In the

Supreme Court of the United States

UNITED STATES,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 73-2000
	)	
JAMES ROBERT PELTIER	)	

Washington, D. C.
February 18, 1975

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UNITED STATES, Petitioner,	:	
v.	:	No. 73-2000
JAMES ROBERT PELTIER	:	

Washington, D. C.

Tuesday, February 18, 1975

The above-entitled matter came on for argument at 10:11 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM L. PATTON, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.
For Petitioner

SANDOR W. SHAPERY, ESQ., 1821 Castellana Road, La Jolla, California 92037
For Respondent (appointed by this Court)

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 73-2000, the United States against James Robert Peltier.

Mr. Patton, before you proceed, I want to indicate to you and to other counsel in these cases being argued today that Mr. Justice Marshall reserves the right to participate on the basis of the filed papers, of course, and the tape recording of the oral argument.

Now, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM L. PATTON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PATTON: Mr. Chief Justice, and may it please the Court:

This is one of four cases that will be argued today concerning issues related to this Court's decision in Almeida-Sanchez against the United States decided June 21, 1973.

In Almeida-Sanchez, this Court held that warrantless searches of automobiles for concealed illegal aliens conducted without probable cause by border patrol agents on roving patrols violated the Fourth Amendment.

Each of these cases is here on writ of certiorari to the Ninth Circuit.

The questions presented in Ortiz and Bowen, Numbers 73-2050 and 73-6848, are whether Almeida-Sanchez should be extended to searches conducted at fixed check points and, if

so, whether the extension should apply to searches conducted before the Ninth Circuit's decision in the United States against Bowen.

The question presented in Brignoni-Ponce, Number 74-114, is whether the warrantless stop of an automobile by border patrol officers violates the Fourth Amendment and requires the suppression of evidence obtained as a result of the stop, but without any subsequent search.

The sole issue presented in this case, the United States against Peltier, Number 73-2000, is whether Almeida-Sanchez should be given retroactive effect.

The prior proceedings of this case are set forth in detail in our brief and I will only briefly summarize them here.

On March 7, 1973, Respondent was indicted for possession of approximately 270 pounds of marijuana with intent to distribute in violation of Title 21 of the United States Code. He filed the motion to suppress the marijuana claiming that the search of his automobile had violated the Fourth Amendment and that motion was denied after a hearing.

The evidence showed that on February 28th, 1973 at approximately 2:30 in the morning, Respondent's automobile was stopped by border patrol agents on roving patrol near Temecula, California.

The stop occurred on Highway 395 at a point

approximately 70 air miles north of the Mexican border.

The agents testified that they had stopped Respondent's car because he was driving an old-model car and because he appeared to be a Mexican man. At the agents request, the trunk was opened to permit them to inspect for the presence of concealed or illegal aliens.

Although no aliens were discovered, the agents did find 270 pounds of marijuana in plastic bags in the trunk of the car.

Respondent was tried on stipulated facts. He stipulated among other things that he possessed the marijuana with intent to distribute. The stipulation contained a proviso that it could not have been entered into if his motion to suppress had been granted and he reserved his right to appeal the question of the suppression motion.

The District Court found Respondent guilty and sentenced him to a prison term of one year and one day, subject to immediate parole eligibility and to a special parole term of two years.

The Court of Appeals sitting en banc, by a seven to six vote, reversed the conviction and remanded the District Court with instructions to suppress the marijuana.

We conceded in the Court of Appeals that the search of Respondent's automobile was invalid under this Court's decision in Almeida-Sanchez but we urged there, as we urge

here, that Almeida-Sanchez should not be given retroactive effect.

The majority in the Court of Appeals held that it need not reach the retroactivity issue because in its view, Almeida-Sanchez did not establish a new rule. The majority conceded that numerous of its decisions since 1961 had contained language from which the Government might infer that the Court would uphold a roving patrol search but the majority distinguished this language as dicta, apparently on the ground that many of these cases involved check-point searchs.

The majority also conceded that, in 1970, it had upheld the roving patrol search in its decision in United States against Miranda and began, in Almeida-Sanchez itself.

It also noted that the Tenth Circuit had upheld a roving patrol search in Roa-Rodriquez but the majority said these decisions enjoyed only a brief acceptance.

The decision of the Ninth Circuit is in conflict with United States against Miller, a decision of the Fifth Circuit which is pending before this Court on petition for writ of certiorari in Number 73-6975.

The Ninth Circuit also reached the opposite result in the United States against Bowen. The only difference between Bowen and this case is that Bowen involved check-point search and there the majority -- again by a seven to six vote found that Almeida-Sanchez had overruled clear past

precedent.

The Tenth Circuit has given Almeida-Sanchez retroactive effect in the case of check-point searches and presumably it would give it retroactive effect in the case of roving patrol searches.

We submit that Almeida-Sanchez did, indeed, establish a new rule that overruled past Court of Appeals precedent and the long-established practice and that under principles of this Court's retroactivity decisions and under principles of exclusionary rule policy itself, Almeida-Sanchez should not be given retroactive effect. That is, it should not apply to searches conducted before June 21, 1973, the date on which it was decided.

Support for roving patrol searches prior to Almeida-Sanchez was both judicial and statutory. Section 1357 of Title 8 authorized Immigration and Naturalization Service officers without a warrant, within a reasonable distance from any external border of the United States, to board and search any vehicle or conveyance for illegal aliens.

In regulations promulgated under the statute, the Attorney General had defined a reasonable distance from the borders to be any point between 100 air miles from an external boundary.

Now, we believe that the statute alone, in the

absence of the contrary judicial construction would be sufficient basis for reliance by law-enforcement officers and would present a retroactivity question and that, we believe, is the thrust of this Court's plurality opinion in Lemon against Kurtzman, declining to give retroactive effect to its prior decision holding a Pennsylvania statute unconstitutional that provided public aid to non-public sectarian schools.

But we do not rely on the statute alone because the constitutionality of the statute was upheld in numerous decisions in the Fifth, Ninth and Tenth Circuits.

The Ninth Circuit distinguished many of these cases as dicta, as I said, presumably on the grounds that they involved check-point searches. But the language in those decisions was not so limited and prior to Almeida-Sanchez, there was no distinction drawn in the case law between check-point searches and roving patrol searches and the majority in the Ninth Circuit conceded that its cases contained language from which the Government might infer that roving patrol searches would be upheld and that, of course, is precisely what happened.

The Ninth Circuit upheld roving patrol searches in Miranda and Almeida-Sanchez. The Tenth Circuit, in its decision in United States against Roa-Rodriguez, and the Fifth Circuit in its decision the the United States against Miller.

Mr. Justice Powell's concurring opinion in

Almeida-Sanchez recognized this consistent judicial approval. He wrote that roving automobile searches in border regions for aliens have been consistently approved by the judiciary.

And Mr. Justice White's dissenting opinion also recognized this prior judicial approval for he observed that the courts have consistently and almost without dissent come to the same conclusion that is invited in the judgment that is reversed today.

Respondent himself recognized at the time of his suppression motion that the state of the law sustained roving patrol stops and searches for concealed illegal aliens.

In the District Court, he contended that while it was permissible to stop and search for aliens, once border patrol agents discovered no illegal aliens, they then were required to go no further, even though they observed the marijuana in the trunk of the car.

For example, at page 23 of the Appendix, REspondent's counsel stated to the Court, "Now, if Agent Ainscoe had felt the bag to see if there was an alien in there, I would say, fine, we do not have an illegal search and seizure."

Respondent did ask that his case be stayed pending this Court's decision in Almeida-Sanchez. That is simply recognition that he needed a change in the law.

The only additional factors which could be

required are either a prior decision by this Court or additional Court of Appeals opinions, but neither requirement is sound.

There is no support in this Court's decisions for the proposition that a decision must overrule a prior precedent of this Court before a retroactivity issue is presented.

In Chevron Oil against Houston, for example, this Court declined to give retroactive effect to Rodriguez against Aetna Casualty, even though Rodriguez had overruled only a long line of Fifth Circuit opinions.

QUESTION: That is for example. Now, what other cases are there? If any.

MR. PATTON: Other than Chevron, I don't think of any, your Honor.

QUESTION: There aren't any, are there?

And Chevron was a civil case, wasn't it?

MR. PATTON: It was a civil case.

QUESTION: Involving --

MR. PATTON: But in Linkletter, Mr. Justice Stewart, as the Court indicated that it saw no difference between civil and criminal cases for purposes of retroactivity.

I think -- we believe that the majority opinion in Bowen in the Ninth Circuit is the correct analysis on this point. Every issue cannot be brought to this Court and by necessity a number of important issues of law enforcement

must be litigated in the Courts of Appeal.

QUESTION: This issue was brought to this Court a good many years ago, in Carroll against the United States.

MR. PATTON: Well, we disagree about that, Mr. Justice Stewart. We believe that it is true that the Court's opinion in Almeida-Sanchez relied on prior Fourth Amendment precedent but there was an intervening federal statute which we believe the law enforcement officers were entitled to rely on until courts declared otherwise and this issue was litigated in the Courts of Appeals for the Fifth, Ninth and Tenth Circuit and the Government never lost the issue.

Now, we rely on this Court's opinion in Lemon against Kurtzman that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct and that is exactly what the border patrol did.

Roving patrols were extensively used in the Mexican border area prior to Almeida-Sanchez.

For example, we are informed that in Fiscal Year 1972, approximately 240,000 man-hours were devoted to highway surveillance or roving patrol searches or roving patrol activities.

We believe that Almeida-Sanchez did establish a new rule, that it was a clear break with the past and under

this court's retroactivity decision and under exclusionary rule policy itself, it should not be given retroactive effect.

This Court's decisions have established three tests. The first and most important of those is the purpose of the rule itself and uniformly, this Court's decisions involving the exclusionary rule have declined to give exclusionary rule decisions retroactive effect.

Whether the rule is viewed as directed at conforming police conduct or it is indicating the right of privacy protected by the Fourth Amendment, in either case there is no effect on the integrity of the fact-finding process and neither purpose is advanced by retroactive application.

The second two tests, the extent of reliance by law-enforcement officers and the disruption of the administration of justice that would result from retroactive application are looked to only when the purpose of the rule is neutral as to retroactivity and as we have indicated, that purpose is not neutral but looking to those tests, there was widespread reliance on the authority to conduct roving patrol searches and as for a disruption, there are approximately 40 cases in the Courts of Appeal that involve Almeida-Sanchez roving patrol issues.

There are an indeterminate number of cases in the District Courts and, of course, there would be a large number of cases affected in collateral attack proceedings if

Almeida-Sanchez were given retroactive effect.

For all of these reasons, we submit that Almeida-Sanchez should not be applied to searches conducted before the date that it was decided and we submit that the judgment of the Court of Appeals should be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Shapery.

ORAL ARGUMENT OF SANDOR W. SHAPERY, ESQ.,

ON BEHALF OF RESPONDENT

MR. SHAPERY: Mr. Chief Justice and may it please the Court:

The main question that we are confronted with here is whether or not Almeida-Sanchez should be applied retroactively or prospectively.

However, before we should even approach that question, we must realize that the issue of retroactivity only applies to a new constitutional rule.

The dissenting opinion in Milton versus Wainwright, I believe, the Government will clearly agree sets up the test for determining whether or not a new constitutional rule is even stated by a decision of this Court and that is, whether it overrules clear-cast precedent or disruptive practice long accepted and widely relied upon.

The third --

QUESTION: Do you think the statute authorized the search and escape?

MR. SHAPERY: I don't feel that any statutes of the United States are greater than the Constitution.

QUESTION: That isn't what I asked you, is it?

MR. SHAPERY: I -- could you possibly rephrase the question? Maybe it is my misunderstanding but I feel the statute --

QUESTION: I asked you whether the statute authorized the -- purported to authorize the search and escape?

MR. SHAPERY: Read literally, the statute would purportedly authorize the search.

QUESTION: Had it ever been held unconstitutional before Almeida?

MR. SHAPERY: I don't believe that the issue had even been up before the Court.

QUESTION: Let's assume the statute, in so many words, authorizes a particular kind of search and officers have been operating under it and performing in accordance with its terms.

It has never been held unconstitutional.

And then the Court declares it unconstitutional.

Now, what about the retroactivity issue in that context?

MR. SHAPERY: I think, to determine the retroactivity issue in that context we must look at the statute itself and whether or not the reliance on the literal interpretation

of the statute was even reasonable and I feel that looking at this statute, 1357 Section A1 and Section A2 --

QUESTION: You don't think it was even reasonable although the Court of Appeals just said it was?

MR. SHAPERY: I don't think it was. I don't think the Section A3 being read devoid of Fourth Amendment is reasonable in light of the fact that Section A1 and A2 have recognized Fourth Amendment requirements of constitutionality.

QUESTION: Are you suggesting that one of the border patrol officers reading the statute should have known that on its face it was unconstitutional?

MR. SHAPERY: No, I am suggesting that the attorneys that wrote the statute for the Government were perfectly aware of the problem and were aware that they were treading on, so to speak, thin ice and -- in regard to this but saw that this was a viable alternative and that they may step forward and take their chances until the question is presented to this Court.

It was submitted that this Court's decision in Almeida-Sanchez overruled past precedent. However, the test is clear past precedent.

We do not feel that one case prior to Almeida-Sanchez allowing a roving patrol to stop and search a car without probable cause or even reasonable suspicion, that criminal activity was afoot establishes clear past precedent.

As a matter of fact, the Ninth Circuit has held, with the exception of United States versus Rand and Almeida-Sanchez, that all other cases that have ever addressed themselves to that issue required either probable cause to believe that the vehicle had contraband or illegal aliens or that there was a reasonable certainty [that] existed that contraband was aboard the vehicle at the time it entered the United States or a reasonable certainty the vehicle contained aliens or goods which had just been smuggled into the United States.

This is the Ninth Circuit's own recognition of their prior case law.

Contrary to the Ninth Circuit, the Tenth Circuit and the Fifth Circuit have uniformly required reasonable or founded suspicion to stop and search prior to this Court's decision in Almeida-Sanchez.

It would appear, therefore, that the Ninth Circuit is the only court and that the United States versus Almeida-Sanchez and the United States versus Miranda are the only cases which held that the border patrol can make a roving stop and search of a vehicle without probable cause or founded suspicion or even any recognition of Fourth Amendment rights under the Constitution.

On this basis I feel that it can be hardly argued that this Court's decision in Almeida-Sanchez overruled clear past precedent.

The second test is, did this Court's decision overrule a practiced law exception widely relied upon?

As I pointed out, I feel that the reliance must be reasonable. I do not think that illegal governmental activity should be allowed to establish constitutional precedent, no matter how long it has been relied upon and this is exactly what the Government is asking to occur in this situation.

The Government has relied on Section 1357(A)(3) on its literal interpretation which is completely devoid of the Fourth Amendment to the Constitution and it is unreasonable in the light of the fact that prior decisions of circuit courts have held that the same statute but a prior code section, 1357(A)(1), applied the Fourth Amendment reasonable suspicions standard to interrogate an alien and that was in the case of Au Yi Lau versus the Immigration and Naturalization Service.

Likewise, Section 1357(A)(2) applied the Fourth Amendment probable cause to arrest an alien in Yan Sang Kwai, another Circuit Court decision.

On that basis I feel that it is unreasonable to hold that the first two sections of the Act require recognition of the Fourth Amendment where the third section of the Act can be read completely devoid of the constitutional requirement.

Likewise, I feel that the governmental reliance on the statute was unreasonable in light of the history of the immigration laws which have been set out in the Brignoni-Ponce brief of Petitioner.

All prior statutes recognized Fourth Amendment requirements even in this area.

Furthermore, the small number of cases which even address themselves to the roving search show that there was very little reliance upon this practice.

Therefore, it can hardly be said that this Court's decision in Almeida-Sanchez overruled the practice which was long accepted and widely relied upon as one of the requirements to determine whether a new constitutional rule has been established.

On that basis it is submitted that Almeida-Sanchez did not establish new constitutional rule but merely reaffirmed the long line of decisions which have followed Carroll versus the United States.

To hold that Almeida-Sanchez establishes a new exclusionary rule based solely on Governmental reliance would be to hold that the Government can establish constitutional precedent by its illegal unilateral activity.

The third test, as set out in Chevron Oil versus Huson, was whether or not Almeida-Sanchez decided an issue of first impression whose resolution was not clearly

foreshadowed.

The Chevron Oil case held that Respondent can only rely on the law as it then was so we must look to the law as it then was.

The Fifth Circuit had determined that a roving check always requires at least a reasonable or founded suspicion and recognized application of the Fourth Amendment.

The Ninth Circuit and the Tenth Circuit, since this Court's decision in Almeida-Sanchez, have stated that a roving check always required probable cause.

They find this -- they achieve this conclusion by determining that this Court's decision in Almeida-Sanchez did not state a new rule but merely reaffirmed Carroll versus the United States and on that basis, that has always been the rule.

Based on the Chevron Oil case which held that Respondent can only rely on the law as it then was, it is submitted that Peltier can only rely on the law as it then was and it has been determined that the law as it then was required probable cause to stop and search a vehicle by a roving border patrolman.

Even applying the straight reasonableness test as set out in the dissent in Almeida-Sanchez, Peltier, unlike Almeida-Sanchez, lacked reasonableness.

By comparison, the highway where Almeida-Sanchez

was apprehended came directly from the border.

In Peltier, the highway upon which he was apprehended began in downtown San Diego and it is one of the three major roads leading out of Southern California.

In Almeida-Sanchez, there was no check point --

QUESTION: Are you sure about that, in Almeida-Sanchez? Wasn't the highway parallel to the border?

MR. SHAPERY: It was parallel to the border but I believe it terminated in Colexico or Mexicali, which is the twin bordertown.

QUESTION: I think it was an east-west road, route 90, as I remember, that at no time was closer than 20 miles to the border. That, as I recollect, was the record in that case. But it is, perhaps, not that important.

MR. SHAPERY: It was further stated in Almeida-Sanchez that this highway is often used by smugglers of contraband and illegal aliens because it did not have a check-point.

On the contrary, there is a fixed check-point. There was a fixed check-point on Highway 395 right -- right near the point where Peltier was stopped.

QUESTION: Is this the [inaudible]?

MR. SHAPERY: No, this is the Temecula check-point.

QUESTION: Temecula.

MR. SHAPERY: It is approximately the same location from the border but on another major highway.

QUESTION: Is Temecula inland from --?

MR. SHAPERY: Yes, it is. That is correct.

Almeida-Sanchez was purportedly stopped 20 miles from the border, where Peltier was stopped 70 miles from the border. Now, it is separated by the second-largest city in the State of California.

In Almeida-Sanchez --

QUESTION: What are you talking about, the "second-largest city" in --?

QUESTION: San Diego.

MR. SHAPERY: San Diego.

QUESTION: San Diego?

MR. SHAPERY: Right. Highway 395, upon which Mr. Peltier was stopped, begins in downtown San Diego and all of the residents of San Diego wishing to go to northern inland California or even to the midwest would be going on Highway 395 as the most direct route.

So there would be millions of people who had never even been to the Mexican border travelling on this highway in the same direction that Mr. Peltier was and at the same point.

QUESTION: Mr. Peltier was, in fact -- he has a French name. Was he a United States citizen or an American or a Frenchman or what?

MR. SHAPERY: M r. Peltier is a United States

and he -- as far as I know, had never even been to Mexico.

I don't even know whether he even speaks any Spanish. I don't think he does, but I know that he does not speak with an accent and upon communicating with him, the border patrol officers could easily recognize that he was not a Mexican citizen or even of Mexican descent,as they had stated when they pulled him over.

QUESTION: But that is no guarantee that he might not have aliens in his back seat.

MR. SHAPERY: That is true but there is no guarantee that any person, any citizen in San Diego might not be having aliens behind the back seat.

QUESTION: And in this case there was no showing of any kind that either he or his car had ever either been to Mexico or had aliens in it.

MR. SHAPERY: None whatsoever. In fact, that is another distinguishing factor between Almeida-Sanchez and Peltier is that in addition to the fact that Almeida-Sanchez was a resident of Mexico and had stated that he was coming from Mexico, Mr. Peltier was questioned before the search as to his citizenship and as to where he was coming from and as to his destination, at which point he stated he was coming from San Diego and he was going to Las Vegas, never having even mentioned the Mexican border or having been there.

Looking at the totality of the circumstances and

applying the reasonableness test of the Fourth Amendment as set out in the dissent in Almeida-Sanchez, taking all of the factors in Almeida-Sanchez --

QUESTION: Does the record show in this case the point of origin of the marijuana that he was carrying in his car?

MR. SHAPERY: No, it does not.

QUESTION: Mr. Shapery, what do you perceive to be the principal purpose of the exclusionary rule?

MR. SHAPERY: The principal purpose of the exclusionary rule is to deter unlawful governmental conduct and at the same time insulate the court system and maintain the integrity of the judicial system in determining decisions.

QUESTION: I think in Calandra we said that the principal purpose of that rule was to deter future police misconduct.

The rule that you advocate here today would not be relevant to that, would it?

MR. SHAPERY: I think it would be relevant to that inasmuch as I believe the conduct in this situation was one, unreasonable in light of the fact that the statute had always required -- all the statutes had required probable cause.

We have to look to the reasonableness and I think that to hold that the exclusionary rule only totally across

the board will prevent future conduct, would be to give the Government and overzealous law enforcement officers a free ride to conduct illegal activities until such time as this Court decides the issue.

QUESTION: Do you think where there is a statute enacted by the Congress that -- I think you conceded earlier authorized this type of stop and search -- should be rejected by policemen on their own initiative before this Court decides it is unconstitutional?

MR. SHAPERY: I feel that Congress has always recognized the Fourth Amendment and that in passing this legislation they did not intend to completely abrogate the Fourth Amendment in this particular statute, as is shown in Section (A)(1) and (A)(2). There has always been recognition for the Fourth Amendment and I feel that it is a unilateral activity of the border patrol which has overstepped the bounds, not Congress.

And on that basis it is their unilateral illegal activity which has abrogated the use of the Fourth Amendment.

QUESTION: Are you suggesting the statute requires probable cause for a search at the border?

MR. SHAPERY: No, I am not. I -- I --

QUESTION: Well, it is the same section that authorizes it.

MR. SHAPERY: I think there is -- there is a

distinction --

QUESTION: It is the same section, isn't it?

MR. SHAPERY: I believe that it refers to a search at the border or functional equivalent.

QUESTION: Well, it refers to a search at the border or a reasonable distance from the border.

MR. SHAPERY: That is correct but I --

QUESTION: Well, it is the same statute that authorizes the examination at the border as authorizes an examination a reasonable distance from the border.

Now, are you suggesting the statute requires probable cause at the border?

MR. SHAPERY: I am suggesting that the statute requires recognition of the Fourth Amendment.

QUESTION: Well, what about probable cause at the border?

MR. SHAPERY: I feel that the probable cause issue at the border is not brought up inasmuch as the Government has a need to protect the integrity of the entire country.

QUESTION: But the statute on its face purports to authorize the same kind of a search a reasonable distance from the border as it does at the border, as you -- I thought indicated earlier in our conversation.

MR. SHAPERY: That is correct.

QUESTION: And so that a border patrol officer

does have, or did have some thought that this statute authorized warrantless and non-probable cause searches although not exactly at the border.

And it is a rather old statute, isn't it?

MR. SHAPERY: I believe the statute was enacted in 1946 and amended in 1952.

The reasonable distance requirement, though, I believe would relate to the functional equivalent of the border and on that basis where it is --

QUESTION: A different point may be that it isn't a functional equivalent.

MR. SHAPERY: I believe that is the case.

QUESTION: That is another matter but it isn't -- if it were it wouldn't have to have probable cause.

MR. SHAPERY: That is correct.

QUESTION: Doesn't it come down to the proposition that you are saying that the officer should have known and been able to predict the ultimate outcome of the Almeida-Sanchez case?

MR. SHAPERY: I don't think that is the case.

QUESTION: In terms of the deterrence that Mr. Justice Powell was asking you about.

MR. SHAPERY: I think the point should not have been left up to the individual officer as such. I think that the problem stems from his superiors, from the attorneys

working in creating these rules and regulations pursuant to the statute and I feel that they at all times realized that they were rather in a precarious position.

However, looking to the recent application of the exclusionary rule, they possibly felt that until some alternative better than this comes up, we'll do what we can as long as we can.

And on that basis the interpretation has been unreasonable through its application wherein other sections of the statute require probable -- not probable cause but require recognition of Fourth Amendment requirements.

In the Ninth Circuit, the courts, for a short period of time, held that the statute could be read devoid of the Constitution and I feel that this is not a new rule where a statute must be read in recognition of the higher law of the land than the Constitution.

So the question comes down to whether or not it is a new rule that a law or a statute passed must be read in recognition of the Constitution.

That is not a new rule. It has been with us from the beginning of our legal history and on that basis we have to look to Carroll versus the United States as establishing a rule by this Court that has not been modified by this Court but merely reaffirmed by the case in Almeida-Sanchez.

Additionally I'd like to point out that the border

patrol agents, upon examination, have stated that the sole basis for their stopping Mr. Peltier is that he appeared to be of a Mexican descent.

This, in itself is invidious discrimination, to stop and search a car because a person appears to be of Mexican descent.

QUESTION: Well, what if they stopped him because he spoke Spanish?

MR. SHAPERY: I don't feel that they -- that they could tell that he spoke Spanish.

QUESTION: Well, I didn't ask you whether they had in fact stopped him because he spoke Spanish.

I said, what if they had stopped him because he spoke Spanish?

MR. SHAPERY: I have a little trouble with the analogy because I can't understand how they would know that he spoke Spanish until they made the stop and that at that point they would have violated his constitutional rights through this invidious discrimination.

QUESTION: Well, do you feel that stopping a person for speaking Spanish is of the same order in your apparent scale of values as stopping a person because he appeared to be of Mexican descent?

MR. SHAPERY: I think the courts have held that discrimination based upon apparent national origin is

invidious discrimination and because a person speaks Spanish is justification for the stop.

I feel that that is just one step away from Mexican descent and is just another justification for this invidious discrimination.

QUESTION: Isn't it the job of the border patrol to figure out who are illegal aliens from Mexico and who are people either lawfully admitted aliens or United States citizens that they don't have any business with?

MR. SHAPERY: I believe that the decision Almeida-Sanchez has established that the border patrolmen cannot do this without probable cause.

QUESTION: Well, what I am trying to get at is, what are the elements of probable cause? You apparently rule out both speaking Spanish and the appearance of Mexican nationality.

MR. SHAPERY: I think the Ninth Circuit has established that a person's national origin or his ancestry must remain a neutral factor not to be considered by the Court because it would raise an issue of invidious discrimination.

QUESTION: Even if he is stopped at the border they can't ask him his national ancestry?

MR. SHAPERY: No, getting stopped at the border I think is quite a different matter. As I have stated --

QUESTION: Well, but I should think it would be as invidious there as it would be any place else.

MR. SHAPERY: Well, the Government has a need and the public has an interest in maintaining the integrity of the country and that integrity is maintained through controlling what is coming into the country.

Now, we do not have a situation felt here. We have a stop of a person north of the second largest city in California on the sole basis --

QUESTION: Well, would this be invidious at the border?

MR. SHAPERY: I don't think so.

QUESTION: But it would be, say, 10 miles inland.

MR. SHAPERY: If they had no reason to believe that this person had crossed the border, I would think so.

QUESTION: Well, then, the same answer you would give if it were one mile north of the border?

MR. SHAPERY: I think that the proximity to the border has a lot to do with the reasonableness -- using the reasonableness standard as set out in the dissent.

I think that the distance from the border, in addition to the distance or the route, the proximity to a --

QUESTION: Of course, that question isn't really before us, the reasonableness, is it?

MR. SHAPERY: I am --

QUESTION: That isn't raised in the petition for certiorari.

MR. SHAPERY: I believe that --

QUESTION: The question is retroactivity.

MR. SHAPERY: I believe that the question of reasonableness can be raised inasmuch as --

QUESTION: On a plain error basis? Is that it?

MR. SHAPERY: Well, it was pointed out in the Government case in Bowen on page 11, note 6 that if a party prevails in a lower decision they can bring up any basis or any ground upon which to additionally make determination in their case.

The issue of reasonableness has been maintained from the trial court level.

I wish to also point out that all circuit courts who have ever addressed themselves to this issue, that is, the Fifth and the Ninth and the Tenth, would obtain the exact same result in Peltier as the Ninth had and the Ninth and the Tenth Circuits hold that the law now, after Almeida-Sanchez, always required probable cause to search on a roving patrol, wherein Almeida-Sanchez reaffirmed the rule of Carroll versus the United States.

On that basis, the Ninth Circuit has held that lacking probable cause, lacking recognition of the Fourth Amendment, that Peltier, like Almeida-Sanchez, should have

the evidence suppressed.

Now, the Fifth Circuit has always required -- now, this is pre-Almeida-Sanchez, has always required a least a founded or reasonable suspicion and since June 25th -- or since June 21st, 1973, it required probable cause.

But even the Fifth Circuit, on pre-Almeida-Sanchez law, would have suppressed the evidence in Peltier because it did not even comport to the founded or reasonable suspicion requirements.

Therefore, lacking probable cause or even a founded or reasonable suspicion, all the circuits would have dismissed Peltier.

The Government in this situation attempted to apply a statute completely devoid of the Fourth Amendment requirements.

Now, the Ninth Circuit, for a short period of time, went along with the Immigration and Nationality Service.

However, the Fifth Circuit at all times refused to go along with recognizing -- without recognizing the Fourth Amendment at all and they attempted to carve an exception to Carroll versus the United States by requiring a founded suspicion and applying, therefore, a minimal Fourth Amendment recognition.

Now, to agree with the Fifth Circuit would be to allow all circuit courts to establish their own constitutional

exceptions until overturned by this Court and I feel that to so do that would create chaos in lower court decisions giving them authority to carve exceptions to rules established by this Court and justify those exceptions until the issue is brought to this Court and reviewed or overturned.

Constitutional rules should begin with the Supreme Court and they should end with the Supreme Court and, as occurred in the case of Carroll versus the United States and reaffirmed by Almeida-Sanchez, Peltier's case should be affirmed.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Patton?

REBUTTAL ARGUMENT OF WILLIAM L. PATTON, ESQ.,

MR. PATTON: Mr. Chief Justice, I just would like to make a few quick remarks.

First of all, we are not talking about the government's unilateral conduct establishing a rule. There was a federal statute that had been construed in all the circuits that encompassed jurisdictions bordering on the Republic of Mexico.

We disagree with Respondent's analysis of the decisions of the Fifth, Tenth and Ninth Circuits and we say this is simply not true, that there was any requirement of probable cause for immigration searches prior to Almeida-Sanchez.

The Fumagalli decision in the Ninth Circuit, which is discussed in Justice White's dissenting opinion in Almeida-Sanchez, is represented in the Ninth Circuit decisions.

They drew a distinction between contraband searches for which they required probable cause and immigration searches And in immigration searches relying on the statute they did not require probable cause.

And the same is true in the Fifth Circuit. If you look at the Miller decisions and the Wright decision which is cited in our brief, you will see that what the Fifth Circuit said is that the test is whether the search is reasonable under the circumstances but it was not probable cause or reasonable suspicion.

If it was, it was no more than a requirement that border patrol officers search only compartments large enough to conceal illegal aliens and as to the reasonableness issue which Respondent has brought up in his argument, I don't believe that was raised in the Court of Appeals and, unfortunately I don't have the briefs here and I don't think it should be considered now.

But in any event, under the prior law --

QUESTION: Well, why isn't he entitled to defend the decision below on any ground that doesn't expand his relief?

MR. PATTON: Well, he would -- ordinarily this Court would not consider an issue that was not raised.

QUESTION: Ordinarily we would. Ordinarily we would if our Respondent -- if he is defending a decision below on the grounds -- even if it was rejected below.

MR. PATTON: Well, it --

QUESTION: If he doesn't try to expand his judgment.

MR. PATTON: Well, let me assume, Mr. Justice White, for the purpose of argument, that it can be raised now even so, as we have said, under all the decisions in the Ninth, Tenth and Fifth Circuits there is simply nothing to the claim that the search was unreasonable under prior law, prior to Almeida-Sanchez.

QUESTION: Could I ask you a question? I may as well ask you now as in some later case.

Is the Government seeking to get any kind of an area warrant for any check point?

MR. PATTON: Well, Mr. Justice White, at Temecula, where this search was conducted, we did operate a check point there for a period in 1974 under an area warrant.

Unfortunately, in October of 1974, the District Court in the Central District of California refused to renew the warrant on the ground that it lacked the authority to give an area warrant.

We didn't go up on that case but we have taken the issue up to the Ninth Circuit and Mr. Evans will discuss

this in more detail in his argument in Ortiz and Bowen .

QUESTION: All right.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, 73-2000 is submitted.

[Whereupon, at 10:56 o'clock a.m., the case was submitted.]