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## UNITED STATES V. CABRERA 222 F.3D 590 (9TH 2000)

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**UNITED STATES V. CABRERA**  
**222 F.3D 590 (9TH 2000)**

**FACTS**

At his trial for distribution of crack cocaine, remarks about defendant Carlos Manuel Cabrera's Cuban ancestry were admitted as evidence.<sup>1</sup> Cabrera was convicted in the United States District Court for conspiracy to distribute, possession with intent to distribute, and distribution of crack-cocaine (crack).<sup>2</sup> At trial, police testified that they had learned Cabrera was selling crack and bought some from him in an undercover operation.<sup>3</sup> The police arranged subsequent purchases of crack from Cabrera, which Detective Brooks recorded on audio tape.<sup>4</sup> During the investigation, police discovered that Cabrera's supplier was Iran Poch Mulgado (Mulgado).<sup>5</sup> At the third meeting with Cabrera, the police simultaneously arrested him and searched Mulgado's home pursuant to a search warrant.<sup>6</sup> When the police discovered crack, Mulgado admitted to the police that he was selling.<sup>7</sup>

The federal prosecutor charged Cabrera and Mulgado with conspiracy to distribute a controlled substance,<sup>8</sup> several counts of distribution of a controlled substance, and possession with intent to distribute a controlled substance.<sup>9</sup> Detective Brooks was the prosecution's main witness at trial.<sup>10</sup> Throughout the joint trial, Detective Brooks repeatedly referred to the defendants' Cuban origin.<sup>11</sup> The jury convicted both defendants.<sup>12</sup>

Although Detective Brooks made many remarks about Cubans during the trial, the defendants did not object, but instead chose to challenge the detective on cross examination.<sup>13</sup> For example, Detective Brooks testified that the reason that there was a three-month gap in the investigation between the initial contact with Cabrera to his actual arrest was that police were "working" Cubans in the area for other drug-related transactions.<sup>14</sup> Detective Brooks further testified that, in his experience, crack manufactured and distributed in round, flat wafers suggested that members of the Cuban community were

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1. United States v. Cabrera, 222 F.3d 590 (9th Cir. 2000).
  2. Cabrera, 222 F.3d at 590.
  3. 222 F.3d at 591.
  4. *Id.*
  5. *Id.*
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. *Id.*
  10. *Id.*
  11. *Id.*
  12. *Id.*
  13. *Id.*
  14. *Id.* at 592.

involved.<sup>15</sup> Detective Brooks also stated that he had conducted many drug-related investigations in an area he called "Naked City,"<sup>16</sup> a community densely populated with Cubans.<sup>17</sup>

When the prosecutor asked Detective Brooks why the police served the search warrant on Mulgado at the same time that the police arrested Cabrera, he replied that this practice was customary among the North Las Vegas Police Department when dealing with people who were resident aliens or otherwise not American citizens.<sup>18</sup> Detective Brooks stated that many people who were resident aliens flee the country if they know arrest is imminent.<sup>19</sup> Detective Brooks stated that he was not being derogatory, but in his experience Cubans and people from South America should be considered flight risks.<sup>20</sup> Defense counsel clarified that both Cabrera and Mulgado were resident aliens employed in Las Vegas.<sup>21</sup>

The jury convicted Cabrera and Mulgado for conspiracy to distribute, possession with intent to distribute, and distribution of crack, based in part on the Detective's testimony.<sup>22</sup> Cabrera and Mulgado appealed their convictions to the United States Court of Appeals for the Ninth Circuit.<sup>23</sup>

#### HOLDING

The United States Court of Appeals for the Ninth Circuit, in a unanimous decision, held that references to a defendant's racial or ethnic background violate both Due Process and Equal Protection rights guaranteed under the Fifth Amendment.<sup>24</sup> Using a plain error standard of review, the court found the references to the defendants' Cuban ancestry at trial improper and inadmissible under Federal Rules of Evidence Rule 403.<sup>25</sup> The court also found that most of the references to Cubans were not relevant under Federal Rules of Evidence Rules 401 and 402.<sup>26</sup> The court reversed the convictions and remanded for a new trial.<sup>27</sup>

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15. *Id.* at 591-92.

16. *Id.* at 592.

17. *Id.*

18. *Id.* at 593.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 590.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 596.

27. *Id.*

## ANALYSIS

Writing for the court, Judge Dorothy W. Nelson stated that “[a]ppeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant’s Fifth Amendment right to a fair trial.”<sup>28</sup> The court used the plain error standard of review in its analysis of this case.<sup>29</sup> The Federal Rules of Criminal Procedure establish two different standards of reviewing evidence. Federal Rules of Criminal Procedure Rule 52(a) sets forth the standard for a court to review a case using a harmless error analysis.<sup>30</sup> Appellate courts apply the harmless error standard of review when a defendant preserves his right to appeal by objecting to evidence offered during the course of a trial. Under this standard of review, a conviction will be upheld even if some of the evidence was improperly admitted, provided that the total evidence of guilt is overwhelming and the evidence improperly admitted does not substantially affect the defendant’s rights.<sup>31</sup>

Federal Rules of Criminal Procedure Rule 52(b) sets forth the plain error standard of review.<sup>32</sup> Courts use the plain error standard of review when a defendant fails to object to challengeable evidence offered during the course of a trial.<sup>33</sup> Admission of evidence that affects a substantial right of the defendant is considered plain error. Rule 52(b) gives discretion to the appellate court regarding review, and although the rule suggests review, it is not mandatory.<sup>34</sup> According to the Advisory Committee Notes to Rule 52(b), this rule simply restates existing law.<sup>35</sup> The admission of such evidence is a fundamental error and Rule 52(b) is a mechanism that is used to avoid a procedural defect in a case and to protect the rights of defendants.<sup>36</sup>

In *United States v. Olano*,<sup>37</sup> the Supreme Court established a three-prong limitation on an appellate court’s authority to review a case for plain error

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28. *Id.* at 594.

29. *Id.* at 595.

30. Rule 52(a) of the Federal Rules of Criminal Procedure states: “Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” FED. R. CRIM. P. 52(a).

31. *See id.*

32. Rule 52(b) of the Federal Rules of Criminal Procedure states: “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” FED. R. CRIM. P. 52(b).

33. *See id.*

34. *See id.*

35. FED. R. CRIM. P. 52(b) Advisory Committee Notes.

36. *See id.*

37. *United States v. Olano*, 507 U.S. 725 (1993).

under Rule 52(b).<sup>38</sup> The first limitation is that there must be an “error.”<sup>39</sup>

Olano explained that an error is a “deviation from a legal rule, unless the rule has been waived.”<sup>40</sup> The second limitation is that the error in question must be plain.<sup>41</sup> The court noted that “[p]lain error is ‘clear’ or ‘obvious’ [error] that affect[s] the defendant’s substantial rights and that ‘seriously affects the fairness, integrity or public reputation of the judicial proceedings.’”<sup>42</sup> The third limitation is that the error must actually affect the substantial rights of a defendant.<sup>43</sup> Under Rule 52(b), the defendant has the burden of proving that the error is prejudicial.<sup>44</sup>

Because neither defendant objected to the prejudicial testimony at trial, the court reviewed the evidence for plain error in accordance with Rule 52(b). The court applied its ruling to both defendants, although only Mulgado filed an appeal, because the testimony affected both equally.<sup>45</sup> The court also recognized that reversing one conviction and upholding another would be fundamentally unfair, since both convictions were the result of a joint trial with the same error.<sup>46</sup> Lastly, until the court decided *Bains v. Cambra*,<sup>47</sup> which was after the parties here filed briefs, no Ninth Circuit case had dealt with this issue.<sup>48</sup> The Ninth Circuit found that the testimony admitted by the district court was “‘plain error’ and therefore reversal [was] ‘necessary to prevent a miscarriage of justice.’”<sup>49</sup>

In *Bains*, the Ninth Circuit held that the prosecutor committed harmless error in soliciting trial testimony about the Sikh religion to generalize that “all Sikh persons (and thus [defendant] by extension) are irresistibly predisposed to violence when a family member has been dishonored.”<sup>50</sup> Although the Ninth Circuit upheld the convictions in *Bains*, the court explained that typically “references to racial, ethnic or religious groups are not only improper and prejudicial but also reversible error.”<sup>51</sup> However, because the review in

38. See *United States v. Olano*, 507 U.S. 725, 732 (1993) (holding presence of alternate jurors during jury deliberations in criminal case is not plain error under Rule 52(b) of Federal Rules of Criminal Procedure).

39. *Olano*, 507 U.S. at 733.

40. 507 U.S. at 732-33.

41. *Id.* at 734.

42. *Cabrera*, 222 F.3d at 595-96 (quoting *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999)).

43. *Olano*, 507 U.S. at 734.

44. 507 U.S. at 734.

45. *Cabrera*, 222 F.3d at 596 n.3.

46. 222 F.3d at 596 n.3 (citing *United States v. Olano*, 934 F.2d 1425, 1439 (9th Cir. 1991), *rev'd on other grounds*, 507 U.S. 725 (1993)).

47. *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000).

48. *Cabrera*, 222 F.3d 596 n.3.

49. 222 F.3d at 596 n.3. (citations omitted).

50. *Id.* at 594 (quoting *Bains*, 204 F.3d at 975)(emphasis in original).

51. 222 F.3d at 594.

*Bains* was a habeas review of a state court decision, and not a federal court decision as in this case, the court reviewed the admission of racial remarks under the state's harmless error standard of review and upheld the conviction.<sup>52</sup> Also, the facts are distinguishable because in *Bains* the comments were made in closing arguments and not in testimony.<sup>53</sup>

In *Cabrera*, applying the plain error standard of review, the court held that references to a defendant's racial or ethnic background violate both Due Process and Equal Protection rights guaranteed under the Fifth Amendment.<sup>54</sup> In this case, the court followed the Eighth Circuit decision in *United States v. Vue*,<sup>55</sup> which held that testimony that Hmong<sup>56</sup> people have a tendency to smuggle opium into St. Paul and Minneapolis was reversible error under the plain error standard.<sup>57</sup> Although the court in *Vue* found sufficient evidence to support the conviction, it nonetheless reversed the verdict because stereotypes about the Hmong people were admitted at trial,<sup>58</sup> violating both the Due Process and Equal Protection guarantees of the Fifth Amendment.<sup>59</sup> The Eighth Circuit explained that bringing the issue of race or ethnic background into the trial was a clear invitation to the jury to use race and ethnicity in determining guilt.<sup>60</sup>

In considering *Cabrera*'s claim, the court gleaned additional guidance from *United States v. Cruz*.<sup>61</sup> In that case, the Second Circuit applied the plain error standard of review and held that the star witness's references to the defendant as "the Dominican" and testimony describing a New York City neighborhood where drug transactions took place as having "a very high Hispanic population" were reversible error.<sup>62</sup> The Second Circuit said the "injection of a defendant's ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial for reasons that need no elaboration here."<sup>63</sup> Finally, the court noted the D.C. Circuit's decision in *United States v. Doe*.<sup>64</sup>

In *Doe*, the court found reversible error where the bulk of evidence presented at trial was testimony and closing arguments about Jamaicans taking

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52. *Cabrera*, 222 F.3d at 594.

53. 222 F.3d at 594.

54. *Id.*

55. *United States v. Vue*, 13 F.3d 1206 (8th Cir. 1994).

56. *See Vue*, 13 F.3d at 1212-13 (explaining that Hmong people originate in Laos).

57. 13 F.3d at 1212.

58. *Id.* at 1212.

59. *Cabrera*, 222 F.3d at 594.

60. *Vue*, 13 F.3d at 1212.

61. *United States v. Cruz*, 981 F.2d 659 (2d Cir. 1992).

62. *Cabrera*, 222 F.3d at 594.

63. *Cruz*, 981 F.2d at 664.

64. *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990).

over the crack trade in Washington.<sup>65</sup> A police detective provided the majority of the testimony and gave a detailed description of the Jamaican drug trade locally.<sup>66</sup> Attorneys for the government explained that the testimony was only about Jamaican drug dealers, not all Jamaicans, and therefore insisted that the court consider the appeal only as an issue of juror bias.<sup>67</sup> The D.C. Circuit refused to accept the explanation and stated, "It is much too late in the day to treat lightly the risk that racial bias may influence a jury's verdict in a criminal case."<sup>68</sup> The D.C. Circuit further held that appeals to race or ancestry are "odious" and "suspect" and endanger the fairness that is required in a trial.<sup>69</sup> "[R]acial fairness of the trial," the Doe court found, "is an indispensable ingredient of due process and racial equality a hallmark of justice."<sup>70</sup>

## II. Standards of Admissibility

In deciding whether the evidence offered in the district court was relevant and admissible, the court reviewed Rules 401 and 402, the applicable Federal Rules of Evidence.<sup>71</sup> Under Rule 402, "[e]vidence which is not relevant is not admissible."<sup>72</sup> Rule 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>73</sup> Rule 403 provides, in part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."<sup>74</sup>

The court found that under Rules 401 and 402, the remarks by Detective Brooks were not relevant.<sup>75</sup> Though highlighting the ethnicity of the other drug dealers also under investigation was ostensibly introduced to explain the three-month gap in the detectives' investigation,<sup>76</sup> the court held it only led the jury to believe that because the other drug dealers under investigation were Cuban, the Cuban defendants must also be drug dealers.<sup>77</sup> In addition, the court found that the comments about the proliferation of Cuban drug dealers

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65. *Id.* 20.

66. *Id.* at 19-20.

67. *Id.*

68. *Id.* at 21-22.

69. *Id.*

70. *Id.* at 25 (citations omitted).

71. *Cabrera*, 222 F.3d at 596.

72. FED. R. EVID. 402.

73. FED. R. EVID. 401.

74. FED. R. EVID. 403.

75. *Cabrera*, 222 F.3d at 596.

76. 222 F.3d at 596.

77. *Id.*

were similar to the comments about Jamaicans taking over Washington, D.C. in Doe.<sup>78</sup> The court stated that because the evidence was not relevant, it was not admissible, and as such constituted plain error.<sup>79</sup>

Although the court decided that most of the comments made by the police officers relating to the defendants' Cuban origin were not relevant, the court found that the references to packaging could be relevant. Applying Rule 403, the court examined the testimony that Cubans were usually the only persons who manufactured and distributed crack in round, flat wafers.<sup>80</sup> The court decided that the information, though arguably probative, was prejudicial because it lent itself to the misconception that Cubans were responsible for the crack epidemic in the city.<sup>81</sup> Even though the packaging could be demonstrative of Cabrera and Mulgado's expertise as drug dealers, the court stated it was unnecessary to tie that fact together with the defendants' national origin.<sup>82</sup> The court also found that the reference to Cubans being flight risks served only to reinforce the idea that foreign drug dealers were creating a drug epidemic.<sup>83</sup> Therefore, the court found that under Rules 401, 402, and 403, All of Officer Brooks's references to Cuban drug habits were improper and inadmissible."<sup>84</sup>

## CONCLUSION

The Ninth Circuit sets forth a bright line on the admission of evidence regarding racial, ethnic or religious backgrounds of defendants in a criminal trial. If courts allow police officers and other witnesses to make stereotypical statements about racial and ethnic groups just to get a conviction, then the essential fairness of a criminal trial is at risk. It is not acceptable under the Constitution to allow people to be tried and convicted merely because they are of a certain racial, ethnic or religious group. The court recognized that the evidence admitted in this case affected the substantial rights of the defendants. As a result, the case was reviewed using the plain error standard of review proscribed in Rule 52(b).

This decision has an important impact on racial and ethnic groups by recognizing the existence of stereotypes and forbidding their use in court. The decision by the court establishes a prohibition on the use of stereotypes to

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*



generalize specific characteristics to defendants. Under this ruling, attorneys must give a jury facts to decide a case and not emotion.

Summary and Analysis Prepared by:  
Loren Weiss