

No. _____

In the

Supreme Court of the United States

Enrique Lopez Lara,
A.K.A. Juan Francisco Martinez Reyes,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Can an undocumented alien suppress his identity when it was discovered in violation of the Fourth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Enrique Lopez Lara, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Enrique Lopez Lara seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is *United States v. Lara*, No. 16-11756, 714 Fed. App'x 432 (5th Cir. March 9, 2018). The district court did not issue a written opinion.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on March 9, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This petition involves the Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects,[a] 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. Const. Amend. IV.

STATEMENT OF THE CASE

On May 14, 2016, Mr. Lopez Lara flew from Leon, Guanajuato, Mexico, to Dallas, Texas, on Envoye Airlines under the name Juan Francisco Martinez-Reyes. While in the customs area of DFW airport, Mr. Lopez Lara presented a passport to a primary customs officer, who admitted him as a U.S. citizen and directed Mr. Lopez Lara to collect his baggage. While collecting his baggage, Mr. Lopez Lara was approached by a customs officer who was patrolling the baggage area. The officer observed signs of nervousness in Mr. Lopez Lara and referred Mr. Lopez Lara to secondary baggage inspection. At the secondary baggage inspection, Mr. Lopez Lara was again interviewed and again exhibited signs of nervousness. Eventually, Mr. Lopez Lara admitted to the customs agents that he was not who he had originally claimed to be and was in this country illegally.

Federal prosecutors indicted Mr. Lopez Lara on one count of False Claim to United States Citizenship, in violation of 18 U.S.C. § 911. On July 27, 2016, Mr. Lopez Lara filed a motion to suppress, arguing that the baggage claim officer's encounter required reasonable suspicion, which is lacking with mere signs of nervousness. At the same time, Mr. Lopez Lara conceded that his argument was ultimately foreclosed by Fifth Circuit precedent, which holds that one cannot suppress their identity. The district court heard Mr. Lopez Lara's motion to suppress on August 12, 2016. On August 16, 2016, the district court denied the motion to suppress.

On August 16, 2016, Mr. Lopez Lara signed a plea agreement, which contained a conditional plea provision. This provision preserved his right to appeal an adverse

ruling on his motion to suppress evidence. On August 18, 2016, Mr. Lopez Lara pleaded guilty to the one-count indictment. U.S. Probation prepared its presentence investigation report (PSR), which fixed Mr. Lopez Lara's advisory sentencing range at 10 to 16 months. On November 28, 2016, the district court sentenced Mr. Lopez Lara to 10 months imprisonment, followed by a 1-year term of supervised release. He was released and deported on March 13, 2017, but remains on supervised release at this time. The Fifth Circuit affirmed because the issue of suppression of identity is foreclosed under *United States v. Roque-Villanueva*, 175 F.3d 345 (5th Cir. 1999).

REASONS FOR GRANTING THIS PETITION

I. Mr. Lopez Lara was stopped in an extended border search, which requires reasonable suspicion to justify a seizure.

Passing through Customs at DFW Airport is a multi-stage process. At stage one, all arriving passengers meet with a U.S. Customs and Border Protection officer at the passport control kiosk booth for a primary inspection. This officer checks documents, visas, passports, and the reasons people are entering the United States. More specifically, the officer examines a passenger's passport and customs receipt, does a facial comparison, evaluates whether any documents were forged or altered, and asks a series of questions. If the officer is satisfied with his inspection, he will direct the passenger downstairs to Baggage Control. If the officer is not fully satisfied, he will direct the passenger to Passport Secondary for further examination.

Once a passenger has successfully passed the primary inspection at the passport control kiosk booth, they walk downstairs to pick up their baggage. Once they have done so, they wait in the baggage control egress line, where they will meet with one last officer for a final documents check. This portion of the process may be interrupted, however, by a roving officer who walks around the baggage control area and randomly initiates interviews. This roving officer, if he sees fit, may direct a passenger to Baggage Control Secondary for further inquiries.

In this case, Mr. Lopez Lara successfully completed the primary inspection by U.S. Customs Officer Terry Hunt, who then directed Mr. Lopez Lara downstairs to baggage control. As Mr. Lopez Lara was collecting his bags, he was approached by roving officer Justin Janacek, who initiated an interview. Officer Janacek observed

signs of nervousness (lack of eye contact, shaky hand, pulsating artery) but nothing else suspicious. Based on the signs of nervousness, Mr. Janacek directed Mr. Lopez Lara back to Secondary Inspection for a customs enforcement examination. Mr. Lopez Lara complied and met with U.S. Customs and Border Protection officer Raul Cortez, who was working the Baggage Control Secondary area. During the secondary inspection, Mr. Cortez inspected Mr. Lopez Lara's documentation and asked a series of questions, not unlike during the primary inspection. During their conversation, Officer Cortez thought Mr. Lopez Lara appeared nervous and began to suspect that Mr. Lopez Lara was not who he claimed to be. (ROA.139). Furthermore, to Officer Cortez's ear, Mr. Lopez Lara spoke with a Mexican accent, which, according to his testimony, differs from a Puerto Rican accent. (ROA.140-41). Ultimately, it was determined that Mr. Lopez Lara was entering the United States illegally.

Prior to the live testimony given by the U.S. Customs officers at Mr. Lopez Lara's suppression hearing, U.S. Customs and Border Protection (CBP) Enforcement Officer Rogelio Ordonez created a written report, signed and dated May 23, 2016. In that report, Officer Ordonez states, "Mr. LOPEZ LARA was admitted as a United States Citizen by the primary officer and was allowed to proceed to collect his baggage." This admittance, argues Mr. Lopez Lara, makes these circumstances analogous to a border crossing, at least with respect to the applicability of the Fourth Amendment. Additionally, the district court erred when it found that Mr. Lopez Lara's circumstances were not governed by the Fourth Amendment as used in the

border crossing framework. Under the analogy, the activities that occurred after Mr. Lopez Lara's admittance in the United States were an extended border search.

The extended border search allows for warrantless searches beyond the border based on "reasonable suspicion" of criminal activity. *United States v. Cardenas*, 9 F.3d 1139, 1148 (5th Cir. 1993). These extended border searches occur "after the first point in time when the entity might have been stopped within the country." *Id.* (quoting *United States v. Niver*, 689 F.2d 520, 526 (5th Cir.1982)); *see also United States v. McGinnis*, 247 F. App'x 589, 593 (6th Cir. 2007) (applying the extended border search doctrine "when the individual has crossed the border (and customs officials already have exercised—or chosen not to exercise—their right to conduct a suspicion-less search of the individual or her luggage), when the individual has not left the airport"). Extended border searches are for circumstances that reflect "that the subject has regained an expectation of privacy." *United States v. Cotterman*, 709 F.3d 952, 962 (9th Cir. 2013).

The Fifth Circuit utilizes a three-factor test to determine if an extended border search is constitutional under the Fourth Amendment. *Cardenas*, 9 F.3d at 1148. The government is required to make:

- (1) a showing of a "reasonable certainty" or a "high degree of probability" that a border crossing has occurred;
- (2) a showing of a "reasonable certainty" that no change in the condition of the person or vehicle being inspected occurred from the time of the border crossing until the search and that the contraband found was present when the person or vehicle crossed the border; and
- (3) a showing of a "reasonable suspicion" that criminal activity was occurring.

Id. The third factor requirement of “reasonable suspicion” “entails ‘some minimal level of objective justification’ that consists of ‘more than inchoate or unparticularized suspicion or “hunch,”’ but less than the level of suspicion required for probable cause.” *United States v. Smith*, 273 F.3d 629, 633-34 (5th Cir. 2001) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). The Fifth Circuit requires specific facts and rational inferences, and considers the totality of the circumstances, when finding reasonable suspicion. *Id.* at 634.

II. The secondary customs officer did not have reasonable suspicion to seize Mr. Lopez Lara.

The Fifth Circuit has consistently held that nervousness, standing alone, is not enough to establish reasonable suspicion. *See, e.g., United States v. Santiago*, 310 F.3d 336, 342 (5th Cir. 2002) (holding it was unreasonable for law enforcement to detain defendant on suspicion of drug trafficking based on extreme nervousness). At least one district court has explicitly applied this principle to an illegal immigration case. *United States v. Robinson*, No. CRIM 506CR16(DCB)(JCS), 2007 WL 37767, at *4 (S.D. Miss. Jan. 4, 2007).

Even when combined with other factors, nervousness is not always enough to give rise to reasonable suspicion. *United States v. Jenson*, 462 F.3d 399, 405, 404–06 (5th Cir. 2006) (holding that reasonable suspicion was not established by defendant’s nervousness, hesitation in pulling over, and inconsistent answers). Nervousness is only a relevant factor when looking at the totality of the circumstances and is not alone dispositive. *Id.* at 404. The reason is simple: “[n]ervousness is a normal reaction

to circumstances which one does not understand.” *United States v. Williams-Hendricks*, 805 F.2d 496, 500 (5th Cir. 1986).

The second stop of Mr. Lopez Lara, in the baggage claim area, was an extended border search. He had already been stopped and questioned once, at the Primary Inspection area. At that time CBP determined that Mr. Lopez Lara was not a match for law enforcement records and was admitted to the United States as a citizen. When Mr. Lopez Lara was detained a second time by CBP, it was, as *Cardenas* describes extended border searches, “after the first point in time when the entity might have been stopped within the country.” Such an extended border search requires reasonable suspicion of criminal activity under *Cardenas*.

The government has not made a sufficient showing of reasonable suspicion on the part of the CBP official stopping Mr. Lopez Lara for the second time. The only facts given in CBP’s Report of Investigation concerning Mr. Lopez Lara’s behavior are his description as “being very fidgety, excessive pulsating carotid artery, excessive sweating, and failure to maintain eye contact.” (ROA.182-83). These are all signs of nervousness, not uncommon when anyone is stopped by law enforcement, and by themselves are not sufficient for reasonable suspicion under Fifth Circuit precedent including *Santiago*, *Jenson*, and *Williams-Hendricks*. The government gave no more concrete evidence to support seizing Mr. Lopez Lara, beyond indications of nervousness.

The facts that would provide valid grounds for reasonable suspicion, such as his inability to explain where his purported Puerto Rican birthplace was located or

inability to recall the age and date of birth on the passport he had presented at entry, only arose after he was seized by CBP officials and sent to Baggage Control Secondary. As there was no reasonable suspicion for the extended border search, this search was invalid under Fifth Circuit precedent and unconstitutional under the Fourth Amendment.

III. Because Mr. Lopez Lara's search was unconstitutional under the Fourth Amendment, all evidence relating to the search, including his identity, must be suppressed.

The burden of proof is on the government to show that a warrantless search or seizure was constitutional under the Fourth Amendment. *United States v. Berick*, 710 F.2d 1035, 1037 (5th Cir. 1983) (citing *Vale v. Louisiana*, 399 U.S. 30 (1969)); *see also* LaFave, *Search & Seizure: A Treatise on the Fourth Amendment*, sec. 11.2(b) (5th ed. 2015). The government must prove the constitutionality of the search or seizure by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164 (1974); *see also* LaFave, *supra*, at sec. 11.2(c).

When a Fourth Amendment violation has occurred, the exclusionary rule mandates the suppression of not only all evidence obtained in the illegal search or seizure itself; it also requires the suppression of all evidence obtained as a result of, or derivatively from, the illegally seized evidence, as such derivative evidence is the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). Verbal evidence that derives from an illegal search must be excluded just as physical evidence is. *Id.* at 485-86.

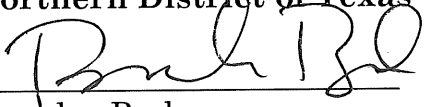
The government has not shown by a preponderance of the evidence that the second warrantless search and seizure of Mr. Lopez Lara satisfied the “reasonable suspicion” requirement of the extended border search. As the second stop and interrogation of Mr. Lopez Lara was an unconstitutional search and seizure under the Fourth Amendment, all evidence—including verbal evidence of his citizenship—should have been suppressed under the exclusionary rule.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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