



10-1980

## United States v. Cortez

Lewis F. Powell Jr.

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Hold for  
Mendenhall

78-1821

This is a  
stronger  
case for  
Gov't  
than  
Mendenhall  
9's  
probably  
vote  
to  
Reverse

As result of fast-rate  
work (& deduction that would  
have pleased Sherlock Holmes)  
U.S. Agents caught Resps - actively  
engaged in guiding Mex. aliens  
to pick-up points in U.S.

All evidence was circumstantial  
& there was no probable cause to stop  
the particular van in which Resps was  
found. DC found reasonable

PRELIMINARY MEMORANDUM

November 2, 1979 Conference  
List 1, Sheet 3

suspicion but CA 9 (2-1)  
reversed.

No. 79-404

UNITED STATES

v.

CORTEZ

I think DC was right.

Cert to CA 9  
(Hug, Ferguson, Chambers,  
dissenting)

Federal/Criminal

Timely

1. SUMMARY: The SG challenges the CA 9's standards for judging the  
legality of vehicle stops by Border Patrol officers.

2. FACTS: Following jury trials, resps were convicted of trans-  
porting illegal aliens in violation of 8 U.S.C. § 1324(a)(2). Resps  
filed a motion to suppress evidence obtained pursuant to an allegedly  
illegal stop by Border Patrol officers. The evidence at the pre-trial  
suppression hearing established that early in December 1976, Border  
Patrol officers patrolling a sparsely populated area of the Mexican  
border near Sells, Arizona, began investigating footprint patterns sug-

This was an excellent piece of police work. I would hold for Mendenhall, but  
would note that this case is a stronger one for the Government [PAC]

gesting illegal immigration. Footprints indicated that on a number of occasions groups of from 8 to 20 persons had walked north from the Mexican border across 30 miles of desert and mountains to an isolated area on Highway 86, an east-west highway in Arizona. One recurring shoe print was of a **distinctive** chevron design. The officers knew that the area through which the groups passed was heavily used by aliens illegally entering the country, and they concluded that a person (whom they referred to as "Chevron") was guiding groups of aliens across the border and north to a place on Highway 86 where they would be picked up by a vehicle.

Investigation led the officers to a number of additional conclusions. They had reason to believe that the groups travelled at night, during clear weather, and on or near weekends. In addition, the tracks around Highway 86 indicated that the aliens, when they reached the highway, would walk parallel to the road for several miles in an eastward direction, and then turn directly north to the highway and disappear. From this the officers concluded that the groups were probably picked up by a vehicle that approached them from the east, since it was unlikely that the aliens, after a long overland march, would walk along the highway away from the vehicle that was coming to meet them. They also inferred that the vehicle probably returned to the east since it was unlikely that the aliens would be walking away from their ultimate destination.

Armed with this information, two officers who had been involved in the Chevron tracks investigation devised criteria for identifying a vehicle which might be transporting Chevron and illegal aliens. On the evening of January 30, 1977, the two officers decided to station themselves just off Highway 86 approximately 30 miles east of the area where

the Chevron-led groups had been picked up. The officers had no direct information suggesting that Chevron would be leading a group that evening. Nonetheless, the officers believed it might be a likely time since it was a Sunday and the first clear night after a three-day period of rain. The officers estimated that if Chevron did lead a group that night, they would probably be picked up between 2:00 and 6:00 a.m. on January 31, in accordance with the officers' estimate of the travelling time. The officers decided to watch particularly for a camper, van, or similar vehicle that was capable of concealing a fairly large group. The officers therefore determined that they would stop any camper or similar vehicle that passed the officers in a westward direction, in the early morning hours of January 31, and which returned eastward approximately one and one half hours later.

Two of the 20 vehicles which passed the Border Patrol officers that morning were pick-up trucks with camper shells. The first camper passed them at 4:30 a.m. travelling in a westward direction, and passed them a second time, travelling in an eastward direction at 6:12 a.m. Since the vehicle fit the profile formulated by the officers, they stopped the camper. The officers identified themselves and told the driver that they were conducting an immigration check. They asked resp Cortez if there was anyone in the camper. Cortez stated that he had picked up some hitchhikers and proceeded to open the back of the camper. The officers established that the six persons in the back were aliens. The passenger *Wow!* in the front seat wore the tell-tale Chevron shoes.

3. DECISIONS BELOW: The DC denied the motion to suppress. The CA reversed, holding that the officers lacked reasonable suspicion justifying the stop of the camper. The CA reasoned that United States v. Brignoni-Ponce, 422 U.S. 873 (1975) established that probable cause to

stop the vehicle was not constitutionally required. Rather, a "founded suspicion" was all that was necessary. A founded suspicion could not, however, be based merely on a profile, in the judgment of the CA. The stop was not grounded on a founded suspicion because it was "solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle. Officers did not see anything suspicious about the vehicle itself, nor did they have specific information about illegal movement of aliens in the area that night. The court concluded, therefore, that the circumstances "furnished far too many innocent inferences to make the officers' suspicions reasonably warranted."

Judge Chambers dissented. The dissent concluded that in the facts of this case, the suspicion which was based on skillful police analysis, was not "unfounded" under Brignoni-Ponce.

4. CONTENTIONS: The SG argues that the decision of the CA essentially precludes law enforcement officers from formulating a "founded suspicion" on the basis of merely circumstantial evidence. The SG states that this distinction in the nature of evidence necessary to support a suspicion is contrary to this Court's cases. In Brignoni-Ponce, the Court recognized that numerous circumstantial factors could be taken into account in deciding whether there was reasonable suspicion to stop a car in the border area. The court specifically approved consideration of proximity to the border, usual traffic patterns on a road, previous experience with alien traffic, information about recent illegal border crossings, the driver's behavior, and the suitability of the vehicle for transporting concealed aliens. 422 U.S. at 884-885. The SG argues that these factors indicate the legality of the stop. Resps rely on the decision of the CA.

5. DISCUSSION: The decision of the CA is <sup>yes</sup> questionable under the standards articulated by this Court in Brignoni-Ponce itself. Furthermore, the Court has recently suggested that stops undertaken in accordance with neutral law enforcement criteria may presumably be valid. See Brown v. Texas, 47 USLW 4810, 4811 (June 25, 1979). Granting cert may not be necessary since the Court may address the validity of profile stops in United States v. Mendenhall, 78-1821 (cert granted Oct. 1, 1979). In Mendenhall, an airline passenger was stopped for questioning in an airport by Drug Enforcement Administration agents on the basis of a drug courier profile. The facts supporting the profile in Mendenhall were far less indicative of the likelihood of criminal behavior than the profile utilized by the law enforcement officers in this case. Therefore, if the Court in Mendenhall holds that the drug courier profile supported a reasonable suspicion justifying the stop, it would appear appropriate to GVR in light of Mendenhall. I would recommend a hold for Mendenhall.

Response filed.

10/22/79  
CMS

Mahoney

Op in petn.

than Mendenhall. Mendenhall involved  
a general profile ~~of~~ developed for all  
drug cowiers. This case involved a particular  
profile developed for the facts of  
this smuggling operation -

DOS

Court .....  
 Argued ....., 19...  
 Submitted ....., 19...

Voted on....., 19...  
 Assigned ....., 19...  
 Announced ....., 19...

No. 79-404

## UNITED STATES

vs.

CORTEZ

Also motion of respondent for leave to proceed ifp.

*Hold  
 for  
 Mandenhall  
 78-1821*

*(9'll then  
 Reverse)*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.	✓												
Brennan, J.	✓												
Stewart, J.		✓	+	Rev.									
White, J.	✓												
Marshall, J.				Absent									
Blackmun, J.	✓	✓											
Powell, J.	✓	+		than Reverse									
Rehnquist, J.		✓	+	Rev									
Stevens, J.	✓	+		G + Rev.									



Held for Mendenhall

GVR on Mendenhall.

No. 79-404, United States v. Cortez. The question in this case is whether two border agents reasonably suspected that the vehicle driven by the respondent contained illegal aliens, which it did. The agents' suspicions rested on circumstantial evidence suggesting that illegal aliens were being transported to the interior by a truck or camper from an isolated point along a highway, 25 miles north of the Mexican border. From footprints in the desert sand, the agents concluded that the aliens came over the border by foot at night and were met by a vehicle travelling from the east, and which was assumed to return in the same direction. Calculating the timing of the march and the rendezvous, on a night following several nights of inclement weather, the agents stopped the one vehicle that fit their inferences. The district court denied the motion to suppress, but a divided Court of Appeals reversed (CA9; Hug, Ferguson; Chambers, diss'g), concluding that there were no facts focusing suspicion on the respondent's vehicle, and that there were "far too many innocent inferences to make the officers' suspicions reasonably warranted." Although the question is for me a close one, I do not think that the elaborate inferences on which the agents acted in this case are typical, and thus that plenary review would be useful. Since the case is also not governed by Mendenhall, I shall vote to deny certiorari.

DC  
was  
right

DC  
found  
reasonable  
suspicion

I think the district court was right. I would 6, 0, + Ron Mendenhall

Received 11/23

File

PS 11/21/80

Border agents had "reasonable suspicion" for stopping petitioner's camper - in which were 6 illegal aliens.

Thus in the "Chevron shoe" case - excellent detective work

Brignoni-Power outlines facts that may establish "reasonable suspicion". It controls.

BENCH MEMORANDUM

To: Mr. Justice Powell

November 21, 1980

From: Paul Smith

No. 79-404: United States v. Cortez

Question Presented

Whether it was constitutional, under the Fourth Amendment, for two border agents to stop petitioners' vehicle, based on the grounds they then had for suspecting criminal activity.

### Background

Petitioners were arrested after being stopped while driving in a camper truck that also contained six illegal aliens. Petitioner Hernandez wore shoes with a distinctive, "Chevron" tread. Tracks with this tread had been observed while border agents were tracking at least four separate trails from the Mexican border up to Highway 86, where this stop took place. These trails showed that a person wearing the Chevron shoes had repeatedly been part of groups of people hiking the 25 miles from the border to the highway--at night and without rests. In addition, captured illegal aliens had previously identified their guide as a man wearing these shoes.

The four trails were actually tracked on two occasions. On Tuesday January 4, Agent Gray followed one track that was "a day or two old," and another that was approximately a week old. On Sunday January 16, Agents Gray and Rayburn saw one set of tracks that was from the previous night, and another set that was perhaps three or four days old. The tracks turned east when they reached Highway 86, an east-west road, and paralleled the roadway for four miles until they reached Milepost 122, where they disappeared into the roadway.

Based on these facts, Agents Gray and Evans suspected that "Chevron" tended to take groups over the border on weekend nights, leaving in early evening so as to arrive at

Highway 86 before dawn. They were particularly suspicious about the night of Sunday, January 30, because it was preceded by several days of rain that would have made such a hike difficult. During the early morning hours of January 31, they were posted at Milepost 149, 27 miles east of Chevron's normal pick-up point, where they could watch traffic coming up a side road from the south, as well as traffic on Highway 86 itself. They felt that the vehicle meeting the group would probably come from the east, because the previous groups had headed in that direction when they reached the highway. Based on their experience, they were particularly suspicious of large vehicles that could carry groups. They also calculated the time at which a rendezvous would be expected, and the amount of time required to pass them by heading westward, pick up a group, and return to their location.

Petitioners' was one of two campers that passed the officers heading west. It returned one hour and forty minutes later, just about as they had calculated. They stopped the camper, and petitioner Cortez got out immediately from the driver seat. They observed someone move a curtain in the rear, and asked Cortez whether there were people inside. He stated that he had picked up some hitchhikers, and opened the rear door without being asked to do so.<sup>1</sup> The six undocumented

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<sup>1</sup>Petitioners dispute this version of how the camper door was opened. The Court is, however, probably bound to accept the

aliens were inside. Petitioner Hernandez was in the passenger seat.

#### Discussion

This case presents a single, distinct issue--whether the facts known to the officers were sufficient to create "reasonable suspicion," justifying their stop of the camper for questioning.<sup>2</sup> The seminal case in this area is, of course, Terry v. Ohio, 392 U.S. 1 (1968), which established that some limited seizures may be justified by less than probable cause. G

More recently, in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), your opinion for the Court discussed the application of Terry to the context of vehicle stops near the Mexican border. You held that random stops, or stops based solely on the Mexican appearance of a driver, were

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government's version, since the motion to suppress was denied in the district court and the CA9's ruling was a legal one, that did not dispute any factual conclusions the district court could have reached. Unfortunately, the record (at least the printed materials) does not contain findings by the district court.

<sup>2</sup>There can be no question, on these facts, about whether there was a "seizure" here, for Fourth Amendment purposes. Delaware v. Prouse, 440 U.S. 648, 653 (1979). Moreover, it is clear that the seizure was a minimal stop for questioning, not a full search requiring probable cause. Cortez opened the camper voluntarily. And the fact that the officers may have intended to conduct a full search is irrelevant.

unconstitutional, but elaborated on the various factors that may create reasonable suspicion:<sup>3</sup>

Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. ... They also may consider information about recent illegal border crossing in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. ... Aspects of the vehicle itself may justify suspicion. For example, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. ... The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. ... The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. ... In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling.

*My opinion in Brignoni-Ponce*

Id. at 884-85 (citations omitted).

This list of factors suggests that the overall set of circumstances in this case was sufficient to create reasonable suspicion. Any single factor might have had an innocent explanation, but in combination they created grounds

*yes*

<sup>3</sup>See also United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (short stops for questioning are permissible at a permanent checkpoint even in the absence of reasonable suspicion); United States v. Ortiz, 422 U.S. 891 (1975) (searches without probable cause not permissible even at a checkpoint).

for a stop. Even then, of course, the officers might have stopped an innocent party, but the Fourth Amendment does not require certainty in this context. In sum, this case is relatively easy, since there were substantial grounds for the officers' suspicions.

To begin with, as Brignoni-Ponce anticipated, there were several characteristics of the camper itself that were suspicious:

The Nature of the Vehicle--This camper was large enough to carry a group of aliens. Few of the vehicles that passed by that night were this large. Although the officers testified that their suspicions were not aroused by two "linen trucks," that judgment seems reasonable. In addition, petitioners point out that the officers did not take notice of any station wagons that may have passed by, even though these might contain up to eight persons. But this may be explained by the fact that officers knew that Chevron generally had brought in groups larger than that.

The Location of the Vehicle: This camper was driving in a relatively isolated desert area near the border late at night.

The Activities of the Vehicle: The camper headed west on the highway and returned east, suggesting that it had completed an errand in this relatively desolate area.

In addition, as the SG points out, the officers had good cause to be especially suspicious on the night in question. At least three of the previous four hikes involving

Chevron seemed to have taken place on weekends. This was a clear Sunday night preceded by three days of rain. Moreover, since the hikers had always turned east in the past after reaching Highway 86, there was at least some reason to believe that they were meeting a vehicle coming from the east. Finally, the amount of time between the first sighting of the camper and its return heading the opposite direction was one hour and forty minutes. The camper was driving about 50 miles per hour and had to cover 27 miles, find the group, load them up, and return 27 more miles. It was quite reasonable for the officers to estimate that this process would take about one and a half hours.

Based on these facts, your opinion in United States v. Mendenhall, 48 U.S.L.W. 4575 (1980), requires a finding reasonable suspicion. It is obviously important for the government to stop the smuggling of illegal aliens (although this interest is arguably less important than the stopping of drug trafficking), and these officers were making use of their special expertise in tracking smugglers. This case is distinguishable from Reid v. Georgia, 48 U.S.L.W. 3847 (1980) (per curiam summary reversal), where the airport stop was based on almost no suspicious factors. There, the petitioners had been stopped because they had taken an early morning flight from Fort Lauderdale, carried only shoulder bags, and had occasionally looked at each other while walking separately. Id. at 3847-48. The Court emphasized that

yes

evidence this minimal could subject travellers to virtually random stops. In my view, however, the present case presents no such danger. The factors leading to this stop pointed to petitioners' camper with great particularity.

#### Summary

The officers who made this stop had good reason to suspect that petitioners would be bringing in a group on the night in question. They had reason to believe that the vehicle meeting the group would come from the east in the early morning hours, taking about one and one-half hours between the time it first passed them until its return. They also had reason to be suspicious about a camper vehicle following such a route in this desolate area late at night. Based on the above, I would hold that "reasonable suspicion" existed, justifying the limited stop. Any other holding, it seems to me, would tend to eliminate the distinction between reasonable suspicion and actual probable cause.

*A Bragioni-Paul "reasonable  
suspect" case ("Chevron shot" case)*

Mr. E#kind (S.G.)

Johm says "founded suspicion" has not been used. It is ~~same~~ same as "reasonable suspicion" - term I used.

Burgundy-Powell controls.

Not a "profile" case.

Velasco (for one of Respi)

The DC made no findings of fact. WHR said, however, that when the DC refused to suppress <sup>evidence or</sup> officer's testimony, we can assume ~~the~~ the DC found reasonable suspicion.

Miner (for another Respi) ("Chevron").

Cites CA9 decision in Clark v U.S.

In this case, no new test is involved.

Gov't wants a new test: the "hunch" test. Agt. said ~~if~~ we had a "profile" (only of the vehicle)

1. The Campsite

Large enough to carry  
group of eleven.

Chevron was known to  
bring in large groups  
(more than station  
wagon load)

2. Location of vehicle

Isolated desert area  
near border - late at  
night.

3. Headed West - returned  
headed East

4. Clear night - following  
3 nights of rain

The Chief Justice

Reverse 7-2

Reverse

Somewhat like Mendenhall.

Finding of reasonable suspicion  
was based - properly - on series of  
inferences.

Police work of highest order.

Mr. Justice Brennan

Affirm

SG asked us to take this case  
because of a prior CA 9 case that  
involved a "profile" stop.

Agree with CA 9 rule.

Mr. Justice Stewart

Reverse

The Q is whether a warrantless  
stop may be valid if based on  
circumstantial ev - rather than  
personally observed facts.

Not a profile case.

There was probable cause here

If circumstantial ev, ~~can~~ &  
inferences therefrom, can convict, it is adequate  
here.

Mr. Justice White

Reverse

Agrees with P. S. & C-2.

Mr. Justice Marshall

Affirm

Would not commend the  
police.

No one knows how many  
cars police stopped that night.

Mr. Justice Blackmun

Reverse

Agrees with P. S.

Probable cause

Mr. Justice Powell Reverse

There were grounds for reasonable suspicion. Indeed, enough for probable cause. Commendable police work.

Bonguoni - Ponce is most relevant precedent.

There is not a "profile" case in the sense that term was used in Mendenhall. Circumstantial ev. is sufficient.

Mr. Justice Rehnquist Reverse

Strong circumstantial ev.

Should say it is better practice for DC to make findings of fact on motions to suppress

Mr. Justice Stevens Reverse

nothing to use of term "profile".

May not have been probable cause. We should not find it here or might imply that was necessary. Should find reasonable suspicion.

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

Circulated: JAN 9 1981

No. 79-404

Recirculated: \_\_\_\_\_

United States, Petitioner, }  
v. } On Writ of Certiorari to the  
Jesus E. Cortez and Pedro } United States Court of Appeals  
Hernandez-Loera. } for the Ninth Circuit.

[January —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether objective facts and circumstantial evidence suggesting that a particular vehicle is involved in criminal activity may provide a sufficient basis to justify an investigative stop of that vehicle.

I

Late in 1976, Border Patrol officers patrolling a sparsely populated section of southern central Arizona found human footprints in the desert. In time, other sets of similar footprints were discovered in the same area. From these sets of footprints, it was deduced that, on a number of occasions, groups of from 8 to 20 persons had walked north from the Mexican border, across 30 miles of desert and mountains, over a fairly well-defined path, to an isolated point on Highway 86, an east-west road running roughly parallel to the Mexican border.

Officers observed that one recurring shoeprint bore a distinctive repetitive V-shape, or chevron, design. Because the officers knew from recorded experience that the area through which the groups passed was heavily trafficked by aliens illegally entering the country from Mexico, they surmised that a person, whom they gave the case-name "Chevron," was guiding aliens illegally into the United States over the path

*Reviewed*  
*1/11*

*Join*

*9-11*  
*note*  
*CGA*  
*note*  
*about*  
*p 5*

marked by the tracks to a point where they could be picked up by a vehicle.

The tracks led into or over obstacles that would have been avoided in daylight. From this, the officers deduced that "Chevron" probably led his groups across the border and to the pick-up point at night. Moreover, based upon the times when they had discovered the distinctive sets of tracks, they concluded that "Chevron" generally travelled during or near weekends and on nights when the weather was clear.

Their tracking disclosed that when "Chevron's" groups came within 50 to 75 yards of Highway 86, they turned right and walked eastward, parallel to the road. Then, approximately at highway milepost 122, the tracks would turn north and disappear at the road. From this pattern, the officers concluded that the aliens very likely were picked up by a vehicle—probably one approaching from the east, for after a long overland march the group was most likely to walk parallel to the highway *toward* the approaching vehicle. The officers also concluded that, after the pick-up, the vehicle probably returned to the east, because it was unlikely that the group would be walking away from its ultimate destination.

On the Sunday night of January 30-31, 1977, officers Gray and Evans, two Border Patrolmen who had been pursuing the investigation of "Chevron," were on duty in the Casa Grande area. The latest set of observed "Chevron" tracks had been made on Saturday, January 15-16. January 30-31 was the first clear night after three days of rain. For these reasons, Gray and Evans decided there was a strong possibility that "Chevron" would lead aliens from the border to the highway that night.

The officers assumed that, if "Chevron" did conduct a group that night, he would not leave Mexico until after dark, that is, about 6 p.m. They knew from their experience that groups of this sort, travelling on foot, cover about two and a half to three miles an hour. Thus, the 30-mile journey would take from 8 to 12 hours. From this, the officers calculated

that "Chevron" and his group would arrive at Highway 86 somewhere between 2 a. m. and 6 a. m. on January 31.

About 1 a. m., Gray and Evans parked their patrol car on an elevated location about one hundred feet off Highway 86 at milepost 149, a point some 27 miles east of milepost 122. From their vantage point, they could see passing vehicles by the moonlight. They estimated that it would take approximately one hour and a half for a vehicle to make a round trip from their vantage point to milepost 122. Working on the hypothesis that the pick-up vehicle approached milepost 122 from the east and thereafter returned to its starting point, they focused upon vehicles that passed them from the east and, after about one hour and a half, passed them returning to the east.

Because "Chevron" appeared to lead groups of between 8 and 20 aliens at a time, the officers deduced that the pick-up vehicle would be one that was capable of carrying that a large group without arousing suspicion. For this reason, and because they knew that certain types of vehicles were commonly used for smuggling sizable groups of aliens, they decided to limit their attention to vans, pick-up trucks, small trucks, campers, motor homes, and other similar vehicles.

Traffic on Highway 86 at milepost 149 was normal for the time of day of the officers' surveillance. In the five-hour period between 1 a. m. and 6 a. m., 15 to 20 vehicles passed the officers heading west, toward milepost 122. Only two of them—both pick-up trucks with camper shells—were of the kind that the officers had concluded "Chevron" would likely use if he was to carry aliens that night. One, a distinctively colored pick-up truck with a camper shell, passed for the first time at 4:30 a. m. Agent Gray was able to see and record only a partial license number, "GN 88—."<sup>1</sup> At 6:12 a. m., almost exactly the estimated one hour and a half later, a

<sup>1</sup> The second camper passed them 15 or 20 minutes later. As far as the record shows, it did not return.

vehicle looking like this same pick-up passed them again, this time heading east.

The officers followed the pick-up and were satisfied from its license plate, "GN 8804," that it was the same vehicle that had passed at 4:30 a. m. At that point, they flashed their police lights and intercepted the vehicle. Respondent Jesus Cortez was the driver and owner of the pick-up; respondent Pedro Hernandez-Lorea was sitting in the passenger's seat. Hernandez-Lorea was wearing shoes with soles matching the distinctive "chevron" shoeprint.

The officers identified themselves and told Cortez they were conducting an immigration check. They asked if he was carrying any passengers in the camper. Cortez told them he had picked up some hitchhikers, and he proceeded to open the back of the camper. In the camper, there were six illegal aliens. The officers then arrested the respondents.

Cortez and Hernandez-Lorea were charged with six counts of transporting illegal aliens in violation of 8 U. S. C. § 1324 (a). By pretrial motion, they sought to suppress the evidence obtained by Officers Gray and Evans as a result of stopping their vehicle. They argued that the officers did not have adequate cause to make the investigative stop. The District Court denied the motion. A jury found the respondents guilty as charged. They were sentenced to concurrent prison terms of five years on each of six counts. In addition, Hernandez-Lorea was fined \$12,000.

A divided panel of the Court of Appeals for the Ninth Circuit reversed, holding that the officers lacked a sufficient basis to justify the stop of the pick-up. 595 F. 2d 505 (1979). That court recognized that *United States v. Brignoni-Ponce*, 422 U. S. 873 (1975), provides a standard governing investigative stops of the kind involved in this case, stating:

"The quantum of cause necessary in . . . cases [like this one] was established in *United States v. Brignoni-Ponce*. '[O]fficers on roving patrol may stop vehicles only if they are aware of specific articulable facts, to-

gether with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." 595 F. 2d, at 507 (quoting *United States v. Brignoni-Ponce*, *supra*, at 884) (citations omitted).

The court also recognized that "the ultimate question on appeal is whether the trial judge's finding that founded suspicion was present here was clearly erroneous." *Ibid.* Here, because, in the view of the facts of the two judges constituting the majority, "[t]he officers did not have a valid basis for singling out the Cortez vehicle," *id.*, at 508, and because the circumstances admitted "far too many innocent inferences to make the officers' suspicions reasonably warranted," *ibid.*, the panel concluded that the stop of Cortez' vehicle was a violation of the respondents' rights under the Fourth Amendment. In dissent, Judge Chambers was persuaded that *Brignoni-Ponce* recognized the validity of permitting an officer to assess the facts in light of his past experience.

## II

### A

The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of the vehicle here. *Reid v. Georgia*, — U. S. —, — (1980); *United States v. Brignoni-Ponce*, 422 U. S. *supra*, at 878; *Davis v. Mississippi*, 394 U. S. 721 (1969); *Terry v. Ohio*, 392 U. S. 1, 16-19 (1968). An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. *Brown v. Texas*, 443 U. S. 47, 51 (1979); *Delaware v. Prouse*, 440 U. S. 648, 661 (1979); *United States v. Brignoni-Ponce*, *supra*, at 884; *Adams v. Williams*, 407 U. S. 143, 146-149 (1972); *Terry v. Ohio*, *supra*, at 16-19.

Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop

What  
about  
prior  
criminal  
conduct?

a person. Terms like "probable cause" and "articulable reasons" or "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. See, e. g., *Brown v. Texas*, *supra*, at 51; *United States v. Brignoni-Ponce*, *supra*, at 884.

The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, *supra*, said, "[t]his demand

for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence.*" *Id.*, at 21, n. 18 (emphasis added. See also, *Brown v. Texas*, *supra*, at 51; *Delaware v. Prouse*, *supra*, at 661-663; *United States v. Brignoni-Ponce*, *supra*, at 884.

## B

This case portrays at once both the enormous difficulties of patrolling a 2,000-mile open border and the patient skills needed by those charged with halting illegal entry into this country. It implicates all of the principles just discussed—especially the imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person—and action on that suspicion. We see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement. Here, fact on fact and clue on clue afforded a basis for the deductions and inferences that brought the officers to focus on "Chevron."

Of critical importance, the agents knew that the area was a crossing point for illegal aliens. They knew that it was common practice for persons to lead aliens through the desert from the border to Highway 86, where they could—by prearrangement—be picked up by a vehicle. Moreover, based upon clues they had discovered in the two-month period prior to the events at issue here, they believed that one such guide, whom they designated "Chevron," had a particular pattern of operations.

By piecing together the information at their disposal, the officers tentatively concluded that there was a reasonable likelihood that "Chevron" would attempt to lead a group of aliens on the night of Sunday, January 30-31. Someone with chevron-soled shoes had led several groups of aliens in the

previous two months, yet it had been two weeks since the latest crossing. "Chevron," they deduced, was therefore due reasonably soon. "Chevron" tended to travel on clear weekend nights. Because it had rained on the Friday and Saturday nights of the weekend involved here, Sunday was the only clear night of that weekend; the officers surmised it was therefore a likely night for a trip.

Once they had focused on that night, the officers drew upon other objective facts known to them to deduce a time frame within which "Chevron" and the aliens were likely to arrive. From what they knew of the practice of those who smuggle aliens, including what they knew of "Chevron's" previous activities, they deduced that the border crossing and journey through the desert would probably be at night. They knew the time when sunset would occur at the point of the border crossing; they knew about how long the trip would take. They were thus able to deduce that "Chevron" would likely arrive at the pick-up point on Highway 86 in the time frame between 2 a. m. and 6 a. m.

From objective facts, the officers also deduced the probable point on the highway—milepost 122—at which "Chevron" would likely rendezvous with a pick-up vehicle milepost 122. They deduced from the direction taken by the sets of "Chevron" footprints they had earlier discovered that the pick-up vehicle would approach the aliens from, and return with them to, a point east of milepost 122. They therefore staked out a position east of milepost 122 (at milepost 149) and watched for vehicles that passed them going west and then, approximately one and a half hours later, passed them again, this time going east.

From what they had observed about the previous groups guided by the person with chevron shoes, they deduced that "Chevron" would lead a group of 8 to 20 aliens. They therefore focused their attention on enclosed vehicles of that passenger capacity.

The analysis produced by officers Gray and Evans can be summarized as follows: if, on the night upon which they believed "Chevron" was likely to travel, sometime between 2 a. m. and 6 a. m., a large enclosed vehicle was seen to make a east-west-east round trip to and from a deserted point (milepost 122) on a deserted road (Highway 86), the officers would stop the vehicle on the return trip. In four-hour period the agents observed only one vehicle meeting that description. And is it not surprising that when they stopped the vehicle on its return trip it contained "Chevron" and several illegal aliens.<sup>2</sup>

## C

The limited purpose of the stop in this case was to question the occupants of the vehicle about their citizenship and immigration status and the reasons for the round trip in a short time span in a virtually deserted area. No search of the camper or any of its occupants occurred until after respondent Cortez voluntarily opened the back door of the camper<sup>3</sup>; thus, only the stop, not the search is at issue here. There intrusion upon privacy associated with this stop was limited and was "reasonably related in scope to the justification for [its] initiation." *Terry v. Ohio, supra*, at 29.

We have recently held that stops by the Border Patrol may be justified under circumstances less than those constituting probable cause for arrest or search. *United States v. Brignoni-Ponce, supra*, at 880. In no other way can there be any meaningful control over the illegal entry of aliens. Thus,

<sup>2</sup> In *Brignoni-Ponce, supra*, at 884-885, the Court listed several factors to be considered as part of the totality of the circumstances in determining the existence *vel non* of a particularized suspicion in cases treating official attempts to stem the influx of illegal aliens into our country. Though the list did not purport to be exhaustive, it is noteworthy that several of the factors present here were recognized by *Brignoni-Ponce* as significant in this context; for example, information about recent border crossings and the type of vehicle involved.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 9, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 80-404 Prince Edward School Foundation v.  
United States

While I think that the question of whether the regulation of the IRS is "fairly subsumed" within the questions presented, see Pet. inside cover, in order to avoid the possibility that a majority of us would conclude after argument that it was not, or that the argument on it was not sufficiently targeted, I suggest that in addition to the order granting certiorari the following language be appended:

"The parties are requested to brief, in addition to any other issues they desire, the following question:

'Does §501(c)(3) authorize the Internal Revenue Service to deny tax-exempt status to a private school which discriminates in its admissions policy?'"

Sincerely,

*WHR*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

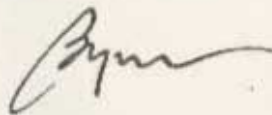
January 12, 1981 ✓

Re: 79-404 - United States v.  
Cortez, etc

Dear Chief,

Please join me.

Sincerely yours,




The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 12, 1981

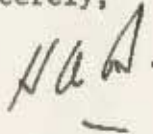


Re: No. 79-404 - United States v. Cortez

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

January 12, 1981

No. 79-404 U. S. v. Cortez

Dear Chief:

I have written you a separate join note.

In reading your description of the cause required to justify an investigative stop, you state that such a stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."

I have thought that an officer also may stop a person for questioning if he has reasonable grounds for believing the individual is wanted for alleged criminal conduct in the past. Do you think it is desirable to add a footnote to this effect?

Sincerely,

The Chief Justice

LFP/lab

January 12, 1981

No. 79-404 U. S. v. Cortez

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

LFP/lab

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 12, 1981

RE: 79-404 - U.S. v. Cortez

Dear Lewis:

To be on the "safe" side I will add a footnote

"Of course an officer may stop and question a person if there is reasonable grounds to believe that person is wanted for past criminal conduct".

Regards,

Justice Powell  
Copies to the Conference

Good idea. Thanks!

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 13, 1981

Re: No. 79-404 United States v. Cortez

Dear Chief:

Please join me in your opinion for the Court.

Sincerely,

*WHR*

The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 13, 1981

Re: No. 79-404 - U.S. v. Cortez

Dear Chief:

I await the dissent.

Sincerely,

T.M.  
T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 16, 1981

✓

RE: No. 79-404 United States v. Cortez

Dear Chief:

I agree. "

Sincerely,

*Bul*

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 16, 1981 ✓

RE: 79-404 - United States v. Cortez

Dear Thurgood:

Now that Bill Brennan has joined there will be no dissent unless you do ~~do~~.

All are now in. Should you join this case can come down next Wednesday.

Regards,

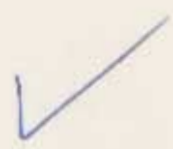


Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS



January 14, 1981

Re: 79-404 - United States v. Cortez

Dear Chief:

Please join me.

Respectfully,

A handwritten signature in black ink, appearing to be "John", located below the word "Respectfully,".

The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 19, 1981

Re: No. 79-404 - United States v. Cortez

Dear Chief:

Please add to the bottom of your opinion  
that I concur in the judgment.

Sincerely,

*T.M.*  
T.M.

The Chief Justice

cc: The Conference

[illegible]