09-11556 NO. ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JOSE TOLENTINO,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

RICHARD JOSELSON
Attorney of Record

THE LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
199 WATER STREET
NEW YORK, NEW YORK 10038
212-577-3587

KRISTINA SCHWARZ
Of Counsel

QUESTION PRESENTED

Whether pre-existing identity-related governmental documents, such as motor vehicle records, obtained as the direct result of police action violative of the Fourth Amendment, are subject to the exclusionary rule?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 14

CONCLUSION 31

INDEX OF APPENDICES

APPENDIX A

Majority Opinion of the New York Court of Appeals A1

Dissenting Opinion of the New York Court of Appeals A5

APPENDIX B

Opinion of the New York Supreme Court, Appellate Division, First Department A8

APPENDIX C

Decision and Order of the New York Supreme Court, New York County A9

APPENDIX D

Petitioner Tolentino's Omnibus Motion (excluding Exhibits A and B) A11

Respondent's Affirmation in Response A36

TABLE OF AUTHORITIES CITED

CASES

Davis v. Mississippi,
394 U.S. 721 (1969) ..... Passim

Delaware v. Prouse,
440 U.S. 648 (1979) 15

Dunaway v. New York,
442 U.S. 200 (1979) 16

Frisbie v. Collins,
342 U.S. 519 (1952) 12, 23

Gerstein v. Pugh,
420 U.S. 103 (1975) 12, 22

Hayes v. Florida,
470 U.S. 811 (1985) 10, 13, 26

Hoonsilapa v. Immigration & Naturalization Serv.,
575 F.2d 735 (9th Cir. 1978) 3, 8, 27

Immigration and Naturalization Service (INS) v. Lopez-Mendoza,
468 U.S. 1032 (1984) ..... Passim

Nardone v. United States,
308 U.S. 338 (1939) 17

People v. Pleasant,
54 N.Y.2d 972 (1981), cert denied 455 U.S. 924 (1982) 7, 9, 14

Sibron v. State of New York,
392 U.S. 40 (1968) 15

Silverthorne Lumber Co. v. United States,
251 U.S. 385 (1920) 15, 26

United States ex rel. Bilokumsky v. Tod,
263 U.S. 149 (1923) 23

United States v. Bowley,
435 F.3d 426 (3d Cir. 2006) 3, 8, 25, 27

United States v. Crews,
445 U.S. 463 (1980) 6, 9, 16, 18

United States v. Farias-Gonzalez,
556 F.3d 1181 (11th Cir. 2009) 3, 8, 24, 27

United States v. Giordano,
416 U.S. 505 (1974) 16

United States v. Guevara-Martinez,
262 F.3d 751 (8th Cir. 2001) ..... Passim

United States v. Guzman-Bruno,
27 F.3d 420 (9th Cir. 1994), cert denied 513 U.S. 975 (1994) 7, 25

United States v. Juarez-Torres,
441 F.Supp.2d 1108 (D. New Mexico 2006) 24, 27

United States v. Olivares-Rangel,
458 F.3d 1104 (10th Cir. 2006) ..... Passim

United States v. Oscar-Torres,
507 F.3d 224 (4th Cir. 2007) ..... Passim

United States v. Roque-Villanueva,
175 F.3d 345 (5th Cir. 1999) 3, 8, 25, 27

Wong Sun v. United States,
371 U.S. 471 (1963) ..... Passim

CONSTITUTIONAL PROVISIONS

U.S. Const., Fourth Amendment ..... Passim

OTHER AUTHORITIES

6 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §11.4 (4th Ed. 2004 & Supp. 2009-2010) 15, 25

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2009

JOSE TOLENTINO, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Jose Tolentino respectfully petitions for a writ of certiorari to review the judgment of the New York State Court of Appeals in this case.

OPINIONS BELOW

The opinion of the New York State Court of Appeals (Appendix A, A1-A7) has been officially reported at 14 N.Y.3d 382 (2010). The opinion of the New York State Supreme Court, Appellate Division, First Department (Appendix B, A8) has been officially reported at 59 A.D.3d 298 (1st Dept. 2009).

JURISDICTION

The New York State Court of Appeals entered its decision on March 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Fourteenth Amendment to the United States Constitution provides, in relevant part, ". . . nor shall any State deprive any person of . . . liberty, . . . without due process of law."

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the New York Court of Appeals, affirming the New York Supreme Court denial of his motion for a Mapp/Dunaway hearing, where he sought to suppress Department of Motor Vehicle (DMV) records. Petitioner argued that his vehicle was stopped by the police for no apparent reason, and that the police exploited this illegality to perform a DMV record search that resulted in the discovery that petitioner's driver's license had been suspended and had not been reinstated. Accordingly, petitioner filed a motion in New York Supreme Court seeking the suppression of the DMV records as a remedy for the unlawful police conduct.

This motion was denied because the court found that DMV records are a type of identity-related evidence, and as such, are not subject to suppression. In support of this decision, the court cited this Court's decision in Immigration and

Naturalization Service (INS) v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). However, because this finding is based on a misreading of the Lopez-Mendoza case, and because the Federal Circuit Courts are divided regarding the applicability of the exclusionary rule to pre-existing identity-related government records accessed through police action violative of the Fourth Amendment,[1] petitioner seeks the review of this Court to clarify this area of the law.

MOTION FOR MAPP HEARING

As part of petitioner's omnibus motion, he moved to suppress his Department of Motor Vehicles ("DMV") records, and any testimony regarding such records, or, in the alternative, to direct the holding of a Mapp/Dunaway hearing (Appendix D, A12).

Before setting forth the factual basis for suppression, the motion stated that the defense had not been provided with any indication as to why petitioner had been stopped. All that the defense knew was that petitioner "was operating the motor vehicle in accordance with all posted traffic laws," and that he was "simply driving the car on a public road." (Appendix D, A19). The motion further elaborated that petitioner had not been driving "in an erratic, dangerous or

[1] Compare United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009); United States v. Bowley, 435 F.3d 426, 430-431 (3d Cir. 2006); United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999); Hoonsilapa v. Immigration & Naturalization Serv., 575 F.2d 735, 737 (9th Cir. 1978) with United States v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006); United States v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001); United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007).

otherwise unlawful manner," that there was nothing "illegal about the condition of his automobile, and that he had not been "playing his radio at an unlawfully high volume (Appendix D, A25-A26).

The motion concluded that because petitioner's vehicle was "stopped without reasonable suspicion, probable cause, or any other legal justification," all evidence seized from petitioner as a result of the illegal seizure, including "his Department of Motor Vehicle ("DMV") records, and any testimony regarding such records as well as any tangible or testimonial fruits of his illegal seizure and search by police, including observations of the defendant by police," should be suppressed as the fruit of the illegality. The motion cited, inter alia, the Fourth and Fourteenth Amendments to the United States Constitution (Appendix D, A19-A20, A-25-A26).

The motion alleged that, without justification, the police stopped petitioner while he was driving a car, ordered him to turn over his driver's license, and conducted a computer check of petitioner's DMV records which revealed that his license was suspended and had not been reinstated. Subsequent to that, a Department of Motor Vehicles Abstract of Driving Record of petitioner was obtained from the Department of Motor Vehicles by the prosecution and filed with the court. Thus, the motion established that the prosecution obtained petitioner's

DMV records as a direct result of his unlawful seizure by the police (Appendix D, A21, A26).

The motion reasoned that petitioner's DMV records were suppressible as fruits of the police illegality because they were only accessible due to petitioner's unlawful seizure. The motion delineated that a vehicle must be stopped and the driver's name or license number must be obtained before DMV driving records can be generated, and that these records cannot be obtained by "observing the license plate of a car driving down the road." (Appendix D, A21, A24). Then, the motion further reasoned that "[a]lthough the DMV records which form the basis for this prosecution were in existence in computerized form prior to the defendant's arrest," the records are nonetheless subject to suppression because the prosecution was only able to obtain these records "as a direct result of the defendant's illegal street stop and subsequent arrest" (Appendix D, A23-A24).

Relying on Davis v. Mississippi, 394 U.S. 721 (1969), Wong Sun v. United States, 371 U.S. 471, 485-86 (1963), and other relevant state cases, the motion asserted that it was a "general and well-established proposition" that the exclusionary rule is broadly applicable to any type of evidence – tangible or intangible – and that the controlling question is not what type of evidence is being sought to be suppressed, but rather, whether the evidence constituted, "fruits of illegal police conduct." (Appendix D, A22). The motion acknowledged that even

though cases such as INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) and United States v. Crews, 445 U.S. 463 (1980) have found in certain circumstances that "a defendant's body or identity cannot be suppressed as the fruit of an unlawful stop or arrest," this would not apply in the circumstances presented here because the DMV records sought to be suppressed "are not 'merely an extension of the defendant's identity.'" (Appendix D, A23).

The district attorney's response began by summarily asserting that petitioner had failed to dispute the factual basis for his stop, including that he had been playing loud music from his vehicle (Appendix D, A39). Then, the response went on to argue that "even if defendant was illegally stopped, apprehended, or arrested, defendant's identity and the documents from DMV are not subject to the exclusionary rule" because they "were in the possession of a public agency before the defendant was stopped, apprehended, and/or arrested" (Appendix D, A39-A41).

On July 12, 2005, the court issued a written decision denying petitioner's Motion to Suppress Tangible Evidence or Mapp Hearing. The decision on this issue held in its entirety that "[a]n individual does not possess a legitimate expectation of privacy in files maintained by the Department of Motor Vehicles and such records do not constitute evidence which is subject to suppression under a *fruit of the poisonous tree* analysis " (emphasis in original). In support of this

decision the only Federal case the court cited was United States v. Guzman-Bruno, 27 F.3d 420 (9th Cir. 1994), cert denied 513 U.S. 975 (1994) (Appendix C, A9-A10).

APPELLATE DIVISION DECISION

On February 24, 2009, the Appellate Division issued a written decision affirming the Supreme Court finding [Appendix B, A8; People v. Tolentino, 59 A.D.3d 298 (1st Dept. 2009)]. The decision disagreed with the lower court requirement concerning standing, holding that a defendant need not establish a privacy interest in "an alleged fruit of a preexisting violation of his or her Fourth Amendment rights."

Nonetheless, the court concluded that DMV records were not "suppressible fruits" because they were akin to the identity of the defendant himself, which it concluded was not suppressible. To support this ruling, the court cited Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) and United States v. Guzman-Bruno, 27 F.3d 420, 422 (9th Cir. 1994), cert denied 513 U.S. 975 (1994).

The court also held that the DMV records were not suppressible because they "were compiled independently of defendant's arrest." For this proposition, the court cited People v. Pleasant, 54 N.Y.2d 972, 973-974 (1981), cert denied 455 U.S. 924 (1982).

NEW YORK STATE COURT OF APPEALS DECISION

The majority opinion

By a vote of five to two, the Court affirmed the denial of suppression. The majority began its analysis with INS v. Lopez-Mendoza, concluding that that case stands for the well-settled proposition that the name or identity of an individual is never suppressible. As a result, the court concluded that the question to be addressed by this case was whether, "the preexisting DMV records are subject to suppression because without the alleged illegality, the police would not have learned his name and would not have been able to access these records." [Appendix A, A3; People v. Tolentino, 14 N.Y.3d 383, 385 (2010)].

The court examined federal circuit court decisions addressing the question whether pre-existing government immigration files are subject to suppression. However, the decision only cited those cases that conclude that pre-existing files are not suppressible, completely ignoring those circuit court decisions that find them subject to suppression. Compare United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009); United States v. Bowley, 435 F.3d 426, 430-431 (3d Cir. 2006); United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999); Hoonsilapa v. Immigration & Naturalization Serv., 575 F.2d 735, 737 (9th Cir. 1978) with United States v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006);

United States v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001); United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007).

The decision relied on language from United States v. Crews, 445 U.S. 463, 475-477 and 475 n. 22 (1980 plurality op) ("[t]he exclusionary rule . . . does not reach backward to taint information that was in official hands prior to any illegality") to support its conclusion that pre-existing public records are not subject to suppression. The decision also looked to a New York state case, People v. Pleasant, 54 N.Y.2d 972 (1981) to support its finding that evidence already in the government's possession prior to the illegality is not suppressible when it is "obtained by the police from a source independent of the claimed illegal stop." Id. at 387.

Next, the court suggested that there was a policy rationale against applying the exclusionary rule to identity-related evidence. The court performed a balancing test, weighing the social costs of excluding identity-related evidence, which it characterized as "permitting defendants to hide their identity" and as "undermin[ing] the administration of the criminal justice system and essentially allow[ing] suppression of the court's jurisdiction," against the potential for deterrence of improper police conduct, and concluded that there were few deterrence benefits since "[other] evidence recovered in the course of an illegal stop remain[] subject to the exclusionary rule." Id. at 387.

Finally, the court attempted to harmonize its decision with this Court's decisions in Davis v. Mississippi, 394 U.S. 721, 724 (1969) and Hayes v. Florida, 470 U.S. 811, 815 (1985), where this Court authorized the suppression of fingerprint identity evidence. To do this, the New York court distinguished the defendants in Davis and Hayes from the defendant here because they were stopped in order that police could obtain evidence that was not pre-existing (fingerprints) and because the fingerprint evidence was being used to "establish[] defendants' 'identities' as the perpetrators, but not their 'identities' in the sense relevant here." Id. Because of these differences, the New York court concluded that their decision, essentially finding that pre-existing identity-related evidence is not subject to the suppression rule, was in harmony with Davis and Hayes and would not "alter the outcome" of those cases.

The dissenting opinion

Judge Ciparick, joined by Chief Judge Lippman, dissented, finding that DMV records "are subject to suppression if obtained by the police through exploitation of a Fourth Amendment violation, namely an unlawful traffic stop." (Appendix A, A5; Id. at 388). In coming to this conclusion, the dissent began its analysis by pointing out that the majority opinion rested on two principles, regarding both of which it was in disagreement. First, the majority had set forth a new rule, "that regardless of police conduct, DMV records obtained through a

police stop and inquiry of the driver are not subject to the exclusionary rule when the only link between the police conduct and the evidence is that the police learned a defendant's name." Secondly, the majority had concluded that DMV records are not subject to suppression because they are "government records compiled independently of defendant's arrest." (Appendix A, A5; Id.).

The dissent began its opinion by emphasizing that the law has long held that derivative evidence of any type obtained in violation of the Fourth Amendment must be suppressed as "fruit of the poisonous tree" if obtained through exploitation of illegal police conduct. The dissent pointed out that the majority decision was in effect excluding a specific category of evidence from the suppression rule, something that had never been done before.

The dissent found that the majority decision was flawed because it heavily relied upon a misreading of INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), to support its conclusion that identity-evidence is not subject to suppression. The dissent found that the language from Lopez-Mendoza concerning "[t]he 'body' or identity of a defendant" never being "suppressible as a fruit of an unlawful arrest," referred only to the court's personal jurisdiction over an individual and not, as the majority concluded, to the admissibility of identity-related evidence.

The dissent explained that Lopez-Mendoza reviewed two civil deportation proceedings resulting from illegal police conduct. In the first case, Adan Lopez-

Mendoza raised a purely jurisdictional objection to having been summoned to a deportation proceeding following an unlawful arrest; he did not challenge the admissibility of evidence being proffered against him. In the companion case, Elias Sandoval-Sanchez challenged the introduction of illegally obtained evidence at his deportation proceeding.

The dissent pointed out that the "body" or "identity" language relied on by the majority to justify its position opposing the suppression of identity evidence came from the first portion of the Lopez-Mendoza case that dealt exclusively with the jurisdictional claim, and as such was not directly applicable. The dissent showed that the disputed language was actually a re-stating of an older jurisdictional rule set forth in Gerstein v. Pugh, 420 U.S. 103, 119 (1975) and Frisbie v. Collins, 342 U.S. 519, 522 (1952). Moreover, the dissent went on to show that the Lopez-Mendoza Court did not follow the same "identity rule" in the companion Sandoval-Sanchez case that raised a suppression claim, further establishing that this Court did not intend to exclude identity-related evidence from suppression claims in criminal proceedings. Additionally, the dissent cited cases from the Fourth, Eighth, and Tenth Circuits that all followed this interpretation of Lopez-Mendoza. See United States v. Oscar-Torres, 507 F.3d 224, 227-230 (4th Cir. 2007); United States v. Olivares-Rangel, 458 F.3d 1104, 1111-1112 (10th Cir.

2006); United States v. Guevara-Martinez, 262 F.3d 751, 753, 755 (8th Cir. 2001) (Appendix A, A5; Id. at 389).

The dissent agreed with the majority that a defendant's identity cannot be suppressed to defeat the personal jurisdiction of the court. However, the dissent emphasized that there was a clear difference between identity, for personal jurisdiction purposes, and identity-related evidence, that the dissent maintained was subject to suppression. In support of this, the dissent referred to the Davis and Hayes cases, where this Court found that fingerprint evidence was suppressible (Appendix A, A5; Id. at 389).

The dissenting opinion next turned to a discussion of public policy, emphasizing that the deterrent purpose of the exclusionary rule should equally apply to all evidence illegally obtained, whether or not it is identity-related; that the legality of the police conduct should be the focus of the inquiry, not the type of evidence obtained. Indeed, the dissent concluded that the majority opinion, excluding driving records from the pool of suppressible fruits, "gives law enforcement an incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police." (Appendix A, A6; Id. at 390).

Finally, the dissent addressed the majority's argument that DMV records are not subject to the exclusionary rule because they are compiled by a state agency

independent of any illegality, and concluded that this reasoning was faulty because it, "ignores that the police located these specific records only by relying on identifying information that may have been the product of an illegal stop." The dissent emphasized that the New York state case the majority relied on to justify this finding, People v. Pleasant, 54 N.Y.2d 972, 974 (1981), actually was not premised on a finding that the evidence was not suppressible because it was already in the possession of the government, as the majority wrongly concluded, but was instead decided through the application of a classic attenuation analysis, which necessarily meant that the court had not categorically excluded government records from the list of potentially excludible evidence (Appendix A, A6; Id. at 390-391). Accordingly, the dissent urged a remand for a Mapp/Dunaway hearing, in order to conduct an attenuation analysis to determine whether the DMV records should be suppressed (Appendix A, A6; Id.).

REASONS FOR GRANTING THE PETITION

This Court should take this case since the Federal Circuit Courts are divided as to the applicability of the exclusionary rule to pre-existing identity-related documents maintained by the government. Central to resolving this split, is an examination of this Court's decision in INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

When the police stop a moving vehicle, a seizure of the car and its occupants within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution has occurred. Delaware v. Prouse, 440 U.S. 648 (1979). Such a seizure is proper only if the officers have at least a reasonable suspicion that the car was used in criminal activity or that its occupants were committing, had committed or were about to commit a crime. Id.

As a general rule, evidence obtained as a result of an unlawful stop must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). The exclusionary rule of the Fourth Amendment applies not only to physical evidence immediately seized, but also to "secondary" or "derivative" evidence. Wong Sun v. United States, supra, 371 U.S. 471, 487-488 (1963); see generally 6 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §11.4, pp. 255-258 (4th Ed., 2004).

This Court has held that nearly every category of evidence is subject to suppression as "fruits" or "derivative evidence" of a Fourth Amendment violation, so long as the knowledge of the evidence was obtained by "exploitation" of the initial police illegality. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Wong Sun, supra, 371 U.S. at 488. See, e.g., Sibron v. State of New York, 392 U.S. 40 (1968) ("fruits" held to include both tangible and intangible evidence); Davis v. Mississippi, 394 U.S. 721 (1969) ("fruits" held to include

evidence of defendant's fingerprints); United States v. Giordano, 416 U.S. 505 (1974) ("fruits" held to include objects discovered inadvertently and words overheard); Dunaway v. New York, 442 U.S. 200 (1979) ("fruits" held to include statements and confessions); United States v. Crews, 445 U.S. 463 (1980) ("fruits" held to include pre-trial identifications made as a product of an unlawful arrest).

In Wong Sun, this Court articulated the basic rule for deciding whether evidence derived from an illegal search should be suppressed: "[T]he [] question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun, supra, 371 U.S. at 488 (quoting, Maguire, Evidence of Guilt, 221 (1959)). The fruit of the poisonous tree doctrine articulated in Wong Sun, rests on a public policy decision to preclude the use of evidence which flows directly from illegal police action. The rationale behind the policy is that the best way to curb illegal police conduct is to prevent the police from benefiting from their illegal conduct.

In Wong Sun, this Court declined to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light **but for** the illegal actions of the police." Wong Sun, supra, 371 U.S. at 487-488 (emphasis added). Because the exclusionary rule was created to deter the government from

performing illegal actions, where there was only an "attenuated connection" between the Fourth Amendment violation and certain derivative evidence, this Court concluded that the deterrent effect would be negligible and suppression was not warranted. Id. at 487.

Thus, where the challenged evidence is a direct product of the illegality and a motivating force behind the illegal actions, suppression is required, but where the evidence is so removed from the illegal actions of law enforcement as to be an improbable motivating force behind the illegality, then the evidence is deemed too "attenuated" to require suppression. See Wong Sun, supra, 371 U.S. at 491; Nardone v. United States, 308 U.S. 338, 341 (1939).

In his well-respected treatise on search and seizure law, Professor LaFave articulated three factors as relevant to attenuation analysis:

> (1) "Where the chain between the challenged evidence and the primary illegality is long or the linkage can be shown only by 'sophisticated argument,' exclusion would seem inappropriate. In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus it could not have been a motivating force behind it. It follows that the threat of exclusion could not possibly operate as a deterrent in that situation."
>
> (2) The same may be said where evidence "is used for some relatively insignificant or highly unusual purpose. Under these circumstances it is not likely that, at the time the primary illegality was contemplated, the police foresaw or were motivated by the potential use of the evidence and the threat of exclusion would, therefore, effect no deterrence."

(3) "Since the purpose of the exclusionary rule is to deter undesirable police conduct, where that conduct is particularly offensive the deterrence ought to be greater and, therefore, the scope of exclusion broader." 6 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §11.4, p. 260 (4th Ed., 2004) (citations and footnotes omitted).

Under the standards governing "fruit" and attenuation doctrine, the DMV records at issue here were "come at by exploitation of" his illegal stop, see Wong Sun, supra, 371 U.S. at 488, and thus are suppressible fruits. The test for determining whether a Fourth Amendment violation requires the suppression of seized evidence requires a determination of whether the evidence was "come at by exploitation of that illegality." Wong Sun, supra, 371 U.S. at 488. Clearly petitioner's claim for suppression arises from the exploitation of his unlawful stop. Petitioner's motion sets forth that there was no reason his car should have been singled out and stopped. The police exploited this illegality by eliciting identity information from him and then immediately exploiting that information by gaining access to his driving record and thereby learning he had a suspended license. In other words, the knowledge of defendant's suspended license was "come at by exploitation of the unlawful police action."

This case is a classic example of the police benefiting from the exploitation of their illegal actions – the prevention of which is the very reason the exclusionary rule exists. Indeed, this case is indistinguishable analytically from other cases that resulted in suppression following an unlawful arrest. See e.g., United States v.

Crews, supra, 445 U.S. 463 (pre-trial photographic and line-up identification procedures suppressed as "fruit" of unlawful arrest). Moreover, as we demonstrated on page 15 above, this Court has repeatedly held that the exclusionary rule of the Fourth Amendment applies not only to physical evidence, but to a wide range of other types of evidence. Knowing that suppressible evidence can be virtually anything of an evidentiary nature gleaned from a Fourth Amendment violation, DMV records easily fall within the ambit of evidence subject to the exclusionary rule.

The Wong Sun rule provides that evidence should not be suppressed if it is come at "by means sufficiently distinguishable [from the illegality] to be purged of the primary taint." Wong Sun, supra, 371 U.S. at 488. Thus, when evidence is elicited by the police "merely as part of a routine booking procedure," the rule holds that it is not subject to suppression; whereas when the same type of evidence is elicited in order to investigate criminal activity, then it can be subject to suppression. United States v. Olivares-Rangel, 458 F.3d 1104, 1120-1121 (10th Cir. 2006); United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007); United States v. Guevara-Martinez, 262 F.3d 751 (8th Cir. 2001).

In Olivares-Rangel, the police illegally stopped defendant's vehicle and obtained an admission from him that he was a Mexican citizen and in the United States illegally. Defendant was arrested and taken to the border patrol station

where he was fingerprinted and asked about his biographical information. This information led the police to access the record of petitioner's criminal conviction and his prior deportation. On appeal, the 10th Circuit reasoned that "previously compiled Government records" were suppressible where the evidence was obtained through "exploitation of an illegal search and seizure [that] produced the critical link between a defendant's identity and his immigration or prior criminal history record." Olivares-Rangel, supra, 458 F.3d at 1120.

The 4th Circuit in Oscar-Torres, supra, 507 F.3d 224 directly addressed this issue as well. There, the court held that the record of defendant's criminal conviction and his prior deportation which were recovered after the defendant's illegal car stop would be suppressible if the law enforcement officers were motivated by an investigative purpose in obtaining the evidence; but the evidence would not be suppressible if it was obtained for and motivated by an administrative purpose; and finally, the evidence would be suppressible if both an investigative and administrative purpose motivated the illegal arrest and fingerprinting. Id. at 232.

In this case, the motive behind the unlawful car stop and the request for petitioner's name and driver's license information was to investigate possible criminal activity, as evidenced by the fact that the police immediately entered the driver's license information into the police computer system to investigate

petitioner's driving record. Since the records were not obtained merely as an administrative task or in such a way as to dissipate the taint of the Fourth Amendment violation, they must be found to be a direct product of the exploitation of the unlawful car stop, and thus subject to the suppression rule. Olivares-Rangel, supra, 458 F.3d at 1113-1117; Oscar-Torres, supra, 507 F.3d at 230-232. Thus, for sound policy reasons, this case falls within the range of cases subject to the exclusionary rule, and a suppression hearing should have been ordered.

Yet, the New York State Court of Appeals concluded that DMV records were not suppressible fruits because "identity" is not a suppressible fruit. In reaching this conclusion, the Appellate Division relied upon language from this Court's decision in INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984), that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." However, as many other courts have recognized, a careful reading of this case demonstrates that this language refers to a court's personal jurisdiction over an individual who has been unlawfully arrested rather than to the "more substantial" claim that identity evidence can be subject to suppression as fruit of an unlawful arrest. These cases explain that there is a clear distinction between a court's jurisdiction over a

defendant's person and derivative evidence, such as DMV records, which are the object of the suppression motion here.

In Lopez-Mendoza, this Court held that the exclusionary rule did not extend to civil deportation proceedings. In coming to this conclusion, the Court addressed the claims of two individuals, Lopez-Mendoza and Sandoval-Sanchez. Lopez-Mendoza claimed his arrest was illegal and objected to his compelled presence at his civil deportation proceeding; however, Lopez-Mendoza never sought suppression of any evidence: "At his deportation hearing Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him." Lopez-Mendoza, supra, 468 U.S. at 1040. The argument raised by Lopez-Mendoza was that the fact of his illegal arrest deprived the immigration court of personal jurisdiction over him. Thus, when the Court stated that "the 'body' or identity of a defendant . . . is never itself suppressible as a fruit of an unlawful arrest," it was in the context of addressing the court's jurisdiction over Lopez-Mendoza and not in the context of addressing a suppression issue.

Immediately after making the statement exempting "body" or "identity" from suppressible fruit, the Court cited three cases to support this proposition, all of which concern a court's jurisdiction to prosecute the defendant. Gerstein v. Pugh, 420 U.S. 103 (1975) ("Nor do we retreat from the established rule that

illegal arrest or detention does not void a subsequent conviction."); Frisbie v. Collins, 342 U.S. 519 (1952) ("This Court has never departed from the rule . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923) ("irregularities on the part of the government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law.").

This intentional distinction was highlighted by the later discussion by the Court of Sandoval-Sanchez's claim: "Respondent Sandoval-Sanchez has a more substantial claim. He objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding." Lopez-Mendoza, supra, 468 U.S. at 1040. However, after making this statement concerning Sandoval-Sanchez's "more substantial claim," this Court did not reach the suppression issue being raised because instead, it held that the exclusionary rule was inapplicable to civil deportation proceedings, mooting out Sandoval-Sanchez's claim for suppression of his statements. Lopez-Mendoza, supra, at 1050.

This interpretation of the Lopez-Mendoza case has been cited with approval by numerous courts and other authorities. See, e.g., United States v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006) ("Lopez-Mendoza does not prevent the suppression of all identity-related evidence. Rather, Lopez-Mendoza merely

reiterates the long-standing rule that a defendant may not challenge a court's jurisdiction over him or her based on an illegal arrest."); United States v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001) (finding that the "identity" language in Lopez-Mendoza referred only to jurisdictional challenges and did not foreclose suppression of all identity-related evidence); United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007) (same); United States v. Juarez-Torres, 441 F.Supp.2d 1108, 1116-1120 (D. New Mexico 2006) (same).

The court in Olivares-Rangel aptly summarized this correct interpretation of Lopez-Mendoza:

> Seeking to suppress one's very identity and body from a criminal proceeding merely because of an unconstitutional arrest is the sort of jurisdictional challenge foreclosed by Lopez-Mendoza. The language in Lopez-Mendoza merely says that the defendant cannot suppress the entire issue of his identity. A defendant may still seek suppression of specific pieces of evidence (such as, say, fingerprints or statements) under the ordinary rules announced in Mapp and Wong Sun. A broader reading of Lopez-Mendoza would give the police carte blanche powers to engage in any manner of unconstitutional conduct so long as their purpose was limited to establishing a defendant's identity We do not believe the Supreme Court intended Lopez-Mendoza to be given such a reading. Olivares-Rangel, supra, 458 F.3d at 1111.

However, the New York Court of Appeals chose to rely on other Federal cases, grounded in a misreading of the Lopez-Mendoza case, in order to defeat suppression. See United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009); United States v. Bowley, 435 F.3d 426, 430-431 (3d Cir. 2006); United

States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999); United States v. Guzman-Bruno, 27 F.3d 420, 422 (9th Cir. 1994). All of these cases fail to note that the "body" or "identity" language in Lopez-Mendoza refers only to a court's jurisdiction over the person, rather than the suppression of evidence. Indeed, the Guzman-Bruno case, was relied on heavily by the New York Court of Appeals, for its statement that "there is no sanction to be applied when an illegal arrest only leads to discovery of [a person's] identity and that merely leads to the official file," yet that statement is simply a misapplication of Lopez-Mendoza. Professor LaFave advises against reliance on this interpretation in the most recent update to his treatise on search and seizure law, stating that, "some of the reasoning in Guzman-Bruno is open to serious question, for it appears to be grounded in a misreading of the quoted case, INS v. Lopez-Mendoza." 6 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §11.4, 2009-2010 Pocket Part, p. 62 (4th Ed.).

Based on the above-stated explanation, the New York courts were wrong in concluding that petitioner's driving records were not suppressible. The reasons given in their decisions for finding the driving records exempt from suppression were primarily based upon their erroneous reading of Lopez-Mendoza. The courts simply failed to recognize that the "body" or "identity" language in Lopez-

Mendoza was a restatement of an established jurisdictional rule and was not meant to prohibit the suppression of identity-derived evidence.

Indeed, although this Court has not directly addressed the issue raised by this case concerning pre-existing government identity-related records, it has addressed the question of the suppressibility of fingerprint evidence, a type of identity-related evidence, obtained after an illegal arrest, and concluded that it may be suppressed under the exclusionary rule if obtaining the fingerprints was the objective of the illegal arrest. Davis v. Mississippi, 394 U.S. 721, 727 (1969); Hayes v. Florida, 470 U.S. 811, 815 (1986).

The other issue to be addressed by this case is the validity of the proposition that the DMV records are not subject to the exclusionary rule because they were compiled by a state agency independent of the police illegality, suggesting that they are not the product of exploitation of the initial illegal seizure. Moreover, this erroneous holding ignores the fact that the police located petitioner's records only by relying on information that they obtained because of the illegal car stop. While it is true that knowledge of evidence obtained lawfully and independently of the initial illegality is not properly considered "fruit" of a Fourth Amendment violation, "the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." Silverthorne Lumber Co. v. United States, supra, 251 U.S. at 392. Evidence always exists independently of any illegality. But, the

exclusionary rule must be applied when an illegality is exploited to discover the existence of the incriminating evidence. Thus, even though petitioner's DMV records were available in computerized form prior to the illegal seizure, the unlawful car stop was exploited to link the defendant to the incriminating evidence. The question becomes not whether the DMV records existed prior to the initial illegality, but rather whether the knowledge of the facts of petitioner's crime were discovered through exploitation of the police illegality, as was done here. United States v. Juarez-Torres, supra, 441 F.Supp.2d at 1121.

Indeed, this question exposes yet another division among the Federal courts that can only be harmonized by this Court. This Court should take this opportunity to uphold the reasoning of the Fourth, Eighth, and Tenth Circuits and address the flaws of the Third, Fifth, Ninth and Eleventh Circuits. Compare, United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007); United States v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001); United States v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006) with United States v. Bowley, 435 F.3d 426, 430-431 (3d Cir. 2006); United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999); Hoonsilapa v. Immigration & Naturalization Serv., 575 F.2d 735, 737 (9th Cir. 1978); United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009).

The courts in both Olivares-Rangel and Oscar-Torres acknowledged that pre-existing immigration and criminal record files would be suppressible if obtained through investigative exploitation of the illegal arrest, even though this type of evidence was already in the government's possession. United States v. Oscar-Torres, supra, 507 F.3d at 232 ("We remand for the district court to determine whether . . . both investigative and administrative purposes motivated the illegal arrest and fingerprinting, in which case the fingerprint **and attendant record evidence** must be suppressed.") (emphasis added); United States v. Olivares-Rangel, supra, 458 F.3d at 1121 ("Because the officers used Defendant's fingerprints to obtain his A-file, if those fingerprints are determined to be suppressible as fruits of the poisonous tree, then it follows that the A-file should also be suppressed.").

The fundamental policy basis behind the exclusionary rule is that only evidence that "has been come at by exploitation" of illegal police action is "fruit of the poisonous tree" and subject to suppression. Wong Sun, supra, 371 U.S. at 488. The emphasis is on determining whether the illegal police operations were spurred on by the promise of obtaining the subject evidence, in which case the evidence may be subject to the exclusionary rule. In these circumstances, a proper attenuation analysis must include a determination of whether the illegally-obtained evidence was gained for investigatory purposes or for purely administrative

purposes. United States v. Oscar-Torres, supra, 507 F.3d 224; United States v. Olivares-Rangel, supra, 458 F.3d 1104.

A police car stop – under any circumstances – is a stressful, unpleasant experience. When it occurs without reasonable justification, it becomes a quintessential example of the type of governmental action the Fourth Amendment was designed to eliminate. Yet, with the new rule in place as advanced by the New York Court of Appeals, the police have virtually no incentive to stop performing illegal stops. "Fishing expedition" car stops, under the new rule, will either uncover motorists without valid driver's licenses, who cannot complain that the stop was violative of the Fourth Amendment, or they will inconvenience motorists with valid driver's licenses who will be relieved to be allowed to leave without a ticket. In either event, the police will not receive any disincentive for performing the illegal stops, and will be motivated to conduct illegal stops as a tool to investigate motorists' driving records.[2] Allowing the police carte blanche to benefit from such intrusive investigatory practices, contradicts the very purpose behind the exclusionary rule.

[2]In situations where police uncover both an unlicensed driver and contraband during a vehicular stop, if the exclusionary rule prohibits the introduction of the contraband but allows in the DMV records, thereby limiting the prosecution of the case to the unlicensed offense, the motivation to continue illegally stopping vehicles is not diminished in any way because the offense that remains, unlicensed operation of a motor vehicle, is a serious offense, in and of itself, with harsh penalties and other collateral consequences associated with it. Law enforcement officers would still conclude that unlawful car stops were worth exploiting.

This public policy concern was summarized by the Federal District Court of New Mexico:

> If police are free to detain and question anyone they want in order to obtain the person's identity, without fear of the exclusionary rule, they may be tempted, even in the absence of reasonable suspicion, to single out people of certain ethnic backgrounds for questions. United States v. Juarez-Torres, supra, 441 F.Supp.2d at 1122.

In sum, petitioner's request for a writ of certiorari should be granted so that this Court can properly address the issues outlined above. This Court should take this opportunity to reaffirm its holding in INS v. Lopez-Mendoza, explain the jurisdictional ramifications of the "body" or "identity" language in that case, and insert clarity into the question whether DMV records and other pre-existing government-compiled documents accessed by the police and utilized to justify an arrest should be considered suppressible "fruit" of unlawful police action violative of the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KRISTINA SCHWARZ
RICHARD JOSELSON*

*Counsel of Record

KRISTINA SCHWARZ
Of Counsel

June 22, 2010

APPENDIX A