

In the

Supreme Court of the United States

UNITED STATES,

PETITIONER,

V.

JESUS E. CORTEZ AND PEDRO HERNANDEZ-LOERA

RESPONDENT.

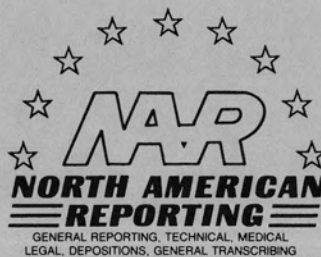
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No. 79-404

Washington, D.C.
December 1, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

 Petitioner, :

 v. : No. 79-404

JESUS E. CORTEZ AND PEDRO :

 HERNANDEZ-LOERA, : :

 Respondents. : :

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Washington, D.C.

Monday, December 1, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 o'clock a.m.

APPEARANCES:

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S. JEFFREY MINKER, Esq., 120 W. Broadway, Tucson, Arizona 85702; on behalf of the Respondent, Jesus E. Cortez.

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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We'll hear arguments
3 first this morning in the United States against Cortez. And
4 Mrs. Etkind, you may proceed whenever you are ready.

5 ORAL ARGUMENT OF MRS. BARBARA E. ETKIND, ESQ.,

6 ON BEHALF OF THE PETITIONER

7 MRS. ETKIND: Thank you, Mr. Chief Justice and may
8 it please the Court:

9 This case is here on the government's petition to
10 review a decision of the United States Court of Appeals for the
11 Ninth Circuit. The single question presented is whether
12 Border Patrol officers have founded suspicion to stop
13 the camper in which Respondents were traveling during the early
14 morning hours of January 31st, 1977.

15 Respondents were indicted in the United States
16 District Court for the District of Arizona on six counts of
17 knowingly transporting illegal aliens, in violation of 8 U.S.C.
18 1324(a)(2). Both Respondents moved to suppress the fruits of
19 the search of the camper in which they were apprehended, on
20 the ground that the initial stop of the vehicle was not support-
21 ed by founded suspicion. The evidence derived from the stop
22 included the illegal aliens themselves, their testimony, a
23 flashlight, and the physical evidence of a Chevron design
24 on the soles of the shoes worn by Respondent, Hernandez-Loera.

25 The District Court denied the motion to suppress,

1 and both Respondents were found guilty on all counts. The
2 Court of Appeals reversed the conviction on the grounds that
3 the Border Patrol officers did not have founded suspicion
4 to stop Respondents' camper.

5 In our view, the stop at issue was the culmination
6 of brilliant detective work on the part of the Border Patrol
7 officers. In holding that the fruits of that stop should
8 have been suppressed, the Court of Appeals departed egregiously
9 from this Court's holding that an articulable founded
10 suspicion justifies the minimal intrusion upon the right to
11 travel, that is occasioned by a roving Border Patrol stop of
12 a vehicle.

13 Because the question of whether founded suspicion
14 exists is a fact-bound one, I shall begin by describing
15 the facts of this case in some detail. For some months prior
16 to the stop at issue, Border Patrol officers had been investi-
17 gating groups of footprints leading from the Mexican border
18 north to Route 86, an east-west highway running generally
19 parallel to the Mexican border and at a distance of
20 between 25 and 50 miles from it. The footprints followed
21 roughly the same 27-mile path, through a sparsely populated
22 desert area known to be heavily used by aliens illegally
23 entering the country. The tracks would reach Route 86, around
24 mile post 119, and then continue eastward for three miles, to
25 mile post 122, where they disappeared. The groups contained

1 between 7 and 16 pairs of footprints, and in each group there
2 recurred the shoeprint of a distinctive Chevron design. That
3 is the front part of the sole containing 8 forward-pointing
4 V's and the back, the heel, contained 4 backward-pointing V's.

5 The Chevron design appeared to be the lead print in
6 each group, and Border Patrol officers in the area concluded
7 that a person, whom they called the Chevron, was guiding groups
8 of aliens across the Mexican border and north to a pick-up
9 point on Route 86. In fact, a group of illegal aliens that
10 were previously apprehended had identified Respondent Hernan-
11 dez-Loera as the wearer of the Chevron-soled shoes and as the
12 man who was to guide them to meet a smuggler off Route 86.

13 Border Patrol officer Wayne Gray, who participated
14 in the stop of Respondents' camper on January 31st, himself
15 had tracked the footprints from mile post 119 to mile post 122
16 on January 4th, and all the way from the Mexican border to
17 mile post 122, on January 16th. From the physical attributes
18 of the footprints, the officers were able to make several
19 deductions. They concluded that Chevron traveled on or near
20 weekends, that he and the aliens he led walked in dark-
21 ness, from shortly after beginning their journey; that it took
22 them from 8 to 12 hours to reach the highway, and that they
23 were met there by a camper, van, or similar vehicle that could
24 hold a large number of people without arousing suspicion. The
25 officers also knew that overland border crossings generally

1 are made in good weather.

2 QUESTION: Mrs. Etkind, this is a fairly remote and
3 deserted part of Arizona, is it not?

4 MRS. ETKIND: Yes, it is, sir. Finally --

5 QUESTION: Let me continue, while you are interrup-
6 ted. Did the officers have any idea as to the aliens ultimate
7 destination?

8 MRS. ETKIND: Yes. From the fact that the footprints
9 once they reached the highway, continued eastward along the
10 highway, the officers concluded that the aliens' ultimate
11 destination was somewhere east of the pick-up point, and
12 that --

13 QUESTION: ~~And~~ But that's all? Just somewhere east?

14 MRS. ETKIND: Yes, yes. And they also considered
15 that the pick-up vehicle would be approaching the area from
16 the east as well.

17 Based on these facts and --

18 QUESTION: From the east or from the west? Approach-
19 ing the aliens from the east?

20 MRS. ETKIND: Yes.

21 QUESTION: Taking them back to the east?

22 MRS. ETKIND: Yes. Based on the --

23 QUESTION: But how could they tell from the footprints
24 that it took 6 to 8 hours and that they walked in the dark?

25 MRS. ETKIND: I'm sorry, 8 to 12 hours that they were

1 walking in the dark.

2 QUESTION: Oh, 8 to 12, that's right.

3 MRS. ETKIND: Well it was an approximately, 27-mile
4 journey, and the officers, from their previous experience, esti-
5 mated that forced marches of this type take two and a half
6 to three miles per hour, so from that, they came to 8 --

7 QUESTION: So that really wasn't just based on
8 the footprints, it's based on their experiences?

9 MRS. ETKIND: Also on their experience, yes; but
10 on the fact that the footprints indicated a forced march,
11 there weren't stops, no evidence of snacking along the way
12 or taking breaks.

13 QUESTION: I see.

14 MRS. ETKIND: Based on these facts and inferences
15 Officer Gray and his partner, Ronald Evans, made the follow-
16 ing arrangements in an attempt to capture the Chevron. During
17 the early morning hours of Monday, January 31st, which was
18 the first clear night after three days of rain, the officers
19 stationed themselves at milepost 149, on Route 86, 27 miles
20 east of the anticipated pick-up point. Because they expected
21 the departure by Chevron and his group, at or shortly after
22 nightfall which occurred around 6 p.m., and an 8- to 12-hour
23 journey by them, the officers watched for a camper, van, or
24 similar vehicle that would pass them heading westward and then
25 return past them heading eastward around one and a half hours

1 later. The round trip to be made, approximately between the
2 hours of 2 and 6 a.m.

3 The officers began their surveillance at 1 a.m. and
4 at 4:30, a greenish-yellow pick-up truck with a camper shell
5 and a license plate number beginning GN-88 passed the officers
6 heading westward. At 6:12 a.m. a vehicle of the same descrip-
7 tion passed the officers heading east. After verifying that
8 the camper's license plate number was GN-8804, the officers
9 stopped the vehicle and in it they found the Respondents and
10 six illegal aliens.

11 The soles of the shoes Respondent Hernandez-Loera
12 was wearing bore the distinctive Chevron design. The Court
13 of Appeals appeared to accept the facts I have outlined, but
14 nonetheless held that they did not establish founded suspic-
15 ion to stop Respondents' camper. According to the Court of
16 Appeals, the only suspicious fact connected with the camper
17 was its passing the officers heading west and returning past
18 them heading east in the pre-dawn hours. That fact, the
19 Court held, was consistent with too many innocent explanations
20 to make the officers' suspicions reasonably warranted. In
21 the first place, a possible innocent explanation does not
22 preclude the existence of founded suspicion. After all, if
23 an innocent explanation were less likely than a guilty one
24 there would be probable cause. But more important for the
25 purpose of the present case, in holding as it did, the Court

1 of Appeals completely ignored all of the clues and inferences
2 that were available to the officers from their extensive inves-
3 tigation of previous illegal border crossings led by Respondent
4 Hernandez-Loera. There is nothing in the prior decisions of
5 this Court that supports the distinctions drawn by the Court
6 of Appeals between, on the one hand suspicious characteristics
7 of an individual or vehicle directly observable at the time
8 of apprehension and on the other hand, physical clues left by
9 a suspect at the scene of his prior offenses, indicative
10 of a very specific modus operandi.

11 Beginning with Terry v. Ohio, this Court has estab-
12 lished that where the founded suspicion justifying an investi-
13 gative stop exists, depends on the totality of the
14 circumstances of which an officer is cognizant. Indeed, it
15 could hardly be otherwise. Because almost any characteristic
16 of a vehicle or person that in isolation may seem entirely
17 innocent, when viewed together with other circumstances may
18 be quite indicative of criminal activity and the converse is
19 also true.

20 In Adams v. Williams, this Court upheld an investi-
21 gatory stop based on a tip from an informant who had provided
22 information in the past. This case made clear that information
23 need be of no particular type in order to serve as the basis
24 for founded suspicion. As the Court stated "informant's
25 tip, like all other clues and evidence coming to a policeman

1 on the scene, vary greatly in their value and reliability.
2 One simple rule will not cover every situation. In United
3 States v. Brignoni-Ponce, in which this Court applied the
4 founded suspicion test to investigatory stops by roving
5 Border Patrols makes clear that it is the totality of
6 circumstances that controls in this context as well.

7 Or if the founded suspicion test were to require
8 that some aspect of a vehicle or its occupants in and of it-
9 self warrants suspicion, the following factors listed by the
10 Court in Brignoni-Ponce would be irrelevant or superfluous;
11 in this case, the Court said that officers may consider the
12 characteristics of the area in which they encounter a vehicle,
13 its proximity to the border, the usual patterns of traffic on
14 the particular road, and previous experience with alien traffic
15 are all relevant. They also may consider information about
16 recent illegal border crossings in the area.

17 All of these factors were present in this case. The
18 country involved was sparsely populated desert terrain, the
19 Mexican border was located approximately 25 miles from the
20 pick-up point and 50 miles from the point of apprehension.

21 QUESTION: It is not contended in this case, is it,
22 Mrs. Etkind, that this stop was, the locus of this stop was the
23 border or its equivalent?

24 MRS. ETKIND: The border or its, I'm sorry, I didn't--

25 QUESTION: Or its equivalent?

1 MRS. ETKIND: No, it is not contended. Only about
2 15 to 20 cars had traveled west and only about 6 to 10 cars
3 had traveled east, past the officers, during their entire five-
4 hour surveillance period. Both officers had worked in the
5 area as Border Patrol officers for 2 to 3 years. And more
6 significantly, not only were they aware of the high degree of
7 alien smuggling in the area in general, but they were also
8 specifically aware of recent smuggling expeditions led by the
9 very person for whom they were watching. In Brignoni-Ponce
10 the Court also listed factors concerning the driver's behavior
11 and the appearance of the vehicle and its occupants. Such
12 factors are present here as well. As the Court suggested, the
13 type of vehicle employed; in this case, the camper is signif-
14 icant. Moreover, the fact that the camper was making an early
15 morning one and a half hour round trip on a lightly traveled
16 road in an area known for alien smuggling, is, we submit, it-
17 self grounds for founded suspicion.

18 QUESTION: Mrs. Etkind?

19 MRS. ETKIND: Yes.

20 QUESTION: Here the Court of Appeals majority
21 reversed the finding of the District Court. Do you think that
22 the question of founded suspicion as the Brignoni-Ponce test
23 has come to be called, is a question of law, a question of
24 fact, or a mixed question of law and fact?

25 MRS. ETKIND: Well I think the ultimate question of

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whether founded suspicion exists is a question of law. But the question is not whether all --

QUESTION: Mrs. Etkind, may I ask you another question about founded suspicion? What's the source of that phrase, founded suspicion; is that in the Ninth Circuit opinions or is that in any opinion of this Court? Is it used in Brignoni-Ponce?

MRS. ETKIND: I think --

QUESTION: And if so, where?

MRS. ETKIND: I think the words in Brignoni-Ponce may be reasonable suspicion.

QUESTION: That's the way I read it, too.

MRS. ETKIND: Oh --

QUESTION: Do you think it's a different test than the test of Terry against Ohio?

MRS. ETKIND: No, I don't think so. I think the idea of specific and articulable factors that lead the officer to believe that criminal activity may be afoot.

QUESTION: Terry v. Ohio was --

MRS. ETKIND: I think --

QUESTION: -- a decision that limited--that is justification for a frisk for a weapon or a gun, wasn't it?

MRS. ETKIND: That's true. And --

QUESTION: That's not this case?

MRS. ETKIND: No, that's not this case. In

1 Brignoni-Ponce -- the Court found that the justification
2 there for allowing --

3 QUESTION: Brignoni-Ponce is the case?

4 MRS. ETKIND: Yes, it is. In any event, the --

5 QUESTION: But your, the government's position is
6 that the founded suspicion test is the same as the Terry test?

7 MRS. ETKIND: The Brignoni-Ponce test --

8 QUESTION: Because that's reasonable suspicion?

9 MRS. ETKIND: Yes.

10 QUESTION: Well you can only slice a cheese so thin,
11 from probable cause to founded suspicion to reasonable sus-
12 picion. In the end, you end up with phrases that really merge
13 into one another, do you not?

14 QUESTION: And that's why I asked, whether you are
15 asking for different tests or not, there only can be so many
16 tests and as Mr. Justice Rehnquist suggests, one would think that
17 reasonable suspicion and founded suspicion would probably be
18 the same thing.

19 MRS. ETKIND: I think that's right. I'm not asking
20 for a different --

21 QUESTION: You're not asking us to slice the cheese
22 any more thinly than --

23 MRS. ETKIND: Oh, I certainly am not, and in fact,
24 the case certainly would not require that. In our view, this
25 case presents probable cause, the facts of this case. But the

1 Court may not reach that decision. But certainly you don't
2 need to slice anything --

3 QUESTION: Of course, you may have been only paying
4 some deference to the language that this Court has used?

5 QUESTION: But my point was, this Court didn't use
6 the language you chose, the founded suspicion language. That's
7 why I was wondering why you picked it up.

8 MRS. ETKIND: It is the language that the Court of
9 Appeals used in this case.

10 QUESTION: Right, I understand.

11 MRS. ETKIND: And I do think it is the same as the
12 reasonable suspicion that was referred to in Terry v. Ohio.

13 QUESTION: Have we not said in some opinions, in
14 common with a good many courts of appeals, that in
15 making this evaluation we are not to do it from the point of
16 view of a judge sitting in a library, but from -- as seen
17 through the eyes and understanding of the trained law enforce-
18 ment officer, words to that effect?

19 MRS. ETKIND: I think that's right, yes. In any
20 event, the question is not whether all of the factors listed
21 in Brignoni-Ponce are present, but whether the totality of
22 the circumstances gives rise to founded suspicion. In that
23 connection, this Court emphasized that any number of factors
24 may be taken into account, but each case must turn on the to-
25 tality of its particular circumstances and that in all

1 situations the officer is entitled to assess the facts in
2 light of his experience in detecting illegal entry and
3 smuggling.

4 Brignoni-Ponce controls the present case and it
5 requires reversal of the decision of the Court of Appeals.
6 What occurred in the present case is detective work of the
7 highest caliber which should be encouraged and not disparaged
8 by the Court. The Court of Appeals here denigrated the
9 officers' actions in this case as being based solely on a
10 profile. While we certainly do not eschew the use of pro-
11 files in appropriate circumstances -- no profile, as that
12 term is commonly used, was employed by the officers in this
13 case. A profile is a set of typical characteristics of a
14 certain type of criminal, such as an airplane hi-jacker or
15 a drug courier, that is developed by law enforcement agents
16 on the basis of their pooled experience with large numbers of
17 criminals of a particular sort. In contrast, in the present
18 case, Border Patrol officers discerned the modus operandi
19 of their particular suspect, the Chevron, not from their
20 prior general experience of alien smuggling, in large part,
21 but from the physical clues left at the scene of Respondent
22 Hernandez-Loera's previous journey. To find clues and deduce
23 them in identifying features of the culprit is the essence of
24 good detective work. While there may be a question of seman-
25 tics, but certainly none of substance, as to whether the

1 identification of a suspect's individualized modus operandi
2 may constitute a profile, there is no question but that such
3 a profile represents precisely the kind of rational assessment
4 of the likelihood of criminal activity that the Fourth Amend-
5 ment demands.

6 Contrary to the Court of Appeals suggestion, it is
7 exactly this type of reasoned investigative work that diminishes
8 the number of police intrusions based on unarticulated hunches,
9 or random guesswork. And finally, with respect to the quan-
10 tity of evidence necessary to establish founded suspicion, we
11 submit that the present case is at the far end of the continuum
12 from what was present in Brignoni-Ponce. In that case, in
13 which this Court suppressed the fruits of the stop, the only
14 basis for the stop was the occupant's apparent Mexican ances-
15 try. Here on the other hand, the officers had all the clues
16 and inferences arising from them that I have described, which
17 were corroborated when Respondents' camper passed the officers
18 heading west and then backtracked past them, heading east,
19 during the early morning hours of January 31st. As I stated,
20 in our view these facts provided not only founded suspicion
21 but probable cause as well. Of course this Court need not
22 reach the question of whether there was probable cause, but for
23 the guidance of the lower federal courts and of law enforce-
24 ment officers in the field, we submit that the facts possessed
25 by the officers in this case are far above the minimum

1 necessary to justify an investigatory stop of the vehicle.
2 Unless there are further questions I'd like to reserve the
3 rest of my time for rebuttal.

4 MR. CHIEF JUSTICE BURGER: Very well.

5 Mr. Velasco.

6 ORAL ARGUMENT OF BERNARDO P. VELASCO, ESQ.,
7 ON BEHALF OF RESPONDENT HERNANDEZ-LOERA

8 MR. VELASCO: Mr. Chief Justice and may it please
9 the Court:

10 This case presents a question that centers upon
11 whether a vehicle may be seized simply because it travels on
12 an east-west highway and returns to the direction from which it
13 came. The government suggests to the Court that the totality
14 of circumstances is that this behavior or this exhibited con-
15 duct is sufficient to lead to the rational conclusion that
16 a crime or criminal activity was taking place.

17 The Supreme Court, in dealing with reasonable sus-
18 picion cases, has adopted the term reasonable suspicion. The
19 Ninth Circuit, after the Brignoni-Ponce decision came out and
20 several other cases, stated that they had been using the
21 founded suspicion test or doctrine, but that in fact was
22 equivalent --

23 QUESTION: Actually, in Martinez -Fuerte, the term
24 is that rational inferences from those facts that reasonably
25 warrant suspicion, is it not?

1 MR. VELASCO: Yes, Your Honor.

2 QUESTION: And again, if you want to make fine
3 points about distinctions, you consider that slightly differ-
4 ent than reasonable suspicion?

5 MR. VELASCO: Founded suspicion? The Ninth Circuit
6 has said that it's the same thing.

7 The manner in which any seizure by a police officer
8 is evaluated, is done by the Court, because the Court has a
9 very important function in these types of cases. The Court
10 clearly has the obligation to view the matter through -- in
11 light of the officer's experience. However, the reasonable
12 suspicion test requires specificity and objectivity. If the
13 Court must look at the evidence and must analyze it objectively
14 to determine whether the officer's experience and observations
15 are reasonable. If the Court is not to look at this objec-
16 tively and specifically, then what you have simply is the
17 Court accepting any rationale by any police officer, which then
18 would eliminate the Court's function in Fourth Amendment cases
19 and would in fact preclude any assertion that the officer's
20 conduct is unreasonable.

21 QUESTION: Well what about the situation you have here
22 where you have a divided panel of the Court of Appeals
23 and the dissenting member is from Arizona and the District
24 Court has found, presumably on the eyewitness testimony before
25 him that there is articulable suspicion. Isn't the panel

1 required to give some weight to the testimony -- or the con-
2 clusion of the District Court?

3 MR. VELASCO: In this case the District Court made
4 no finding; the court simply heard the evidence. If the Court
5 would look at the record carefully, it's clear from the
6 testimony of Agent Gray and Agent Rayburn that in cross-
7 examination, when questions were asked of them about the area,
8 they really weren't that familiar with the area. They didn't
9 know how many people really lived in Sells, they didn't know
10 that Sells was the capital. It's our position that the trial
11 judge and the court appellate judge really cannot take judicial
12 notice of things that this is a remote area.

13 Arizona is not any different than California, Nevada
14 and Texas.

15 QUESTION: Are you saying -- are you telling us
16 that they may not take judicial notice of the geography of the
17 area?

18 MR. VELASCO: Generally, -- the Court can do that.
19 The ruling usually provide that judicial notice is to be taken
20 of something that the Court will notify counsel so they have
21 an opportunity to question or to present evidence on that issue.

22 QUESTION: And there's also a rule that if a defen-
23 dant on trial for a particular offense wishes to suppress
24 evidence, the burden is on the person moving to suppress, is
25 it not?

1 MR. VELASCO: Yes, that's correct. And the problem
2 is that when the -- all the defendant needs to do is show a
3 prima facie -- some showing that the search is unreasonable,
4 where there is no warrant and clearly there has been no warrant
5 obtained in this case. And we submit to the Court that under
6 the facts in this case, it's clearly established that the
7 government had to go forward with proof to justify the seizure.
8 And I don't think it's apparent --

9 QUESTION: Well, supposing there's been no warrant
10 and the government is operating on a theory that there was
11 founded suspicion or whatever one wants to call it, the
12 defendant claims there is none. Now, when that evidence
13 is tendered into evidence, it's up to the defendant to
14 object and to make clear the objection, is it not? It's not
15 up to the government to show why it should go in evidence.

16 MR. VELASCO: Yes, yes. But there's nothing, as
17 I see it, in this case, there's nothing which the government
18 has produced that suggests that the criminal activity that
19 they believe is occurring is in any way connected to the
20 Defendant. The record clearly reflects that this route, that
21 this area of suspicion by these two agents is used less
22 frequently than any other place on the border. So, an objec-
23 tive evaluation of this suspicion of criminal activity
24 doesn't advance the nexus or connection to believe that the
25 crime, if it's being committed, is rationally connected to the

1 Defendant.

2 QUESTION: Well did the defendant object in the
3 trial court on Fourth Amendment grounds?

4 MR. VELASCO: Yes, Your Honor. So what we have in
5 this particular case, is the Court has various decisions
6 regarding this problem.

7 The Court has said that you simply can't stop the
8 vehicle or a person, you can't stop the vehicle because it's
9 on the highway, you can't stop a Mexican simply because he's
10 in a vehicle, you need something more. The Court --

11 QUESTION: Couldn't the government, by statute or
12 regulation, or the Bureau, declare that any vehicle over 5
13 tons, 4 tons, within 25 miles of the border or 15 miles of
14 the border, should be stopped and searched?

15 MR. VELASCO: I don't believe so. If the state
16 were to pass a law like that, the Court would strike that down
17 as an undue burden on interstate commerce.

18 QUESTION: Well how do the states then get by, to
19 use the vernacular, with having these pull-off areas and
20 requiring every truck over a certain tonnage to stop to be
21 checked and weighed?

22 MR. VELASCO: The Court has taken the position
23 that those types of intrusions are made as a regulatory matter,
24 that the public has the ability to know that if they are
25 driving these types of vehicles that there will be these

1 checkpoints. Every person driving these vehicles is subject
2 to seizure, every person knows that a certain seizure will
3 take place.

4 QUESTION: Well that's my hypothesis, that every
5 truck, every vehicle over X-tons, let's make it 2 tons, may
6 be stopped.

7 MR. VELASCO: But in this particular case, there's
8 no rational basis for that, and there's no notice to the
9 public --

10 QUESTION: No, no. Now you're linking this case up
11 with my hypothetical and I'm just asking you an abstract, hypo-
12 thetical question. Could it constitutionally be ordered that
13 every truck over that given, every vehicle over that size,
14 be stopped?

15 MR. VELASCO: I don't believe so. A vehicle, simply
16 because a presence in an area, would not justify a seizure.
17 There would have to be some basis for a seizure, otherwise
18 everything is subject to seizure, whether or not there's a
19 reason to believe that there's any criminal activity --

20 QUESTION: Well can a state require that all trucks
21 be stopped?

22 MR. VELASCO: The Court hasn't --

23 QUESTION: Every state does it, doesn't it?

24 MR. VELASCO: I'm not aware of whether every state
25 does it --

1 QUESTION: Well, at a border when a truck is going
2 through the state?

3 MR. VELASCO: The state does not do that. That's
4 the federal government that stops --

5 QUESTION: Well certainly, going from Arizona to Cal-
6 ifornia or California to Arizona, both states stop trucks and
7 cars as well.

8 QUESTION: That's for the fruit.
9 MR. VELASCO: For purposes of inspecting fruit.

10 QUESTION: Oh. But they stop -- at the border of
11 Colorado, and there isn't any fruit to inspect, they just
12 stop them to see what, see if they are in compliance with the
13 laws.

14 MR. VELASCO: Yes, but the Court has -- has two
15 ways of looking at this. The seizure is whether there's spe-
16 cific and objective facts justifying the seizure of a partic-
17 ular individual, and then the Court has also suggested, or
18 certain areas where discretion of the officers is limited,
19 where the policy decisions for stopping vehicles has been made
20 by persons higher in the government, the discretion of the
21 officer in the field is limited so that he may not make --
22 stops at night simply because he has a belief that criminal
23 activity is occurring and he has a belief that that criminal
24 activity is connected to the vehicle.

25 This Court has already rendered decisions where

1 simply being in an area is insufficient to justify seizure.
2 Certainly, a proposition can be made that in Ybarra v. Illi-
3 nois, that simply being in bar where there's probable cause
4 to believe that the bar has narcotics, that person is not
5 subject to seizure. He's there. In Sibron, the Court said
6 merely talking to drug addicts is insufficient to justify
7 seizure. So, --

8 QUESTION: But In Ybarra nobody was on the move,
9 the people were simply standing around the bar. This is a
10 case of crossing a state line.

11 MR. VELASCO: In this case, let me make an even
12 closer case then, that would be -- in this case there's no
13 crossing a state line. A similar example would be, as in
14 Brown v. Texas, where an individual was coming out of an area
15 of high incidence where he had been seen with another person
16 and that isn't sufficient. What we have in this case, we don't
17 have the vehicle in the area, no reason to believe from look-
18 ing at the vehicle that it's been in the area. We have a
19 vehicle, we can't stop it because it's a vehicle -- you can't
20 stop it if all you've got is the vehicle in the area. The
21 government now suggests that if the vehicle is suspected
22 without more of going into the area, it's not enough. And
23 that clearly can't be the test, because then the next thing that
24 happens is, any vehicle driving north can be seized, any
25 vehicle -- just, on the record here, really, there is no basis

1 to rationally conclude that the seizure was justified.

2 QUESTION: Mr. Velasco, we have a round trip here.

3 MR. VELASCO: Your Honor, without more, and that's
4 all. That might be --

5 QUESTION: It's fairly significant isn't it?

6 MR. VELASCO: It might be --

7 QUESTION: In a deserted area, unless, I mean, you
8 did suggest maybe they were picking up astronomers or some-
9 thing like that, but at this hour of the night it's not
10 totally without reason to assume it has some connection, is
11 it?

12 MR. VELASCO: Well, it's not reasonable to seize
13 the person, but it might be a basis for focusing suspicion.
14 Clearly, if you look at something and you say well that's
15 strange, then the Court considers well, officers are entitled
16 to look at things and decide if they are strange. The question
17 then becomes is there a need for immediate action, is there
18 something beyond their suspicion. And you look at the vehicle
19 and if it's going to have 20 people in it, that should have an
20 effect on the vehicle.

21 QUESTION: Well are you suggesting that perhaps
22 the regulation could have been met by following that vehicle
23 to its destination and watch the illegal aliens disgorge from
24 the camper?

25 MR. VELASCO: Well certainly --

1 QUESTION: Is that the way to do it?

2 MR. VELASCO: Certainly they could have done that,
3 Your Honor. But the point is that they could have done some-
4 thing to watch the vehicle and determine whether it really
5 required any further action.

6 QUESTION: How many illegal aliens were in the camper?

7 MR. VELASCO: There were six in this camper, they
8 expected 8 to 20, at least. So, we submit that based on prior
9 law, this really -- the stop is infamous; what the government
10 really seeks to do, is to say that they can--make any hypo-
11 thesis or any deduction of criminal activity that that places
12 them under reasonable suspicion. And clearly it does not,
13 that cannot be correct, if you try to evaluate the evidence
14 and the totality of circumstances, there comes a point as
15 the Court has recognized in Reid, where simply looking at
16 officers suspicions, the Court has to say it's not reasonable
17 or it's not reasonable, for purposes of the Fourth Amendment.

18 QUESTION: What deference do you think the Court of
19 Appeals was required to give to the findings of the District
20 Court in a case like this?

21 MR. VELASCO: The Court, the Ninth Circuit has
22 adopted the clearly erroneous test, where the Court, the lower
23 court makes findings.

24 QUESTION: Well that's the standard of Rule 52(a),
25 that's the Ninth Circuit.

1 MR. VELASCO: But that's the standard. And the
2 deference -- we have an effect of an open record here, the
3 Court simply denied the motion, granted counsel an ~~exception~~
4 exception.

5 QUESTION: Well isn't there a presumption that when
6 the Court denies a motion it makes every finding that is
7 necessary for the denial of that motion?

8 MR. VELASCO: That may be the case. But even as
9 -- even with the record, at the best that the government
10 states it, ~~and~~ there isn't enough to objectively say that
11 there is a reasonable suspicion of criminal activity and a
12 particularized suspicion that this vehicle was engaged in that
13 suspicion. There's no nexus justifying ~~the~~ seizure.

14 QUESTION: Can you point out which of the suppositions
15 that the officers were making in reaching their total conclus-
16 ion, proved to be untrue? The round trip, for example, that
17 Mr. Justice Stevens referred to, and all the other facts?

18 MR. VELASCO: Well that's, in a hindsight evaluation,
19 that's -- it's not possible.

20 QUESTION: Well of course, it is hindsight now.
21 The judges, the business of judges is necessarily hindsight.

22 MR. VELASCO: Well of course. But if this seizure
23 had resulted in the seizure of some other group of aliens,
24 the Court would look at this and say they've had this hypo-
25 thesis designed to catch Mr. Cortez and Mr. Hernandez, however,

1 it resulted in the apprehension of some totally unrelated
2 group, it would make it sound less reasonable. And I think
3 that's what the Court has to do in this case; to look at --
4 do they have about criminal activity. They merely had a sus-
5 picion that criminal activity took place, and we submit that
6 there is no nexus.

7 MR. CHIEF JUSTICE BURGER: Mr. Minker.

8 ORAL ARGUMENT OF S. JEFFREY MINKER, ESQ.,

9 ON BEHALF OF RESPONDENT JESUS E. CORTEZ

10 MR. MINKER: Mr. Chief Justice, and may it please
11 the Court:

12 In cases of founded suspicion or probable cause, the
13 party having the burden of proof is permitted to use direct
14 or circumstantial evidence or any combination thereof. This
15 has always been the law in founded suspicion cases, it's the
16 law in the Ninth Circuit. And the case to look at for an
17 example is a case cited by the government which is the United
18 States v. Clark. Clark, the facts there, are interesting
19 when you compare them to our case. There were four relevant
20 facts in Clark: one, there was the proximity to the border,
21 one mile; two, the agent received a radio call that aliens
22 were coming over the border; three, there were no other vehicles
23 in the area where the aliens were coming over the border, and
24 four, the Defendant was seen leaving the border on the only
25 north-south road going from the border. Our case does not

1 involve any new tests. The decision of the Ninth Circuit
2 simply says that the government did not meet the requirement
3 of the founded suspicion test.

4 Even Judge Chambers, in his dissent, does not talk
5 about a new test or a different test being created, he quar-
6 reled with the analysis of the facts by the majority.

7 QUESTION: Two questions, Mr. Minker. You began
8 by talking about the person with the burden of persuasion,
9 the burden of proof, the person who has the burden of proof.
10 Who do you think that is?

11 MR. MINKER: I think basically, in the practical
12 day-to-day experience of the District Courts, the Defendant who
13 has been seized without a warrant, simply comes forward and
14 says I have been seized without a warrant, my constitutional
15 rights have --

16 QUESTION: Well yes, he has to first say that, and
17 that gives him --

18 MR. MINKER: Yes.

19 QUESTION: -- a burden, doesn't it?

20 MR. MINKER: Yes. That's what happens.

21 QUESTION: Generally, when the government seeks to
22 introduce evidence, or proposes to introduce evidence, according
23 to whether it's a motion to suppress or objection to the intro-
24 duction of evidence, the person who makes the motion to suppress
25 or the person who objects to the introduction of the evidence

1 has the burden, doesn't he?

2 MR. MINKER: That is correct.

3 QUESTION: Not the government, not the prosecution?

4 MR. MINKER: Well, all you really do is make the
5 motion, the prosecution, as happened in this case, the tran-
6 script clearly shows the government proceeds on to make its
7 case, the government started its case, the government called
8 its witnesses Agent Rayburn and Agent Gray and the other
9 agent and this is what happens in all of these cases. So
10 once the defendant raises the issue in the District Court and
11 says there has been an unreasonable search or seizure in
12 violation of the Fourth Amendment --

13 QUESTION: Well he has to do more than just say
14 that, doesn't he?

15 MR. MINKER: Well, he files a memorandum pointing
16 out why he feels --

17 QUESTION: First of all, that the search
18 or the seizure was without a warrant, doesn't he?

19 MR. MINKER: Yes.

20 QUESTION: Without probable cause, and in the Ninth
21 Circuit without founded suspicion. And that's my second
22 question, isn't that a phrase that's peculiar to their, or
23 at least, was born in the Ninth Circuit, it's not a phrase to
24 be found in an opinion of our Court, is it?

25 MR. MINKER: No, I believe it was born in the

1 Ninth Circuit, and the Ninth Circuit has said that they are
2 using that phrase the same as reasonable suspicion. The Ninth
3 Circuit does not make any distinction.

4 Every day in the district courts of this country,
5 cases are fought out involving founded suspicion or probable
6 cause.

7 QUESTION: Well Mr. Minker, I have some trouble with
8 the printed appendix here, in that, it seems to be solely
9 a hearing on dis -- on a motion to suppress. Was there ever any
10 trial beyond that, or was this simply an appeal of a denial of
11 a motion to suppress?

12 MR. MINKER: No, there was a trial, in the case of
13 Mr. Cortez, there was -- there were two trials, the first
14 ended in a hung jury, and in the second, there was a con-
15 viction. But the cases were severed and Cortez and Hernandez
16 had separate trials.

17 QUESTION: And what was the verdict in the Hernandez
18 case?

19 MR. MINKER: On the second trial he was found guilty.

20 QUESTION: And how about --

21 MR. MINKER: Did you say in Hernandez or in Cortez?
22 I'm sorry --

23 QUESTION: I said Hernandez.

24 MR. MINKER: He was guilty. When a party loses
25 a motion to suppress in the District Court, in most cases

1 the matter ends there. In a few cases, there is an appeal
2 to the Circuit Court of Appeals as there was in this case, to
3 the Ninth Circuit. When the decision is reached in the Ninth
4 Circuit, that is usually the end of the matter. But in this
5 case, the Justice Department has come here, and has said, we
6 want a reversal. And reading their brief, they really, I
7 submit, do not want a reversal simply based on an argument of
8 the facts; they want a new test to create it. They want
9 another slice of the pie. They, no matter how ornately you
10 christen their new test, it will be known in the inelegant
11 vernacular as the hunch test, and a hunch will give an agent
12 the right to make a stop based on a gut feeling or a hunch.
13 Hunches do play a very proper role in police work. The
14 Second Circuit talks about that in a case called Price, where
15 they said a hunch tells an agent to keep an eye out for what's
16 going to happen, but it does not give the basis to make a
17 seizure. In this case, there is a hunch that led to a seizure
18 and --

19 QUESTION: Was it not a series of hunches, rather
20 than one?

21 MR. MINKER: Well, if you call their profile one
22 hunch and there's no question that the agent said I had a pro-
23 file here, and he says it at page 78 and 79 of the joint
24 appendix, he is questioned, and he says I have a profile, the
25 profile is based on the fact that any car, virtually any car

1 but a sedan -- and excluding linen trucks, -for some reason
2 commercial vans, that's capable of carrying 8 to 20 aliens
3 fits my profile. And we are going to stop and search every
4 one of those vehicles that meet that profile provided they
5 went and returned within an approximate time of an hour and a
6 half. Well, when --

7 QUESTION: But that -- it wasn't all over the state.

8 MR. MINKER: I beg your pardon?

9 QUESTION: They didn't stop every truck in the north
10 end of the state --

11 MR. MINKER: Well I said south --

12 QUESTION: That was going east or west at a certain
13 time.

14 QUESTION: This was at a certain location?

15 QUESTION: Interstate 86.

16 MR. MINKER: Highway 86.

17 QUESTION: Interstate 86, it's way south -- it's
18 south of I-10, very close to the Mexican border.

19 MR. MINKER: It is Highway 86, and to --

20 QUESTION: And not just anywhere on Highway 86.

21 MR. MINKER: Well, in our opposition we attached a
22 map. The map clearly shows where the interstate is, and it
23 clearly shows where Highway 86 is. It shows where the agents
24 were, at a place called Three Points. It indicates where Sells,
25 Arizona, the capital of the Papago Nation is, it also

1 indicates where Kitt Peak National Observatory, probably the
2 most famous, one of the most famous world observatories in the
3 world is. And it shows all these things they're on a highway
4 it ~~is~~ -- approximately 25-30 miles north of the border and
5 it goes east-west and the highway does not itself directly go
6 to the border. The highway, eventually, as the map shows,
7 goes to Tucson, or up to Phoenix. You can take, go to either
8 city; if you have metropolitan cities, of a half million, which
9 is Tucson, or Phoenix, which is a million, and you're talking
10 about an hour's distance or so.

11 QUESTION: But no one would take 86 from Phoenix to
12 Tucson, they'd take I-10.

13 MR. MINKER: Well, I respectfully disagree. There
14 are plenty of areas in Arizona that I personally have traveled
15 where I do not take the interstate; where I will take sideroads
16 simply because they are much more scenic.

17 QUESTION: Well but --

18 QUESTION: At night? At night?

19 MR. MINKER: Only if I'm hoping for a very pretty
20 daybreak. Well, the agents know they are on an east-west road,
21 30 miles or so from the border. They also know exactly where
22 the aliens cross the border and come into the United States
23 and they know exactly where they go. They know that the aliens
24 come in near an Indian village called Itek and they go directly
25 to milepost 122. Now knowing that, the agents have certain

1 things that they should have done. They, if they are going to
2 eliminate an interference to innocent travelers, they have a
3 duty to minimize things. There is talk in the transcript
4 about sensors. Well, a sensor could have been placed at
5 Itek and the agents would then know that an alien is coming,
6 that there are hits on the sensor, a number of hits, you know
7 a number of people have just crossed the border. You also
8 put a sensor at milepost 122, the agents talked about a culvert.
9 Well, you put another sensor there. Now you have something.
10 But more important than all of this, you go to milepost 122.
11 If the agents are so sure, even though there's been no activ-
12 ity for two weeks, they have not looked for a track in two
13 weeks, they haven't heard of any alien smuggling in two weeks,
14 they have not had a tip from an informant in two weeks about
15 aliens coming over. And when you compare that with Clark that
16 we talked about before, in Clark you have a tip, in Clark you
17 have an area one mile from the border. You have a car seen
18 going from that area. We don't know where this car went; the
19 agents are 27 miles away, the car goes by them and comes back
20 and that is the key factor. These are trained agents, they
21 could see a license number. Well I submit to you, if they can
22 see a license number, these trained agents who are expecting a
23 vehicle to pick up 8 to 20 aliens -- 8 to 20 aliens is 1500
24 to 3000 pounds; a simple pick-up, camper, if it goes by and
25 they can see the license number and if it comes back and they

1 can again see a license number, they are pretty close to that
2 vehicle. It is going to be riding significantly lower. And
3 there are a myriad of cases saying -- where you take other
4 things into account, the lowness of the vehicle is important.

5 Well if these agents had seen the vehicle riding low, that
6 would have indicated to them that there would have been an
7 added weight in the hour and a half that they had seen it.

8 QUESTION: Or that it wasn't equipped with shock
9 absorbers that could be pushed up.

10 MR. MINKER: Well --

11 QUESTION: Which you can see in any store, any day,
12 right?

13 MR. MINKER: Well I assume that --

14 QUESTION: And you can pump them up, you pump up
15 the shock absorber.

16 MR. MINKER: That can be done. But the Ninth Circuit
17 has held riding low is indicative, gives a basis for a stop.

18 QUESTION: Now when, take that episode now, down
19 and back in 90 minutes, do you say that the inferences which
20 the officers drew from that and all the other circumstances,
21 was reasonable or was it irrational, or totally unfounded?

22 MR. MINKER: It was not sufficient for the follow-
23 ing three reasons. You have Kitt Peak, you have Sells,
24 Arizona, six miles down the road, the capital of the Indian
25 nation, and finally, you have houses, one miles down the road

1 from milepost 122. The transcript shows that there are houses
2 on Highway 86 around milepost 121. When you have all that kind
3 of activity, the agents have a duty to go down, close to mile-
4 post 122, get there earlier in the morning --

5 QUESTION: Well maybe your way would be better and
6 maybe they should do it your way, but we have to deal with it
7 the way it is here. But do you say it was -- the inferences
8 they drew from this round trip in 90 minutes were unfounded?

9 MR. MINKER: Those inferences do not, in and by
10 themselves, do not equal a founded suspicion. They are a
11 hunch, and they say to the officer -- go do more.

12 QUESTION: That wasn't my question. I said added
13 to all the other factors.

14 MR. MINKER: Do not equal a founded suspicion.

15 QUESTION: And you say that's not --that's irrational?

16 MR. MINKER: I say that is not founded suspicion. I
17 do not say the agents acted irrationally; they had, done certain
18 things, no question there was some good police work done here,
19 but as the Court said in Price, they had a good hunch, but they
20 have to do more than a hunch and at the same time, they have
21 to minimize the intrusion on travelers of the road. And to
22 set yourself up 25 miles down the road, well, next time
23 it could be 50 miles or it could be 5 miles, there are
24 no limits here. I think this Court has to say and I think
25 the Ninth Circuit said it, in its opinion, if you

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1 are going to intrude on what may well be innocent travelers,
2 then you have to minimize the people who are going to be
3 intruded upon and you have to limit the area, the scope of the
4 area. And in this case, the scope of the area, if the agents
5 had gone to milepost 123 and set up their binoculars and
6 watched, then there would be no innocent travelers basically,
7 who could be interfered with, because they would be knowing
8 the people would be going to milepost 122, because they'd
9 watch them, and then if the aliens took off in their truck, they
10 could pull them over.

11 QUESTION: Does the record show how many innocent
12 travelers were interfered with in the course of this search?

13 MR. MINKER: The record shows that they saw 10
14 to 15 vehicles go by them in a westerly direction, five of
15 which basically meet their profile but they didn't stop those
16 five. The other ten, they did not -- apparently were sedans.

17 QUESTION: So they stopped only this vehicle, in
18 other words?

19 MR. MINKER: The other vehicle that met their pro-
20 file had not come back as of the time they stopped this
21 vehicle. It was the second vehicle that went by at 10
22 minutes to 5, this vehicle went by at 4:30, but they also
23 didn't stop or keep track of, the three commercial vehicles
24 that were certainly capable of holding 8 to 20 aliens and
25 their --

1 QUESTION: So, what your complaint is, they should
2 have stopped more vehicles, not less?

3 MR. MINKER: I beg your pardon. That is not what we
4 are saying. We are saying that their profile is so broad,
5 virtually any vehicle on the highway can hold 8 to 20 aliens
6 -- the agents so testified to that. That would say to them
7 if they have a gut feeling, any large vehicle, any camper,
8 any motor home, any mobile home, any type of vehicle whatso-
9 ever, can be stopped if the agents have a hunch.

10 QUESTION: Well and if it makes a round trip too,
11 which not many did. But Mr. Minker, can I ask you another
12 question about the procedure in the Ninth Circuit? How often
13 does the trial judges make findings of fact on a motion to
14 suppress, which he did not do here, at least, didn't spell
15 them out.

16 MR. MINKER: I personally have had a relatively sig-
17 nificant number of cases where I've even had written opinions
18 on founded suspicion or probable cause cases. It depends on
19 the judge. This is not a -- the judge in this case is not
20 a District Court Judge from Arizona, he's from New York.

21 QUESTION: Oh, I see. But he sits in Tucson every
22 winter, doesn't he?

23 MR. MINKER: This winter he did not choose to go out.
24 He's sat out there for the last ten winters to avoid the un-
25 pleasant New York weather.

1 MR. CHIEF JUSTICE BURGER: Very well. Your time
2 has expired, Mr. Minker. Do you have anything further, Mrs.
3 Etkind?

4 MRS. ETKIND: A couple of points, Your Honor.

5 MR. CHIEF JUSTICE BURGER: All right.

6 REBUTTAL ARGUMENT OF MRS. BARBARA E. ETKIND, ESQ.,
7 ON BEHALF OF THE PETITIONER

8 MRS. ETKIND: With respect to the interference to
9 innocent travelers, just to clarify it the only vehicle that
10 was stopped during that entire five-hour surveillance period
11 was the Respondents' camper.

12 In response to the point of why the officers didn't
13 station themselves at milepost 122, as we mentioned in our
14 reply brief, the officers were responsible for surveilling also
15 the Alheim Valley, which is at the crossroads of Highway 86
16 and 286, and that's where milepost 149 is located. That's why
17 they were ~~at~~ 149, so that they could watch for both
18 things. And finally, in any event, the test under the Fourth
19 Amendment is a test of reasonableness and it is not a test of
20 the least restrictive alternative that Mr. Minker would suggest
21 the officers should have followed.

22 MR. CHIEF JUSTICE BURGER: Very well. Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 10:55 o'clock a.m. the above-
25 entitled matter was submitted.)

CERTIFICATE

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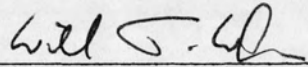
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UNITED STATES

v.

JESUS E. CORTEZ AND PEDRO HERNANDEZ-LOERA

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