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Cynthia Bianchi

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CASENOTES

Has the Fourth Amendment Gone Adrift in *United States v. Villamonte-Marquez*?

— U.S. —, 77 L. Ed. 2d 22, 103 S. Ct. 2573 (1983)

At midday on March 6, 1980, two customs officers sighted a forty-foot sailboat anchored in the Calcasieu River Ship Channel.¹ The officers noticed the words "Henry Morgan II" and a home port designated as "Basilea." They suspected that the sailboat was foreign because they did not recognize "Basilea" as a United States port. As they approached the vessel, the officers sighted a man. When the officers twice asked if he was all right, he merely shrugged his shoulders, appearing not to understand English. Shortly thereafter, both officers boarded the boat and asked to see the vessel's documentation. The defendant, Hamparian, handed them a document which appeared to be a request to change the registration of the boat from Swiss registry to French registry. It was written in French and dated February 6, 1980. While talking with Hamparian, the officers smelled the burning odor of marijuana. One of the officers opened the hatch and found 5,800 pounds of marijuana. The other defendant, Villamonte-Marquez, was asleep on top of the bales. The officers arrested both men and charged them with importation and possession of marijuana with intent to distribute the drug.

Prior to their conviction in the United States District Court for the Western District of Louisiana,² the defendants filed a pretrial suppression motion challenging the search of their vessel on constitutional grounds.³ The district court denied the motion. The defendants appealed, alleging that the customs officers' search and seizure of their sailboat and its cargo violated their fourth amendment rights.⁴ The United States Court of Appeals for the

1. The channel connects the Gulf of Mexico with Lake Charles, Louisiana.

2. *United States v. Villamonte-Marquez*, 652 F.2d 481, 482 (5th Cir. 1981).

3. *Id.*

4. U.S. CONST. amend. IV. The fourth amendment provides:

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

Fifth Circuit reversed the judgment of conviction, finding an invalid search.⁵ The court found that there were no articulable facts giving rise to any reasonable suspicion as required by the fourth amendment.⁶ The boarding of the vessel was held to be unreasonable.⁷

On December 21, 1981, the government's motion for a voluntary dismissal in the district court under Federal Rule of Criminal Procedure 48(a) was granted.⁸ On January 18, 1982, almost one month after the case was dismissed, the government filed its petition for certiorari. Notwithstanding this apparent jurisdictional defect, the Supreme Court of the United States granted certiorari and *held*, reversed: Under 19 U.S.C. 1581(a),⁹ customs officers were authorized to board any vessel at any place in the United States to examine documents even without reasonable suspicion of wrongdoing. The Court held that the strong governmental interest in assuring compliance with documentation requirements, particularly in waters where there was a need to deter and to apprehend smugglers, far outweighed the limited intrusion of the defendants' fourth amendment rights. *United States v. Villamonte-Marquez*, ____ U.S. ____, 77 L. Ed. 2d 22, 103 S. Ct. ____ (1983).

Villamonte was a case of first impression in which the Supreme Court of the United States decided the reasonableness of

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5. 652 F.2d at 488.

6. *Id.*

7. *Id.*

8. *United States v. Villamonte-Marquez*, ____ U.S. ____, 77 L. Ed. 2d 22, 35, 103 S. Ct. 2573, 2583 (1983). Subsequent to the Court of Appeals reversal on August 3, 1981:

Rehearing was denied on October 19, and the mandate issued on October 29. On November 20, the Court of Appeals granted the Government's motion to recall the mandate and stay its reissuance until December 7, pending a petition for a writ of certiorari in this court. The Government, however, permitted the stay to expire without filing the petition, and the mandate issued on December 8.

9. 19 U.S.C. § 1581(a) (1976) provides that:

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, of cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

a customs search of a boat under the fourth amendment. The majority held that "police on a roving random patrol may stop and board any vessel at any time, on any navigable waters accessible to the open sea, with no probable cause or reasonable suspicion to believe that there has been a crime or a border crossing."¹⁰

The Court began its examination of the challenged intrusion by analogizing the fourth amendment issues applicable to searches of vehicular traffic on land.¹¹ Generally, automobile searches fall into two categories of fourth amendment exceptions: border searches and checkpoint stops. Border searches normally occur at fixed points along the United States borders with Canada and Mexico. The objective of these searches is to control the flow of goods and illegal aliens across the border. On the other hand, permanent checkpoints are usually located at intersections of important roads leading away from the border. An officer is permitted to stop a car at these checkpoints for brief questioning even in the absence of reasonable suspicion.¹²

In *Almeida-Sanchez v. United States*, the Border Patrol's warrantless search of an automobile twenty-five miles north of the Mexican-United States border was held invalid absent a search warrant, probable cause or consent.¹³ The Court held that the search for illegal aliens could not be classified as a border search because it was conducted at a point too far removed from the border.¹⁴ The Court recognized the validity of true border searches conducted without probable cause or reasonable suspicion but only if they occurred at the border or its functional equivalent.¹⁵

The *Villamonte* Court went on to analyze its prior decisions in *United States v. Brignoni-Ponce*,¹⁶ *United States v. Martinez-Fuerte*,¹⁷ and *Delaware v. Prouse*.¹⁸ In *Brignoni-Ponce*, the Court held that a vehicle stop near the Mexican border, where the only

10. *Villamonte*, 103 S. Ct. at 2581. The majority included Justices Rehnquist, Burger, White, Blackmun, Powell and O'Connor. The dissent included Justices Brennan, Marshall and Stevens.

11. *Id.* at 2579.

12. *Id.*, (relying on *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976)).

13. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

14. *Id.* at 275-276.

15. Carmichael, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51, 88 (1977).

16. 422 U.S. 873 (1975).

17. 428 U.S. 543 (1976).

18. 440 U.S. 648 (1979).

ground for suspicion was that the occupants appeared to be of Mexican ancestry, was not reasonable under the fourth amendment.¹⁹ Except at the border and its functional equivalent, these roving patrols were prohibited from stopping vehicles unless they were aware of "specific articulable facts together with rational inferences from those facts."²⁰ The Court balanced the individual's fourth amendment rights against the government's interests in preventing the illegal entry of aliens. The public's interest in the free flow of legitimate traffic was considered far more important than the government's interests.²¹

In *Martinez-Fuerte*, the scales tipped in favor of the government. The Supreme Court held that the Border Patrol could randomly stop vehicles for questioning, at designated checkpoints away from the Mexican border, even in the absence of any individualized suspicion that the vehicle contained illegal aliens.²² The decision rested on the important public interest in controlling the influx of illegal aliens.²³ This constituted a "far less intrusive" stop than the *Almeida* roving-patrol stop.²⁴ The Court considered the roving patrol stops to be more intrusive because they could occur at any time of the day or night and within 100 air miles of the border.²⁵ Routine checkpoint stops were considered less intrusive because they would not take the public by surprise and they involved "less discretionary enforcement activity."²⁶ Finally, the Court specifically stated that the holding was limited "to the type of stops described in this opinion."²⁷ The Court held that any other detentions had to be based on probable cause or consent.²⁸

The limited holding in *Martinez-Fuerte* was not extended three years later in *Prouse*. In the absence of any traffic or equipment violations, a police cruiser stopped an automobile in Delaware to check the driver's license and car registration.²⁹ The Court held that the state's interest in discretionary spot checks as a means of ensuring safety on the roadways did not outweigh an

19. 422 U.S. at 876.

20. *Id.* at 884.

21. *Id.* at 883.

22. 428 U.S. at 545.

23. *Id.* at 556.

24. *Id.* at 558.

25. *Id.* at 559.

26. *Id.*

27. *Id.* at 567.

28. *Id.*

29. 440 U.S. at 650.

individual's right to privacy. The stop was plainly unreasonable where there was no articulable and reasonable suspicion to believe the motorist was unlicensed or the car was not registered.³⁰

In each of the vehicle-stop precedents, from *Almeida* to *Prouse*, the Court required "that the stop or search be supported by either probable cause, reasonable suspicion or another discretion-limiting feature such as the use of fixed checkpoints."³¹ Yet, the majority in *Villamonte* fashioned a rule that police could board a boat at any time "with nothing more to guide them than their unsupported hunch, whim, or even their desire to harass or to flaunt their authority."³²

The *Villamonte* Court tried to justify its departure from precedent by distinguishing "between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area."³³ The Court reasoned that it was impracticable to have permanent checkpoints on waters where there were no established "avenues" as on land.³⁴ The Court observed that "customs officials do not have the practical alternative of spotting all vessels which might have come from the open sea and herding them into one or more canals or straits in order to make fixed checkpoint stops."³⁵

The majority in *Villamonte* seemingly ignored the facts of the case. The boarding took place in the Calcasieu River Ship Channel—a limited access waterway. Under these circumstances it would have been easy to establish a designated checkpoint for vessels at the entrance to the channel. In *Prouse*, the Court held that random, roving patrol traffic stops were unconstitutional in any setting. The dissent in *Villamonte* recognized this and argued that the rule should apply to searches in inland navigable waterways.³⁶

The *Villamonte* Court granted certiorari because of the conflict in the circuit courts on the constitutional requirements for maritime searches. The Court, however, ignored the reasoning in the circuit court cases without explanation. The Fifth Circuit

30. *Id.* at 663.

31. *Villamonte*, 103 S. Ct. at 2588.

32. *Id.*

33. *Id.* at 2580.

34. *Id.*

35. *Id.*

36. *Id.* at 2589.

Court of Appeals began to confront the issue of maritime searches when drug smuggling in the 1970's sharply increased. The decisions varied in their interpretation of the statutory authority to search boats within fourth amendment constraints.

In *United States v. Warren*³⁷ and *United States v. Freeman*,³⁸ maritime searches were held valid in spite of the fact that the Coast Guard conducted documentation and safety inspections of vessels located outside the 12-mile border limit without reasonable suspicion. Statutory authority provided the basis for the searches under 14 U.S.C. § 89(a).³⁹ Broadly stated, the courts upheld maritime searches, although conducted without probable cause, but failed to explain why it was not required. The assumption was that safety inspections did not require probable cause.

In *United States v. Whitaker*,⁴⁰ the Fifth Circuit extended the *Freeman* and *Warren* decisions to vessels within the three mile border. In *Whitaker*, the court relied upon a broad interpretation of 19 U.S.C. § 1581(a). It recognized the "difficulty of policing the ocean frontiers, the impracticability of stopping vessels at a designated point in the water, the brief and routine nature of the detention and the broad powers historically granted to customs officials."⁴¹ The court did not determine to what extent the fourth amendment would place geographical limitations on stops pursuant to section 1581(a), since the stop was within customs waters.

The Fifth Circuit has also given section 1581 a narrow constitutional interpretation. In *United States v. Guillen-Linares*⁴² and *United States v. Serrano*,⁴³ it held that the boarding

37. 578 F. 2d 1058 (5th Cir. 1978). The Coast Guard boarded a U.S. shrimp vessel on the high seas with cause, pursuant to 14 U.S.C. § 89(a).

38. 579 F.2d 942 (5th Cir. 1978).

39. 14 U.S.C. § 89(a) (1976) provides:

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

40. 592 F.2d 826 (5th Cir. 1979). Since the vessel was sighted within the three-mile border, the border search doctrine was considered irrelevant.

41. *Id.* at 829.

42. 643 F.2d 1054 (5th Cir. 1981). The search was held to be invalid where customs officers' only suspicion was that the shrimp vessel was travelling in Tampa Bay at night.

of a vessel while in inland waters did not constitute a border search and, in the absence of any articulated facts or circumstances which might have aroused customs officers, the search was unreasonable. Both cases construe section 1581(a) narrowly within the fourth amendment constraints of reasonable suspicion.

The court of appeals decision in *Villamonte* relied on *United States v. D'Antignac*⁴⁴ where the *Serrano* rule was developed into the test that "the constitutionality of the boarding [of a vessel in inland waters under section 1581(a)] turns . . . on one of the following two principles: (1) a border search; or (2) a limited investigatory stop based upon reasonable suspicion of law violation."⁴⁵ The latter principle was applied in *D'Antignac*. The court held that the search of the boat was valid since there was reasonable suspicion to believe that the boat operators were involved in drug smuggling.⁴⁶ More importantly, the court noted that section 1581(a) is couched in very broad language but it was circumscribed by the reasonableness requirement of the fourth amendment.⁴⁷

The majority in *Villamonte* ignored the Fifth Circuit's reasoning concerning maritime searches. Instead, it relied on a comparison of boats and cars in order to justify its conclusions. The Court emphasized that vessels had a lesser expectation of privacy. Therefore, vessels were substantially different from vehicles. The Court concluded that the need to make document

without the required navigation lights.

43. 607 F.2d 1145 (5th Cir. 1979). This case involved the boarding of a vessel by officers while it was anchored in waters adjacent to the Gulf of Mexico.

44. 628 F.2d 428 (5th Cir. 1980). The search was held to be valid where the officers had prior information indicating that the vessel was involved in smuggling contraband.

45. 652 F.2d at 485 (citing *D'Antignac*, 628 F.2d at 433).

46. *Id.* at 434. The court considered that the following factors created a reasonable suspicion:

The facts known to Officer Swigert included the following: "He observed the erratic movements of the vessel in the Intercoastal Waterway late at night for approximately one hour; there were no other vessels in the vicinity either before, during or after the sighting and subsequent boarding; he went to investigate and found a shrimp boat bearing the name 'Little Hornet' pulling into the dock; to his knowledge coastal shrimping was out of season; he had received prior information that the 'Little Hornet' was suspected by the United States Custom Service of being involved in smuggling contraband; he had not seen her in the Valona dock area at all during the spring of 1978. Based on the above facts, the district court found that a reasonable suspicion of law violation existed such that Officer Swigert could make an investigatory boarding to ascertain the identity of those aboard."

47. *Id.* at 432.

checks was great and the resultant intrusion on fourth amendment rights was modest.⁴⁸

The dissent in *Villamonte* argued that the intrusion was modest when compared to a full detailed search of a vessel. The comparison was closer to the entry of a private house than to the stops in *Brignoni-Ponce* and *Prouse*.⁴⁹ The dissent also criticized the Court's comparison of cars and boats. It noted that one's expectation of privacy is greater on a boat, since a boat, unlike a car, can serve as one's actual dwelling place.⁵⁰

The dissent, unlike the majority, apparently relied upon the reasoning in the circuit courts. The Ninth Circuit in *United States v. Piner*,⁵¹ held that a search was invalid, where the Coast Guard had randomly stopped a 43-foot sailboat in San Francisco Bay in order to conduct a routine document and safety inspection. Since the Coast Guard did not have cause to suspect noncompliance with rules or regulations, the search was considered unreasonable.⁵² The court also held that the subjective intrusion on an individual's privacy outweighed the governmental need to conduct safety and registration inspections.⁵³

In contrast, the *Villamonte* Court emphasized the government's interests in conducting documentation checks and the difficulty of these inspections at sea. It reasoned that at sea there were no license plates, so it was difficult to determine if a boat was in compliance with the requirements.⁵⁴ Additionally, domestic and foreign boats must follow certain documentation procedures, which provide a means of controlling legitimate trade and the safety on American waterways.⁵⁵

The Court emphasized the difficulty in documentation checks because boats do not carry uniform license plates like cars. As the dissent appropriately noted, it is "easy and comparatively inexpensive to provide boats with such means of identification."⁵⁶ Even assuming that the need to check documents is great, the

48. *Villamonte*, 103 S. Ct. at 2582.

49. *Id.* at 2588.

50. *Id.*

51. 608 F.2d 358 (9th Cir. 1979).

52. *Id.* at 359.

53. *Id.* at 361.

54. *Villamonte*, 103 S. Ct. at 2580.

55. *Id.* at 2581.

56. *Id.* at 2590.

Court did "not explain why that need invariably requires the police to board a vessel, rather than to come alongside or to request that someone from the vessel come on board the police vessel."⁵⁷

The dissent in *Villamonte* also placed more importance on an individual's fourth amendment rights rather than on the public policy of controlling drug smuggling. Although the majority did not discuss the national problem of drug smuggling, this issue looms over the decision. Instead, the majority concealed this issue by discussing the important public policy of documentation checks. In reality, it may not have been documents that the Court was worried about, but drug smuggling. Since the facts leading up to the search did not show any evidence of drug smuggling, the Court was constrained to legitimize this unwarranted search.

Not only did the Court take this opportunity to demonstrate its attitude toward illegal drug activity but it also used it to chip away at the fourth amendment. The government voluntarily dismissed the indictment against the defendants in December 1981. Then, in January 1982, the government filed its petition for certiorari. Normally, dismissal by the court of appeals moots a case. At that point, the Supreme Court should not have considered the case for certiorari because the prosecution of the case had terminated. However, with no explanation of why it overlooked this well-settled principle of appellate review, the Supreme Court granted certiorari. Thus, it took the opportunity to erode the fourth amendment.

The *Villamonte* majority also failed to address the international ramifications of its decision. The "Henry Morgan II" was foreign and carried French documentation papers.⁵⁸ Section 1581(a) authorizes searches of any vessel or vehicle "at any place in the United States or within the customs waters or . . . within a customs-enforcement area . . . or at any authorized place."⁵⁹ The customs agent's power extends to foreign vessels. All transient vessels must obey the rules and regulations of the particular territorial sea.⁶⁰ In general, all ships have the right to enjoy a foreign country's waters while conforming to its laws. Any coastal state can take the necessary precautions to protect itself from acts

57. *Id.*

58. *Villamonte*, 103 S. Ct. at 2580.

59. 19 U.S.C. § 1581(a) (1976). See, full text of the statute, *supra* note 9.

60. Carmichael, *supra* note 15, at 57.

prejudicial to its security.⁶¹ Any boarding and searching of a foreign vessel should be based on balancing the state's interest in controlling its navigable waterways against the foreign vessel's right to freedom of navigation. Factors weighed in this analysis include: "consequentiality and range of interest sought to be protected by the coastal state, the scope of authority claimed, the importance of the area for navigation, the impact of non-interference on the coastal state, and alternative sanctions available for coastal protection."⁶²

A recognized authority, James S. Carmichael, suggests that there should be some standard, such as 'reasonable suspicion,' before searching a foreign vessel, in order to maintain international law's concept of freedom of the seas as proposed in the Convention on the Territorial Sea and Contiguous Zone.⁶³ In general, all ships are entitled to a right of innocent passage through territorial waters.⁶⁴ However, transient vessels must obey reasonable rules and regulations set forth by the sovereign state.⁶⁵ If there is reasonable suspicion to believe a crime or a breach of the peace is taking place, then a boarding of a foreign ship may be necessary.⁶⁶

Not only should reasonable suspicion serve as a threshold requirement for searches of foreign vessels but also searches not satisfying this requirement should be conducted at the border or its functional equivalent or a permanent checkpoint area. In a maritime context, this border or checkpoint area could be the entrance to a river, strait or channel. This would serve the administrative need for document checks without infringing on the vessel's right to free passage. This alternative would reduce the problems of policing the maritime boundary. The Supreme Court has justified these checkpoint searches on the basis of a broad national interest ensuring safety on American waterways.⁶⁷

These suggested standards would conform to the present requirements set forth in the Convention on the Territorial Sea and Contiguous Zone.⁶⁸ By maintaining consistent rules both

61. B. BRITTON & L. WATSON, *INTERNATIONAL LAW FOR SEAGOING OFFICERS*, 78 (3d ed. 1972).

62. Carmichael, *supra* note 15, at 58.

63. *Id.* at 57.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Villamonte*, 103 S. Ct. at 2581.

68. See Articles 14, 16, 17, Convention on the Territorial Sea and Contiguous Zone

inside and outside territorial waters, foreign vessels could enjoy the essence of freedom of the seas. In *Villamonte*, the United States has set a precedent in treating a foreign vessel with a lesser standard than the international convention requires for maritime searches.⁶⁹ Thus, the possible ramifications of this decision may resound internationally.

The Supreme Court has also abandoned fourth amendment protections, apparently in order to promote a public policy against illegal drug smuggling. The application of the balancing test shows that the government's interest in controlling drug smuggling far exceeds the individual's fourth amendment rights. It was precisely this freedom from arbitrary intrusions which the fourth amendment was designed to protect. The majority has minimized the individual's interests at sea by placing the highest premium on law enforcement. Its expansive interpretation of section 1581(a) provides a decision based solely on statutory grounds while abandoning constitutional grounds.

Furthermore, the Court's comparison between cars and boats does not hold water. One's expectation of privacy in a boat may be even higher than in a car since boats can serve as dwelling places. The comparison between cars and boats is simply an excuse to support the nonapplicability of the fourth amendment in an area of the law where it had traditionally been applied by the Fifth and Ninth Circuits. These circuits have consistently interpreted section 1581(a) within the confines of the Bill of Rights.

The Court's argument on documentation checks also proves to be insufficient given the facts of this case. Since the Calcasieu River Ship Channel has a distinct entrance, it would have been possible to stop the "Henry Morgan II" at a fixed checkpoint prior to entering the channel to verify proper documentation. Based on precedent, the search and seizure should have fallen within one of the following categories: (1) a border search; (2) a fixed checkpoint search; or (3) a limited investigatory stop based upon reasonable suspicion.

The Supreme Court's upholding of a search on less than reasonable suspicion, in the absence of any other exception, can only serve to weaken the protection of the individual's rights provided by the fourth amendment. This decision may affect all

[1964], 15 U.S.T. 1606.

69. *Id.*

pleasure boaters. By granting the state this power at sea, there is no limit to the intrusion upon an individual's privacy. The balancing test has tipped too far in the state's direction. Careful application of the balancing test would protect the government's interest in controlling drug traffic by only allowing searches of vessels reasonably believed to be smuggling.

The international consequences of this decision are still unknown. It may, however, have provided foreign governments with a license to create new standards for American vessels passing through their territorial waters. Thus, the time-honored respect for foreign vessels may have been cast adrift in order to foster a strong public policy against drug smuggling.

CYNTHIA BIANCHI