officers "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" Arvizu, 534 U.S. at 273 (citation omitted). And as set forth above, this Court has explained that a person's "apparent Mexican ancestry" and "inability to speak English" can in some circumstances be relevant factors in assessing whether an officer has reasonable suspicion or probable cause to believe an immigration-related offense has occurred or is occurring. Brignoni-Ponce, 422 U.S. at 877; Ortiz, 422 U.S. at 897.

Petitioner also asserts (Pet. 20-22) that this Court should clarify how Brignoni-Ponce applies to events occurring in the interior of the United States, rather than in border areas. Although the Court in Brignoni-Ponce and Ortiz viewed proximity to the border as a potential source of facts that could support reasonable suspicion, see Brignoni-Ponce, 422 U.S. at 885-886, it did not suggest that the reasonable-suspicion inquiry is legally different in areas further from the border. Indeed, the Court viewed Mexican ancestry as a "relevant factor," notwithstanding that "even in the border area a relatively small proportion" of

individuals with such ancestry "are aliens." Id. at 886-887; see id. at 886 n.12. And consistent with this Court's decisions, the agents here also relied on a confluence of other factors, including not only the appearance of petitioner's roommates but also the agents' knowledge that one of petitioner's roommates was an alien present in the United States unlawfully and that petitioner's landlord "rented to undocumented aliens." Pet. App. C6. Further review is accordingly unwarranted.

2. Contrary to petitioner's contentions (Pet. 14-20), the court of appeals' factbound decision does not conflict with any decision of any other court of appeals.

First, the court of appeals' decision does not conflict with United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir.) (en banc), cert. denied, 531 U.S. 889 (2000). In that decision, the Ninth Circuit held that U.S. Border Patrol agents had reasonable suspicion to stop two cars that were driving in tandem and made U-turns on a highway as they approached a checkpoint in El Centro, California. Id. at 1131-1135.

Although it found the stop lawful, the court of appeals concluded that the Hispanic appearance of the drivers could not be used as a relevant factor. Montero-Camargo, 208 F.3d at 1135. The court distinguished Brignoni-Ponce on the grounds that "the majority of the people who pass through the checkpoint in question are Hispanic" and that the demographics of El Centro and the Southern border States more broadly had changed dramatically from

the demographics in the region when this Court decided Brignoni-Ponce in 1975. Id. at 1135 (citing Brignoni-Ponce, 422 U.S. at 886 n.12); see id. at 1133 (citing evidence that "Hispanics are heavily in the majority" in El Centro, "the site of the vehicle stop."). The court stated that "[t]he likelihood that in an area in which the majority -- or even a substantial part -- of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus." Id. at 1132; see id. at 1134. The court also stated that "at this point in our nation's history, and given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required." Id. at 1135. But the court emphasized that it "decide[d] no broad constitutional questions here," instead addressing only "the narrow question" of how to assess reasonable suspicion in light of the demographics of the people at "the checkpoint in question." Ibid. The court thus did not hold (and, in light of Brignoni-Ponce, could not have held) that the Fourth Amendment categorically precludes courts from ever taking that a person's Hispanic appearance into account, regardless of the circumstances.

The court of appeals' decision does not conflict with Montero-Camargo. As a threshold matter, unlike in Montero-Camargo,

petitioner has not established a factual basis that could potentially be used to distinguish this Court's decision in Brignoni-Ponce. In particular, petitioner has made no effort to establish that that this was a situation analogous to the traffic stop in Montero-Camargo, which involved a highway checkpoint through which most of the people passing were Hispanic, or to establish that the demographics of Cedar Rapids, Iowa, have undergone a demographic transformation similar to those of El Centro, California.

More fundamentally, petitioner cannot show that he would have prevailed if this case had arisen in the Ninth Circuit. The Ninth Circuit upheld the stop in Montero-Camargo, determining that the officers had reasonable suspicion to stop two cars for questioning, notwithstanding its determination that the Hispanic appearance of the drivers was not a relevant factor. See 208 F.3d at 1131-1135. Here, the agents similarly had reasonable suspicion to ask petitioner to come into his living room for questioning, without regard to the appearance of his roommates. At that point, the officers already knew that Mendoza-Marcos was in fact an alien from Guatemala who was present in the United States unlawfully; that petitioner was his roommate, along with several other men; that "it was common for unrelated illegal-alien males to live together"; that "none of the men spoke English, a circumstance that indicated that they had not been in the country for long"; and that petitioner's "landlord rented to undocumented aliens."

Pet. App. C5-C6. That combination of circumstances in itself provides an adequate basis for a reasonable officer to suspect that, like his roommate, petitioner also was an alien present in the United States unlawfully.

The court of appeals' decision also does not conflict with Farm Labor Organizing Committee v. Ohio State Highway Patrol, 308 F.3d 523 (6th Cir. 2002). In that case, the court of appeals denied qualified immunity to police officers in a damages action under 42 U.S.C. 1983, where the plaintiffs contended that (1) they were targeted for questioning "based solely upon their race or national origin" in violation of the Equal Protection Clause; and (2) the officers had unreasonably seized their green cards for a prolonged period (four days), in violation of the Fourth Amendment. 308 F.3d at 528. In the course of its ruling on the equal-protection claim, the Sixth Circuit recognized that "a suspect's inability to speak English may be a proper race-neutral factor" supporting reasonable suspicion that he is an alien present in the United States unlawfully. Id. at 540. Although it also noted that the fact that a suspect speaks Spanish could potentially be used as a pretext for race-based discrimination, "due to the close connection between the Spanish language and a specific ethnic community," ibid., that discussion is immaterial here, because petitioner has not raised an equal protection claim or asserted that the agents' reliance on his roommates' inability to speak English was pretextual. See p. 10 n.*, supra. To the contrary,

the court of appeals determined that petitioner was not targeted for questioning solely on the basis of race or national origin. See Pet. App. C5. Farm Labor Organizing Committee is accordingly inapposite.

3. This case would in any event be a poor vehicle for deciding whether or under what circumstances a person's Hispanic appearance can be used as a relevant factor in determining whether a person is an alien present in the United States unlawfully. For two independent reasons, even a decision in petitioner's favor on the question presented would not change the outcome of this case. First, as explained above, see pp. 15-16, supra, the agents here would have had reasonable suspicion on the facts of this case even if the appearance of the roommates were not taken into account as a factor. Second, the government has urged throughout this case (and the magistrate judge recommended finding) that the evidence that petitioner used a false social security number "would have been inevitably discovered" regardless of the constitutionality of the December 2011 encounter. Pet. App. G18. Although neither the district court nor the court of appeals reached this argument, it would provide an independent basis for denying petitioner's motion to suppress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2018