4th 5th Cir.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FELIX HUMBERTO BRIGNONI-PONCE, Defendant-Appellant.	)	No. 73-2161 EN BANC SUBMISSION

Appeal from the United States District Court
for the Southern District of California
Honorable Howard B. Turrentine, Judge Presiding

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FELIX HUMBERTO BRIGNONI-PONCE, Defendant-Appellant.	)	No. 73-2161 EN BANC SUBMISSION

Prior Proceedings

On 8 October 1973 this case was argued before Circuit Judges Duniway and Sneed and District Judge Sweigert who on 9 October 1973 entered an Order deferring submission of the case for ninety days, or until this Court decided the retroactivity of Almeida-Sanchez v. United States, and the question whether a particular checkpoint must be the "functional equivalent" of the border and what is such functional equivalent. Thereafter, on 31 October 1973, the assignment to the 8 October 1973 panel was withdrawn and the case was set for en banc rehearing and submission with the argument in United States v. Bowen, No. 72-1012. This supplemental brief is submitted pursuant to the 31 October 1973 Order for en banc submission.

Defendant contends that the stop of his automobile north

of the closed San Clemente checkpoint solely because he and his two passengers appeared to be of Mexican descent violated the Fourth and Fifth Amendments and that Almeida-Sanchez v. United States, ___ U.S. ___ (1973) and United States v. Mallides, 473 F.2d 859 (9th Cir. 1973) should be applied to that stop for the following reasons:

1. The stop of Defendant solely because he and his two passengers appeared to be of Mexican descent constituted the application of race as the governing basis for administering 8 U.S.C. § 1357 and 8 C.F.R. § 287 in violation of the Fifth Amendment.

2. The stop of Defendant north of the closed checkpoint is not distinguishable from the roving stop condemned in Almeida-Sanchez.

3. Assuming that the stop of Defendant north of the closed checkpoint is deemed a checkpoint stop, the San Clemente checkpoint is not the functional equivalent of the border and founded suspicion is required to stop vehicles at checkpoints not the functional equivalent of the border.

4. Almeida-Sanchez presents no choice between prospective or retroactive application of new constitutional interpretations but merely affirms the well established Weeks-Carroll doctrine.

5. The proper exercise of the supervisory power of this Court requires that Almeida-Sanchez be applied to all

appeals held in abeyance, recalendared or prosecuted after the granting of certiorari in Almeida-Sanchez.

6. Almeida-Sanchez must be given retroactive effect under the Supreme Court's three criteria.

FACTS

The facts necessary to en banc submission are:

On 11 March 1973 the San Clemente checkpoint was closed because of inclement weather. During the early evening hours Border Patrol Agent Terrance J. Brady parked his patrol car off Interstate 5 at the immigration checkpoint to observe northbound traffic. (R.T. 15-18) [1/] He placed his patrol car at a ninety degree angle to the interstate to enable him and his partner, Agent Harkins, to see the drivers and the occupants of northbound vehicles. Observing a 1969 Chevrolet whose occupants appeared to be of Mexican descent pass through the closed checkpoint, Agent Brady and his partner pursued and stopped the vehicle. (R.T. 18-19) The only thing unusual about the Chevrolet was that it was traveling north on Interstate 5 and that the people inside the automobile appeared to be of Mexican descent. The automobile was stopped solely

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1/ "R.T." refers to the Reporter's Transcript.

because it contained Mexican appearing people. (R.T. 21-23) The interrogation of the occupants of the Chevrolet disclosed that the two passengers were illegal aliens. (R.T. 20, 24-25)

1. The stop of Defendant solely because he and his two passengers appeared to be of Mexican descent constituted the application of race as the governing basis for administering 8 U.S.C. § 1357 and 8 C.F.R. § 287 in violation of the Fifth Amendment.

The record is unequivocal that there was nothing unusual about the 1969 Chevrolet observed by Border Patrol Agents Brady and Harkins as it passed through the closed San Clemente checkpoint early on the evening of 11 March 1973 and that Agent Brady stopped the vehicle solely because the people inside the Chevrolet appeared to be of Mexican descent. (R.T. 21-23) The statute and regulation, 8 U.S.C. § 1357 and 8 C.F.R. § 287, under which Agent Brady conducted the stop makes no discrimination as to Mexican appearing persons. However, Agent Brady did. He applied the impermissible assumption that the pigmentation of the skin of Defendant and his two passengers rendered them more likely to be engaged in immigration violations. He distinguished between the white and Mexican appearing Interstate 5 travelers although the "appeared to be of Mexican descent" described thousands of American citizens, United States v. Camacho, 468 F.2d 1382, 1383 (9th Cir. 1972), United States

v. Mallides, 473 F.2d 859, 860 (9th Cir. 1973), whose right to use the highways cannot be denied or curtailed without due process of law. Wall v. King, 206 F.2d 878, 882 (1st Cir. 1953); United States v. Mallides, supra.

The testimony of Agent Brady that he stopped the 1969 Chevrolet solely because its occupants were Mexican appearing reflects his attitude that Mexican appearing travelers constituted a separate class and his distinguishing between white and Mexican appearing in his administration of the law. His interference with the movement of Defendant based upon the arbitrary and unjustified standard of the Mexican appearing class is as violative of equal protection and due process as the discrimination condemned by the Supreme Court in Yick Wo v. Hopkins, 118 U.S. 356 (1886) [discrimination is issuance of licenses]; Gaines v. Canada, 305 U.S. 337 (1938) [discrimination in the study of law]; Hernandez v. Texas, 347 U.S. 475 [discrimination against Mexicans in jury service]; Bolling v. Sharpe, 347 U.S. 497 (1954) [discrimination in school attendance]; Loving v. Virginia, 388 U.S. 1 (1967) [miscegenation].

As the Supreme Court said more than eighty years ago:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar cir-

cumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." Yick Wo v. Hopkins, supra, 118 U.S. at 373-374 (1886). See, United States v. Steele, 461 F.2d 1148 (9th Cir.1972).

2. The stop of Defendant north of the closed checkpoint is not distinguishable from the roving stop condemned in Almeida-Sanchez.

On 11 March 1973 the San Clemente checkpoint was closed because of inclement weather. (R.T. 15, 18) Agents Brady and Harkins were parked off Interstate 5 at the closed checkpoint to observe northbound traffic as it passed through the closed checkpoint. (R.T. 18) As the 1969 Chevrolet passed through the closed checkpoint, the Agents observed that its occupants were Mexican appearing, pursued the Chevrolet and stopped it. (R.T. 18-19) There is no distinction between the stop of Defendant and that in Almeida-Sanchez, and the Government cannot convert an otherwise roving stop into a checkpoint stop by the mere presence of the patrol car at the closed checkpoint.

Here Defendant was not stopped at the checkpoint. He had passed through the closed checkpoint when the Agents pursued him and stopped his vehicle north of the closed checkpoint. The position of the Government that the stop of the Defendant was a checkpoint stop is untenable where the evidence adduced by the Government established that the San Clemente

checkpoint was closed because of inclement weather and Agents Brady and Harkins had merely parked their vehicle off the right of the closed checkpoint at a ninety degree angle to Interstate 5 to observe northbound traffic, that the Agents observed the Mexican appearing occupants of the Chevrolet as it passed through the closed checkpoint, pursued the vehicle and stopped it north of the closed checkpoint. (R.T. 18-23)

3. Assuming that the stop of Defendant north of the closed checkpoint is deemed a checkpoint stop, the San Clemente checkpoint is not the functional equivalent of the border and founded suspicion is required to stop vehicles at checkpoints not the functional equivalent of the border.

In United States v. Barron, 472 F.2d 1215, 1217 (9th Cir. 1973), this Court sustained the San Clemente checkpoint stop, emphasizing the governmental interest in preventing and detecting the illegal entry of aliens and that the checkpoint had been set up on a major north-south highway extending to the Mexican border at a location where transportation of aliens was known to occur and distinguished Almeida-Sanchez on its facts. The "government interest" stressed by the Barron Court was weighed and rejected in favor of the Fourth Amendment in Almeida-Sanchez v. United States, ____ U.S. ___ (1973), where Mr. Justice Stewart said:

"It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercise of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." ___ U.S. ___ at ____.

Although Almeida-Sanchez concerned a random roving stop and search, the Court recognized that the intrusive border search might be conducted at functional equivalents of the border. Such searches were limited to:

"...established station near the border, at a point marking the confluence of two or more roads that extend from the border,..." ___ U.S. at ____.

The Court limited such searches to established stations "near" the border, "at a point marking the confluence of two or more roads that extend from the border." Consequently, there is nothing magical about the term "checkpoint" which converts an otherwise unconstitutional stop and search into a permissible one unless that checkpoint is "near" the border "at a point marking the confluence of two or more roads that extend from the border." The San Clemente checkpoint which is located on Interstate 5 approximately sixty-five miles from the border

does not qualify as a functional equivalent of the border within the limitations of the language of Mr. Justice Stewart.

The relevant factors enumerated by Mr. Justice Powell in his concurring opinion in Almeida-Sanchez in his advocating the securing of "area" search warrants require the rejection of stops at the San Clement checkpoint or north of that checkpoint as in the instant case. The factors which Mr. Justice Powell stated must be considered are: (1) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (2) the proximity of the area in question to the border; (3) the extensiveness and geographic characteristics of the area, including the roads therein and their use, and (4) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

The San Clemente checkpoint is located "where transportation of aliens who had illegally entered the United States (is) known to occur." United States v. Barron, 472 F.2d at 1217. The frequency of that transportation is not reflected. 2/

2/ Although there is no evidence in the instant record as to illegal alien traffic, in United States v. Heath, No. 73-1008, pending before this Court, Border Patrol Agent Colvin testified that not one alien was discovered during his seventy to eighty searches of vehicles at the San Clemente checkpoint. (Heath Transcript at 36, 40).

Interstate 5 is used extensively and there is an unnecessary degree of interference with the rights of innocent travelers because the checkpoint is located more than sixty miles from the border in a densely populated area. 3/

The stop of a vehicle at the San Clemente checkpoint, therefore, requires a founded suspicion. Here Defendant was stopped north of the checkpoint solely because he was driving north on Interstate 5 and he and his passengers appeared to be of Mexican descent. The stop of his vehicle conflicts with United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973) where this Court said:

> "...there is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite." 473 F.2d at 861.

3/ Statistics furnished the Solicitor General by the Immigration and Naturalization Service in Almeida-Sanchez estimated that ten million vehicles passed through the permanent and temporary checkpoints in fiscal year 1972; that slightly less than two million of the ten million were stopped and that fewer than 400,000 of the vehicles stopped were searched for aliens. Of the 400,000 checkpoint searches, plus the unlisted number of roving searches, only 39,243 deportable aliens were discovered. (Brief for the United States, Almeida-Sanchez v. United States, No. 71-6278, at pages 25, 26).

That 39,243 aliens were discovered does not mean that 39,243 vehicles of the nearly two million vehicles stopped contained aliens, or that the 39,243 aliens were discovered at checkpoints.

4. Almeida-Sanchez presents no choice between prospective or retroactive application of new constitutional interpretations but merely affirms the well established Weeks-Carroll doctrine.

Mr. Justice Day, writing for the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914), enunciated the constitutional principle that evidence illegally obtained by federal officers may not be introduced in a federal criminal trial. The Weeks exclusionary rule was followed in Almeida-Sanchez v. United States, __ U.S. ___ (1973).

The Almeida-Sanchez Court also followed the "warrantless search of an automobile based upon probable cause" doctrine first enunciated by Mr. Chief Justice Taft in Carroll v. United States, 267 U.S. 132 (1925), stating:

> "... the Carroll doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search." ____ U.S. at ____.

Carroll was followed in Husty v. United States, 282 U.S. 694 (1931), where Mr. Justice Stone (later Chief Justice) said:

> "The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause [citing Carroll]" At 695

In Brinegar v. United States, 338 U.S. 160 (1949) the

Court sustained the warrantless search of an automobile by federal officers, quoting the Carroll doctrine.

Mr. Justice White relied on Brinegar and Carroll in reversing Dyke v. Taylor Implement Co., 391 U.S. 216, 221-222 (1968), and quoted Carroll with approval in Chambers v. Maroney, 399 U.S. 42, 48,49 (1970).

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), Mr. Justice Stewart explained and distinguished Carroll. He also emphasized the word "automobile" is not a "talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. 443, 461-462.

The exception to the warrant requirement permitting the warrantless search of an automobile upon probable cause first enunciated by Mr. Chief Justice Taft in the 1925 Carroll case and followed by the Supreme Court in 1931, 1949, 1968 and 1970 had faded and disappeared in this circuit before Mr. Justice Stewart wrote the Coolidge opinion. It is uncertain when the fading process commenced. It did not[4/] originate with the 1961 and 1963 opinions written by Circuit Judges Barnes and Hamlin in Contreras v. United States, 291 F.2d 63 (9th Cir. 1961) or Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963).

4/ As erroneously contended in the opinion of District Judge Byrne in Fumagalli v. United States, 429 F.2d 1011, 1012-1013 (9th Cir. 1970).

The probable cause requirement was applied in Contreras where the Court asked: "Under the circumstances did Inspector Potter have probable cause to search the car and to examine the paper sack?" and answered it negatively. 291 F.2d at 66.

As pointed out by Judge Hamlin in Fernandez, the Contreras Court merely "concluded that the stopping of a car at a checkpoint 72 miles from the border on Highway 395 was proper for the purpose of establishing the nationality of the driver." 321 F.2d 283, at 286.

Probable cause continued its improper fading in the Ninth Circuit in the dicta of Barba-Reyes v. United States, 387 F.2d 91, 92-93 (9th Cir. 1967), which stated, "There can be no question that the officer was fully authorized to stop the vehicle which appellant was driving and to inspect the trunk of the automobile." The opinion of the Court reflects that the search of the vehicle was not considered "because of appellant's failure to put in issue the admissibility of the now questioned evidence at any stage of the proceedings in the district court." 387 F.2d at 93. Nevertheless, the dye had been cast and it was clear that Contreras and Fernandez were rapidly disappearing as precedents in the area.

The probable cause requirement to search a vehicle first enunciated in Carroll finally disappeared in this Circuit in United States v. Elder, 425 F.2d 1002 (9th Cir. 1970) where District Judge Byrne said:

"It is clear that a warrantless search for aliens may not extend into places in which no person could hide." (citing Contreras and other cases [5/] which reversed the searches of areas where no alien could be concealed. 425 F.2d at 1004.

While accurate in its holding, Elder's language made clear by logical corollary that warrantless searches for aliens could extend into places where a person could hide. With this decision, the Ninth Circuit crossed the Fourth Amendment Rubicon into an area where border patrol agents were permitted to stop vehicles without probable cause or founded suspicion. The process was complete. Probable cause had faded into the deep folds of the Fourth Amendment with but a single dissent. United States v. Almeida-Sanchez, 452 F.2d 459, 461-468 (9th Cir. 1971).

The correction of this Court's erroneous decisions that the Fourth Amendment faded away and disappeared in the presence of the omnipotent border patrol officer neither overruled nor enlarged prior constitutional norms. Consequently, Defendant here seeks only the application of the well established principle dating back forty-eight years and consistently followed by the Supreme Court thereafter. The question then is not whether Almeida-Sanchez should be applied retroactively but whether the 1925 Carroll decision and its progeny should be applied prospectively to the March 1973 stop of Defendant.

5. The proper exercise of the supervisory power of this Court requires that Almeida-Sanchez be applied to all appeals held in abeyance, recalendared or prosecuted after the granting of certiorari in Almeida-Sanchez.

Although the preceding contention would appear dispositive, this case could be decided under the supervisory power of this Court. See, Burton v. United States, 483 F.2d 1182, 1187, 1191 (9th Cir. 1973), where Circuit Judges Ely and Choy recognized the supervisory power of this Court. Here the stop of Defendant occurred on 11 March 1973 and Almeida-Sanchez, which had been scheduled for argument before the Supreme Court in December 1972 but was postponed because of the heart attack of defense counsel, was argued 19, 28 March 1973. This Court in affirming the conviction of Flores-Ramos, No. 73-1040, extended the time for petitioning for rehearing because of the Almeida-Sanchez case then pending before the Supreme Court. Similarly, this Court entered orders in other cases holding them in abeyance or recalendaring them pending the Almeida-Sanchez decision. See, United States v. Maddox, No. 72-2017; United States v. Torres-Rios, No. 72-3092; United States v. Heath, No. 73-1008. This case as well as all others prosecuted since the granting of certiorari in Almeida-Sanchez could be reversed under the supervisory power of this Court without resolution of the retroactive or retrospective application question.

A. To deny Almeida-Sanchez application to appeals on direct review which were encouraged by the practice of this Court would work a cruel hardship on defendants who bypassed plea bargain advantages in order to preserve their Fourth Amendment rights.

There are strong policy reasons why the supervisory power of this Court should be invoked to apply Almeida-Sanchez to the cases currently before this Court on direct appeal. Many of these cases are before the Court on stipulated-fact trial records in which defendants forfeited obvious plea-bargaining advantages derived from guilty pleas in return for possible reversals after trial under Almeida-Sanchez. See, Santobello v. New York, 404 U.S. 257 (1971). By the practice of holding appeals in abeyance and recalendaring others pending the adjudication of Almeida-Sanchez, this Court affirmatively encouraged this practice. Now that Almeida-Sanchez has corrected the misapplication of the law and reaffirmed constitutional norms followed by the Supreme Court since 1925, this Court should not exclude the appeals pending on direct review from the prophylactic benefit of the decision and cruelly dash the reasonable expectations of defendants who surrendered plea bargains in reliance upon the correction of the law by the Supreme Court and the belief that this Court intended to apply that correction to their cases as indicated by its numerous orders which held cases in abeyance, recalendared others and extended the time for filing petitions for rehearing in yet others.

B. To deny Almeida-Sanchez application to cases on direct review would reward the government for its 41 years of illegal immigration stop and search practices.

As set forth in Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963), the Immigration Service has randomly stopped and searched vehicles at checkpoints for more than 41 years.[5/] The stops and searches prior to 1946 were illegal and without the benefit of an authorizing statute or regulation. A close examination of the statute involved in this case, 8 U.S.C. § 1357(a) and (c), reveals no legislative intent to grant the Immigration Service a carte blanche to conduct causeless stops and searches for aliens within 100 miles of the border. The intent of Congress may have been to grant authorization for such stops and searches at functional equivalents of the border and not checkpoints located more than sixty miles from the border.

5/ Fernandez v. United States at 286: "... the check point at which appellant's car was stopped was about one quarter mile from the Pacific Ocean and 60 to 70 miles north of the Mexican border. The following evidence was introduced by the government concerning the location of this check point:
"Many aliens who were illegally in the United States had been found at that checkpoint. It had been in operation at least since 31 years before appellant was arrested. There were at least a dozen of such checkpoints in operation along the border between the United States and Mexico."

See, Appendix B where Attorney General Biddle cited the lack of authority in 1945 for such stops and searches.

Almeida-Sanchez did not declare 8 U.S.C. § 1357 unconstitutional but merely read the probable cause requirement into the statute and the implementing regulation. Since Congress did not authorize probable causeless stops and searches, it was unnecessary to vitiate the statute. The statutory provision merely allows Immigration officers, without warrants "within a reasonable distrance from any external boundary, to board and search for aliens...any vehicle...for the purpose of patrolling the border to prevent the illegal entry of aliens..." This section of the statute was the product of Attorney General Biddle's 1945 letter to Representative Dickstein, Chairman of the House Committee on Immigration and Naturalization. (Appendix B to this brief quotes the letter in full) The letter which "quite completely explains the objective of the bill" (8 U.S.C. § 1357) demonstrates: 1) that the Attorney General was the guiding force behind enactment of the statute, having himself submitted a similar bill the prior year (1944) and 2) that the language of § 1357(a)(3) dovetails with that of the Attorney General's suggested language. However, there is no indication that the Attorney General was suggesting the promulgation of a patently unconstitutional statute or the overruling of the 1925 Carroll probable cause requirement.

Scrutiny of § 1357 reveals that subsection(a)(3) is the only section which omits the probable cause requirement. However, this was clearly not done to grant a carte blanche search

authority to Immigration agents. A majority of the Almeida-Sanchez Court agreed. That the Government has been acting under the erroneous construction of the statute by the appellate court is insufficient reason to decline to apply the proper construction to all cases pending before this Court on direct review. The statute has always required probable cause and without a Supreme Court decision, statute, or regulation on which to place "reliance", the Government is at a loss to meet the second requirement of the three-prong test in retroactivity cases. See, Section 6, infra.

6. Almeida-Sanchez must be given retroactive effect under the Supreme Court's three criteria.

Determinations whether decisions of the Supreme Court should be applied retroactively depend upon a careful analysis and balancing of the purposes of the rule announced and the effects of its retroactive or prospective application. Desist v. United States, 394 U.S. 249 (1969); Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965). Retroactivity is to be decided on a case-by-case basis and is not automatically determined by the constitutional provision involved. "Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with

the dictate involved." Johnson v. New Jersey, 384 U.S. 719, 728 (1966).

The Supreme Court has set forth three criteria to be applied in the determination whether new constitutional rules affecting criminal trials are to be applied retroactively or prospectively.

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the affect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967)

Of these factors, the most important is the purpose to be served by the new constitutional rule. Desist v. United States, supra, at 249. The question to be answered is whether the purpose of the rule is advanced by applying the rule retrospectively. The factors of police reliance and the burden placed on the administration of justice by retroactive application have been significant in retroactivity determinations "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity." Desist v. United States, supra, at 252.

A. Purpose: The purposes of the Almeida-Sanchez decision were to reaffirm prior case law relating to automobile searches,

and, as in all exclusionary rule cases, to enforce the Fourth Amendment and protect the fundamental right of privacy by deterring illegal police action. As Almeida-Sanchez has an exclusionary purpose, it is contended by the Government that it should have only prospective application. Since Linkletter v. Walker, supra, which gave partial retroactivity to the exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961) by applying it to all cases not final on the date of the Mapp decision, the Supreme Court has not given retroactive application to three Fourth Amendment decisions. (See Appendix A) Given the fact that evidence seized illegally would not be unreliable, the Court concluded that the deterent purpose of the exclusionary rule to prevent police misconduct would not be advanced by a retroactive application, the misconduct already having taken place. But the decision in Almeida-Sanchez is quite unlike the decisions in other Fourth Amendment exclusionary cases, and the purpose of the Almeida-Sanchez rule will indeed be advanced by retroactive application. Almeida-Sanchez applied well-established Fourth Amendment law to protect the right of privacy by excluding from evidence material seized without a warrant and without probable cause.[6/]

6/ Evidently, this Circuit accepted these principles without question until the 1960's when a gradual erosion took place until 8 U.S.C. 1357 was construed to exempt immigration stops and searches from the Fourth Amendment. See Section 4, pp. 12-14.

Almeida-Sanchez announced no new rule of law, but was the simple application of the principles of Weeks v. United States, 232 U. S. 383 (1914) and Carroll v. United States, 267 U.S. 132 (1925) to a government practice in contravention of those principles. Consequently, while Almeida-Sanchez is a Fourth Amendment case and applies the exclusionary rule, it is unlike other Fourth Amendment decisions in recent years since it did not amplify the evidentiary exclusionary rule, but affirmed existing standards that the Government had attempted to avoid. It is apparent that any decision with the prupose of reaffirming existing constitutional doctrine must receive retroactive application in order to advance the purposes of the decision. If no Supreme Court decision relating to the exclusionary rule is to be given any retroactive effect, the government may, with impunity, conduct illegal searches under the aura of promulgated search regulations or past patterns of conduct. It could then argue reliance on its own illegal regulations or practices to sustain a prospective only application of the Supreme Court decision invalidating its practice. Prospective application in such a case will take away the incentive the government may have to act with greater caution and consideration in the drafting of regulations approaching the outer limits of the Fourth Amendment.

B. Reliance: For reasons already articulated in Section 5 of this brief any inclination to hold Almeida-Sanchez pro-

spective because of the factor of reliance of government agents is also vitiated. The government can point to no Supreme Court decision authorizing such government practices. On the contrary, the applicable Supreme Court decisions, as the Court held in Almeida-Sanchez, provided no support for the legality of such searches. In this respect, the Government is in the same position as the petitioner in Desist v. United States, supra, whose case arose prior to the decision in Katz v. United States, 389 U.S. 347 (1967). There petitioner argued that Supreme Court decisions leading to Katz had so undermined prior cases distinguishing between trespassory searches and those without physical penetration of premises, that that doctrine could no longer be considered controlling. Consequently, the petitioner contended that the decisions in Goldman v. United States, 316 U.S. 129 (1942), and Olmstead v. United States, 277 U.S. 438 (1928), not overruled until Katz, should not have been applied to electronic surveillance conducted before the date of that decision. The Court rejected this argument completely. Desist, supra, at 247-248. Similarly, in this case, any government argument that it relied on developing constitutional law to support Almeida-Sanchez-type searches should likewise be rejected. Surely, if a defendant cannot rely upon case law evolution ultimately leading to a new decision to permit application of the new law to his case, the Government may not rely upon it to bolster its authority to engage in searches

and seizures ultimately declared illegal by the Supreme Court.[7/]

The Government may contend, however, that this is not a case in which it acted without constitutional authority. It may point to the Congressional statute (8 U.S.C. 1357) authorizing a search for aliens at a reasonable distance from the borders, to the regulation (8 CFR 287.1(a)(2) defining that distance as one hundred air miles from the border, and to decisions of three federal Courts of Appeals upholding the random alien search practices under it.[8/] Such reliance is misplaced as is pointed out above under Section 5. With respect to the retroactivity issue, the Government cannot point to one Supreme Court decision affirmatively validating the Almeida-Sanchez-type search. With the exception of Mapp v. Ohio, supra, all the exclusionary rule retroactivity cases dealt with newly announced rules constituting "a clear break with the past," Desist v. United States, supra, at 248, and which overturned rules authoritative until the time of the

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7/ In other words, Government contentions that 8 U.S.C. 1357 and 8 CFR 287.1(a)(2) as well as the more recent decisions of the Ninth Circuit evolved and displaced the probable cause requirements of Weeks and Carroll (so that the latter no longer controlled roving immigration car searches) simply do not hold water as Almeida-Sanchez made clear. Having been made clear, the Government is in no better position than the petitioner in Desist to argue reliance on such a rationale as a basis for prospective only relief.

8/ E.g., United States v. De Leon, 462 F.2d 170 (5th Cir.1972); United States v. Elder, 425 F.2d 1002 (9th Cir.1970); Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir.1966).

new decision. (See Appendix A) Because Almeida-Sanchez does not involve creation of a new constitutional rule, because it reaffirmed existing law and was not a departure from the past, any "reliance" on past illegal conduct does not help the Government here.

C. Effect: There is finally the factor of the effect of a holding of retroactivity upon the administration of justice. Since we deal only with the issue at hand, that is, the retroactive application of Almeida-Sanchez to a case pending on appeal at the time of the Almeida-Sanchez decision, it can affirmatively be said that there will be little effect on the administration of justice. Cases not yet finalized may ultimately have to be reheard for many reasons, and this is fully accepted as a part of our system of justice. Until such cases are final and the legal system's values respecting finality come into play, Cf., Mackey v. United States, 401 U.S. 667, 675 (Harlan, J., concurring and dissenting) (1971), there is no deleterious effect upon the administration of justice of a retroactive application of a decision of the Supreme Court. 9/

9/ Those defendants who were subjected to searches like those in this case and pleaded guilty to charges emanating from evidence derived from the searches are foreclosed from collaterally attacking their convictions based on illegal search and seizure grounds. Tollett v. Henderson, 411 U.S. 258, 267 (1973)

"Since the overwhelming percentage of criminal cases in all state and federal courts, something on the order of 90 percent, are disposed of by pleas of guilty...", it can be seen that a completely historical application of Almeida-Sanchez will have only slight effect on the administration of justice. American Bar Association Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function, March 1971, § 5.3, p. 244.

CONCLUSION

For the foregoing reasons, the Defendant-Appellant, Felix Humberto Brignoni-Ponce, respectfully submits that the stop of his automobile violated the Fourth and Fifth Amendments, that the San Clemente checkpoint is not a functional equivalent of the border, that Almeida-Sanchez applies to the stop at the checkpoint or north of that checkpoint and that the motion to suppress should have been granted.

Respectfully submitted,

Dated: 14 November 1973.

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PROOF OF SERVICE

I, the undersigned, say:

1. That I am a citizen of the United States, over eighteen (18) years of age, a resident of the County of San Diego, State of California, and not a party in the within action;

2. That my business address is 325 West "F" Street, San Diego, California, 92101;

3. That I served the within SUPPLEMENTAL BRIEF FOR APPELLANT

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on counsel for appellee by placing a copy thereof in an envelope, postage prepaid, and addressed to:

Harry D. Steward
United States Attorney
325 West "F" Street
San Diego, California 92101
Attention: Donald F. Shanahan

and to defendant:

Felix Humberto Brignoni-Ponce
P.O. Box 7
San Pedro, California

and the same were deposited in the United States mails at San Diego, California on 14 November 1973.

Marla Y. Morgan
Marla Morgan, Legal Secretary

DECISION	DECISION OVERRULED	NEW RULE ESTABLISHED	DECISION CONCERNING RETROACTIVITY OF NEW RULE	CASES TO WHICH NEW RULE APPLICABLE
Mapp v. Ohio 367 US 643 (1961)	Wolf v. Colorado 338 US 25 (1949)	Exclusionary Rule Applicable to States	Linkletter v. Walker 381 US 618 (1965)	Applicable to cases still pending on direc review at time Mapp decision was rendere i.e. 19 June 1961.
Katz v. United States 389 US 347 (1967)	Olmstead v. United States 277 US 438 (1928) Goldman v. United States 316 US 129 (1942)	Fourth Amendment applies to seizures of speech even though no "trespass" occurs.	Desist v. United States 394 US 244 (1969)	Applicable to cases where the electronic surveillance was conducted after the Katz decision, i.e. 18 December 1967.
Lee v. Florida 392 US 378 (1968)	Schwartz v. Texas 344 US 199 (1952)	Interceptions of conversations done in violation of 47 USC §605 inadmissible in state prosecutions.	Fuller v. Alaska 393 US 80 (1968)	Applicable to cases the trial of which occurs after the date of the Lee decision, i.e. 17 June 1968.
Chimel v. California 394 US 752 (1969)	United States v. Rabinowitz 399 US 56 (1950) Harris v. United States 331 US 145 (1947)	Scope of search incident to arrest is limited to the person and immediate area surrounding him.	Williams v. United States 401 US 278 (1972)	Applicable to cases where the search was conducted after the Chimel decision, i.e. 23 June 1969.

APPENDIX "A"

GENERAL INFORMATION

The following quoted letter of the Attorney General, dated February 10, 1945, addressed to the chairman of the committee, quite completely explains the objective of the bill:

FEBRUARY 10, 1945.

Hon. SAMUEL DICKSTEIN,

Chairman, Committee on Immigration and Naturalization,

House of Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN. This is in response to your request for my views relative to a bill (H. R. 336) to amend the law relating to the authority of certain employees of the Immigration and Naturalization Service to make arrests without warrant in certain cases and to search vehicles.

Under existing law arrests of aliens may be made without warrant only if the alien is entering or attempting to enter the United States in the presence or view of the arresting officer (43 Stat. 1049; 8 U. S. C. 110). Aliens illegally in the United States may be arrested only pursuant to a warrant issued by the Immigration and Naturalization Service. This limitation is cumbersome and at times results in frustrating the ends of justice. The power to make arrests in such cases without a warrant should be conferred on personnel of the Immigration and Naturalization Service with a restriction that an alien so taken into custody should be accorded a hearing without unnecessary delay.

It is also desirable to confer upon personnel of the Immigration and Naturalization Service the power of arrest in cases of violations of immigration laws, subject to the same limitations as those generally imposed on the right of an officer to make an arrest.

Existing law (43 Stat. 1049; 8 U. S. C. 110) confers on personnel of the Service the right to search vessels and vehicles for aliens being brought into the United States. This authority should be extended to cover aircraft, in the light of recent developments in aircraft transportation.

In the enforcement of the immigration laws it is at times desirable to stop and search vehicles within a reasonable distance from the boundaries of the United States and the legal right to do so should be conferred by law.

The bill under consideration embodies the foregoing suggestions and is similar to a bill (H. R. 5464, 78th Cong.) which was introduced at my request and was passed by the House of Representatives on December 4, 1944.

Accordingly, I recommend the enactment of the legislation.

I have been informed by the Director of the Bureau of the Budget that there is no objection to the submission of this report.

Sincerely yours,

FRANCIS BIDDLE, *Attorney General.*

A similar bill, H. R. 5464, passed the House of Representatives in the Seventy-eighth Congress.

The committee are of the opinion that the legislation is highly desirable and, therefore, recommend that the bill do pass.