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States Court of Appeals, Ninth Circuit**

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# GONZALEZ-RIVERA v. INS

22 F.3d 1441 (9th Cir. 1994)

United States Court of Appeals, Ninth Circuit

## FACTS

On January 17, 1988, Mario Gonzalez-Rivera (Gonzalez) and his father were travelling to work on Interstate Highway 805 in California. Immigration and Naturalization Service (INS) officers in a roving Border Patrol car pulled them over. The Border Patrol officers released the father because he had documentation of legal residence in the United States. The officers arrested Gonzalez, who had no such documentation. A non-citizen who cannot prove legal residence is subject to immediate deportation, unless the individual requests a deportation hearing. Gonzalez requested a deportation hearing.

At the hearing, Gonzalez contested deportability, and moved to suppress all evidence that resulted from the stop. Gonzalez argued that the stop was illegal because the sole basis for the stop was his Hispanic appearance. The INS filed an opposition to the motion to suppress evidence.

During the deportation hearing, the arresting Border Patrol officers testified about the stop. Officer Wilson described Interstate Highway 805 as a major alien smuggling route. He also testified that almost everyone on that highway is of Hispanic descent. Wilson testified that there was nothing inherently suspicious about the car or the way that Gonzalez' father was driving. Wilson stated that he based his decision to stop the car on five factors: 1) Gonzalez and his father appeared to be Hispanic; 2) both of them sat up straight, looked straight ahead and did not turn their heads to acknowledge the Border Patrol car; 3) Gonzalez' mouth appeared to be dry; 4) Gonzalez was blinking; and 5) both men appeared to be nervous. He added that Gonzalez was wearing a cap, and I realize that, you know, ev-

erybody who is wearing a cap is not an illegal alien, but all these facts put together, seem to indicate articulable facts . . . to make a reasonable stop."<sup>1</sup>

The Immigration Judge (IJ) found that the sole basis for the stop was Gonzalez' Hispanic appearance. The stop, therefore, was an egregious Fourth Amendment violation.<sup>2</sup> The IJ granted the motion to suppress the I-213 Form and Officer Wilson's testimony.<sup>3</sup>

The INS appealed the IJ's decision to the Board of Immigration Appeals (BIA). The INS argued that Gonzalez' Hispanic appearance was not the sole basis for the stop; but, even if it was, that such a stop was not an egregious Fourth Amendment violation. The INS also contended that Gonzalez had not presented a prima facie case of a Fourth Amendment violation.

The BIA reversed the IJ's decision and found that Hispanic appearance was not the sole basis for the stop, but did not decide whether or not a purely race-based stop would have constituted an egregious violation of Gonzalez' Fourth Amendment rights. The BIA also held that Gonzalez had failed to present a prima facie case because he had not included a statement or testimony on his own behalf. The BIA granted a thirty day voluntary departure to Gonzalez.

Gonzalez appealed the BIA decision to the Ninth Circuit Court of Appeals.

## HOLDING

The Ninth Circuit, in a split decision, reversed the decision of the BIA, holding that the sole basis for the stop was Gonzalez' Hispanic appearance, that the stop was an egregious violation of Gonzalez' Fourth Amendment rights, and that the exclusion-

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<sup>1</sup> *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1444 (9th Cir. 1994).

<sup>2</sup> U.S. Const. amend. IV. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

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probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.  
*Id.*

<sup>3</sup> An INS I-213 Form, entitled "Record of Deportable Alien," is a document that includes all information that an INS officer obtains from a border patrol stop. *Gonzalez-Rivera*, 22 F.3d at 1443.

ary rule applied.<sup>4</sup> The Ninth Circuit also held that the INS claim of defects in Gonzalez' prima facie case was untimely and that the BIA should not have considered the claim.<sup>5</sup> The court decided this case was distinguishable from *INS v. Lopez-Mendoza*,<sup>6</sup> because the violation of Gonzalez' rights was "egregious."<sup>7</sup>

## ANALYSIS/APPLICATION

### I. Exclusionary Rule in Civil Proceedings

The issue in this case is whether a court can apply the exclusionary rule in a civil deportation hearing. The Ninth Circuit ruled in *Gonzalez-Rivera* that a court could use the exclusionary rule because the Fourth Amendment violation in question was egregious. In reaching this decision, the *Gonzalez-Rivera* court relied on dicta found in *Lopez-Mendoza*.<sup>8</sup>

In *Lopez-Mendoza*, the Supreme Court, in a five to four decision, held that a court could not apply the exclusionary rule in a deportation hearing. A deportation hearing, the Court concluded, was a civil action because deportation is not punishment.<sup>9</sup>

The *Lopez-Mendoza* Court using the cost-benefit analysis developed in *U.S. v. Janis*,<sup>10</sup> determined that the social benefits of exclusion of unlawfully obtained evidence must be weighed against the social costs of such exclusion.<sup>11</sup> In discussing the benefits of the exclusionary rule, the *Lopez-Mendoza* Court quoted *Janis*: "[T]he 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'"<sup>12</sup> Costs are the loss of probative evidence and the "less accurate or more cumbersome adjudication" resulting from exclusion of evidence.<sup>13</sup>

The *Lopez-Mendoza* Court held that the cost of excluded evidence in deportation hearings normally outweighs the benefit of deterrence. First, the use of the exclusionary rule would complicate the de-

liberately simple proceedings designed to expedite the numerous deportation hearings that occur annually.<sup>14</sup> Second, the exclusionary rule would place a heavy administrative burden on investigators who arrest several aliens each day.<sup>15</sup> Third, the courts might apply the rule too broadly, excluding lawfully obtained evidence.<sup>16</sup> Finally, application of the exclusionary rule in deportation hearings might result in the continuation of a crime — the illegal presence of an alien in the United States.<sup>17</sup> Though "[t]he constable's blunder may allow the criminal to go free . . . we have never suggested that it allows the criminal to continue in the commission of an ongoing crime."<sup>18</sup>

Although the *Lopez-Mendoza* Court held that the exclusionary rule could not be invoked in a deportation hearing involving an ordinary Fourth Amendment violation, it specifically left open the question of whether courts could apply the rule when there was an egregious violation of the Fourth Amendment or general INS practice.<sup>19</sup> In deciding to apply the exclusionary rule in *Gonzalez-Rivera*, the Ninth Circuit fleshed out the *Lopez-Mendoza* exception. The *Gonzalez-Rivera* court determined that the violation of Gonzalez's Fourth Amendment rights was egregious. Hence, the Ninth Circuit reversed the BIA's decision to allow the evidence.

### II. Egregious Violations

According to the *Gonzalez-Rivera* court, a stop based solely on Hispanic appearance is an egregious violation of the Fourth Amendment. The court, citing *Adamson v. C.I.R.*,<sup>20</sup> noted that "bad faith" violations are egregious. The *Gonzalez-Rivera* court explained that *Lopez-Mendoza* did not limit the scope of egregious violations to physical brutality.<sup>21</sup> "Instead, under Ninth Circuit law, all 'bad faith violations of an individual's fourth amendment rights' are considered sufficiently egregious to 'require[]

<sup>4</sup> *Id.* at 1452.

<sup>5</sup> *Id.*

<sup>6</sup> 468 U.S. 1032 (1984).

<sup>7</sup> *Gonzalez-Rivera*, 22 F.3d at 1451-1452.

<sup>8</sup> *Id.* The only other circuit, besides the Ninth Circuit, to consider the egregious violation "exception" is the Fourth Circuit in two unpublished dispositions. See *Samuels v. INS*, No. 92-2484, 1993 WL 168938, at \*1 (4th Cir. May 20, 1993) (recognizing the egregious violation exception, but finding no egregious violation); *Odukwe v. INS*, No. 92-1037, 1992 WL 301941, at \*1 (4th Cir. Oct. 22, 1992) (same). It does not appear, therefore, that there are any cases that run counter to the Ninth Circuit's application of this "exception."

<sup>9</sup> *Lopez-Mendoza*, 468 U.S. at 1038.

<sup>10</sup> 428 U.S. 433 (1976).

<sup>11</sup> *Lopez-Mendoza*, 468 U.S. at 1041.

<sup>12</sup> *Id.* (quoting *U.S. v. Janis*, 428 U.S. at 446).

<sup>13</sup> *Id.* at 1041.

<sup>14</sup> *Id.* at 1048.

<sup>15</sup> *Id.* at 1049.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1047.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1050. The *Lopez-Mendoza* Court cited *Rochin v. California*, 342 U.S. 165, 172 (1952), as an example of an egregious violation. In *Rochin*, the arresting officers forced the defendant to vomit in order to recover evidence of narcotics. *Rochin*, 342 U.S. at 165. Conduct such as this is an egregious violation because it shocks the conscience. *Id.* at 172.

<sup>20</sup> 745 F.2d 541 (9th Cir. 1984).

<sup>21</sup> *Gonzalez-Rivera*, 22 F.3d at 1449.

application of the exclusionary sanction in a civil . . . proceeding."<sup>22</sup>

The *Adamson* court had established a "reasonableness" standard of "bad faith." According to the *Gonzalez-Rivera* court, such a standard is the appropriate means to judge a race-based stop such as this.<sup>23</sup> Reliance on race or ethnicity as evidence of illegal conduct is "analogous to a facial racial classification" and thus an "impermissible use[] of race".<sup>24</sup> Second, the INS officers, trained in Fourth Amendment law, should have known a race-based stop was unconstitutional. Their "subsequent rationalization" of their stop "compounds the gravity of their actions."<sup>25</sup> Third, an objective standard of reasonableness is appropriate because it requires no reliance on the "level of self-awareness [or racial motivations] of a particular officer."<sup>26</sup>

The *Gonzalez-Rivera* court rejected the INS argument that in order for a Fourth Amendment violation to be egregious, it has to undermine the probative value of the evidence in addition to being fundamentally unfair. The court determined that under *Lopez-Mendoza* and Ninth Circuit law, "a fundamentally unfair Fourth Amendment violation is considered egregious regardless of the probative value of the evidence obtained."<sup>27</sup>

In *Gonzalez-Rivera*, the Ninth Circuit determined that stopping an individual solely on the basis of Hispanic appearance is egregious and a "bad faith" violation of the Fourth Amendment protection against unreasonable searches and seizures. INS officers could not reasonably have believed that a race-based stop was constitutional. The stop occurred after the INS had implemented policy prohibiting such conduct and after *United States v. Brignoni-Ponce*<sup>28</sup> had deemed such conduct unconstitutional. Under an objective standard of reasonableness, the Border Patrol could only have stopped Gonzalez in bad faith.<sup>29</sup>

The dissent, while agreeing that the INS' prima facie claim was untimely and that the Border Patrol relied on inconclusive suspicions to stop Gonzalez, nonetheless disagreed with the majority's conclusion that the use of the exclusionary rule was appropriate in this case. The dissent concluded that Gonzalez' stop was not significantly different from the acceptable INS behavior in *Lopez-Mendoza*.<sup>30</sup> Moreover, the dissent pointed out that the *Lopez-Mendoza* Court did not decide that courts could apply the exclusionary rule in the case of an egregious violation of the Fourth Amendment.<sup>31</sup> According to the dissent, the *Lopez-Mendoza* Court limited its holding to a non-egregious Fourth Amendment violation.

The dissent further argued that the majority in *Gonzalez-Rivera* should have looked at the entire opinion and its goals instead of focusing on dicta relating to a possible exception.<sup>32</sup> The dissent considered the difference in the balance between social costs and benefits of applying the exclusionary rule in *Gonzalez-Rivera* and *Lopez-Mendoza* to be minimal at best.<sup>33</sup>

According to the dissent, *Benitez-Mendez v. INS*<sup>34</sup> was more on point than *Adamson*. In *Benitez-Mendez*, the court did not apply the exclusionary rule in a deportation hearing even though the Border Patrol was unable to "articulate objective facts providing a reasonable suspicion that [the petitioner] was an alien illegally in this country."<sup>35</sup> The dissent argued that *Benitez-Mendez* was dispositive and was unpersuaded by the majority's attempt to distinguish the two cases.<sup>36</sup>

The dissent postulated that injunctive relief aimed at the type of behavior found in this case might be a better solution than use of the exclusionary rule. "By advancing down this path in lieu of the majority's, we would establish a fuller, better documented record on which to revisit the alterna-

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<sup>22</sup> *Id.* (quoting *Adamson*, 745 F.2d at 545 n.1).

<sup>23</sup> *Id.* at 1449.

<sup>24</sup> *Id.* at 1450. Judge Tang, concurring in *Gonzalez-Rivera*, stressed the importance of applying the exclusionary rule to counter racism. The rule "serves the essential function of preserving judicial integrity." *Id.* at 1452.

<sup>25</sup> *Id.* at 1450.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1451.

<sup>28</sup> 422 U.S. 873 (1975) (holding that Hispanic appearance by itself is insufficient to justify a stop by the Border Patrol).

<sup>29</sup> *Gonzalez-Rivera*, 22 F.3d at 1450-51.

<sup>30</sup> *Id.* at 1453.

<sup>31</sup> *Id.*

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* The dissent did not condone the race-based stop involved in this case, but only argued that the factors considered in *Lopez-Mendoza* were equally relevant in the current case. *Id.*

<sup>34</sup> 760 F.2d 907 (9th Cir. 1985).

<sup>35</sup> *Gonzalez-Rivera*, 22 F.3d at 1453-1454 (quoting *Benitez-Mendez*, 760 F.2d at 909).

<sup>36</sup> *Id.* at 1454. The majority distinguished *Benitez-Mendez* because the petitioner in *Benitez-Mendez* had not alleged a race-based stop or that this would have constituted an egregious violation of the Fourth Amendment. *Id.* at 1451 n.1. The majority could have further distinguished *Benitez-Mendez*. In *Benitez-Mendez*, the INS was unable to articulate objective facts to support the arrest

tive limitation on the holding in *Lopez-Mendoza* to be triggered 'if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.'<sup>37</sup>

## CONCLUSION

The Ninth Circuit is the only court to refer to the egregious violation exception and then actually apply it to a deportation hearing. Other cases have

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so there was only an implication of racial motivation. In *Gonzalez-Rivera*, on the other hand, the INS testified affirmatively that race was the primary basis for the stop and the IJ made a judicial finding of fact on this issue. A

referred to the exception, but have not applied it.<sup>38</sup> This case is highly unusual because the INS admitted the racial motivation for the Gonzalez' stop. It is unclear whether the Ninth Circuit will extend its reasoning in *Gonzalez-Rivera* to cases involving only implicit racial motivation.

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further distinction is that the *Benitez-Mendez* court does not mention the egregious violation exception.

<sup>37</sup> *Id.* at 1453 (quoting *Lopez-Mendoza*, 468 U.S. at 1050).

<sup>38</sup> See *supra* note 8.