FOURTH AMENDMENT

Removal proceedings are civil in nature and therefore need not strictly follow conventional rules of evidence. *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). Evidence is admissible if it is probative and its use is fundamentally fair. *See id*.; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980). An Immigration Judge may receive into evidence "any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." 8 C.F.R. § 1240.7. However, in removal proceedings, a respondent has the right to a reasonable opportunity to examine and object to the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government. *See* 8 C.F.R. § 1240.10(a)(4).

When a respondent questions the legality of evidence, he must come forward with proof establishing a prima facie case that the Government's evidence was unlawfully obtained. *See Barcenas*, 19 I&N Dec. at 611 (citations omitted). In meeting this burden, an affidavit alone is not sufficient, rather the testimony of the movant is required. *See id*. at 611-12. Once a respondent makes a prima facie showing, the burden shifts to the Government to prove that it obtained its evidence lawfully. *See Ramirez-Sanchez*, 17 I&N Dec. at 505 (citations omitted).

A respondent in removal proceedings cannot generally suppress evidence asserted to be procured in violation of the Fourth Amendment. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (finding the Fourth Amendment exclusionary rule inapplicable to deportation proceedings). However, evidence may be suppressed if it was obtained through an egregious Fourth Amendment violation, or if the use of it would be fundamentally unfair. *See Lopez-Mendoza*, 468 U.S. at 1050-51; *Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994). Evidence that is the fruit of the unlawful action is also suppressible. *See United States v. Crews,* 445 U.S. 463, 470 (1980) and -, 371 U.S. 471, 484 (1963). The Ninth Circuit has interpreted the Supreme Court's decision in *Lopez-Mendoza* to allow for the application of the exclusionary rule even if the probative value of the evidence acquired has not been undermined. *See Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451-52 (9th Cir. 1994); *Cervantes-Cuevas v. INS*, 797 F.2d 707, 710 (9th Cir. 1985).

A. Unreasonable Seizure

Though an immigration officer may stop and question a person in order to investigate whether he is an alien lawfully present in the United States, this power is limited by the Fourth Amendment's prohibition against unreasonable searches and seizures. See INA § 287(a)(1); *see also* 8 C.F.R. § 287.3; *INS v. Delgado*, 466 U.S. 210 (1984) and *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994). An encounter with an officer may be transformed into a seizure "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Delgado*, 466 U.S. at 215 (quoting *United States v. Mendehall*, 446 U.S. 544, 554 (1980)). For a seizure to be reasonable, the officer "must articulate objective facts providing a reasonable suspicion that the subject of the seizure was an alien illegally in this country." *Orhorhaghe*, 38 F.3d at 497.

1. Seizure

The Ninth Circuit has identified several factors that indicate a seizure has occurred, such as the presence of several officers, the display of a weapon, physical contact, or the use of language or tone of voice indicating that an officer's request might be compelled. *See Benitez-Mendez v. INS*, 707 F.2d 1107, 1108 (9th Cir. 1983), rehr'g granted and opinion modified, 752 F.2d 1309 (9th Cir. 1984). A seizure may occur even "when the officer merely indicates by his authoritative manner that the person is not free to leave." *Orhorhaghe*, 38 F.3d at 495. Furthermore, the officer's failure to warn the alien that he is free to refuse his requests and to terminate the encounter weighs in favor of finding a seizure. See id. at 496.

The Ninth Circuit has concluded that a seizure has occurred in the following circumstances: when a Border Patrol agent made a petitioner wait inside his vehicle until his colleagues could verify the alien's immigration status; when an immigration officer prevented a petitioner from leaving a particular area of the factory; and when a petitioner was physically restrained by an immigration officer who grabbed her by the arm and held her for thirty seconds. *See Martinez v. Nygaard*, 831 F.2d 822, 827-28 (9th Cir. 1987); *Benitez-Mendez*, 707 F.2d at 1108.

Conversely, in *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1277 (9th Cir. 1979), the Ninth Circuit concluded that the initial questioning of the petitioner at the door of her apartment did not constitute a seizure. There, two INS investigators knocked on the petitioner's door. *See id*. at 1276. After she answered their knock, they identified themselves and questioned her regarding where she was born and her legal status in the United States. *See id*. The Ninth Circuit found that the petitioner's admissions were voluntary and made under no constraint to invite or allow the investigators into the apartment. *See id*. at 1276-77.

> Example: In the instant case, the respondent was likewise seized when the officer ordered him out of the vehicle, patted him down, took his wallet and ordered him to talk to an ICE officer. The respondent stated in his declaration that he did not feel like the ICE officer would let him leave. The Court finds that a reasonable person would not feel free to leave in this situation, especially in the context where, as here, several patrol cars and law enforcement entities were involved.
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> Example: The respondent was likewise seized when the officer told the respondent that he must accompany him and his partner for questioning at a DHS detention center. After being handcuffed and placed in the back of the officers's vehicle, the respondent could not have reasonably believed that he was free to leave.
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> Example (Ninth Circuit Published): "The government's contention that RRA-A was not arrested until she was formally told she was under arrest and read her Miranda rights is similarly flawed. RRA-A was handcuffed after the inspector discovered the narcotics in the vehicle, separating that detention from the search itself. A reasonable person handcuffed for four hours in a locked security office after a narcotics search would have believed that [s]he was not free to leave. Given the totality of circumstances, then, we conclude that RRA-A's handcuffing was the clearest indication that she was no longer free to leave and therefore find it to be the point of arrest." United States v. Butler, 249 F.3d 1094, 1100 (9th Cir. 2001).

2. Reasonable Suspicion v. Egregious Violation

For a seizure to be reasonable, the officer "must articulate objective facts providing a reasonable suspicion that the subject of the seizure was an alien illegally in this country." See Orhorhaghe, 38 F.3d at 497 (citation omitted). Trained and experienced immigration officers may draw inferences and make deductions based on an assessment of the whole picture, which can supply a basis for a valid investigatory stop predicated on a reasonable suspicion of illegal activity. See United States v. Cortez, 449 U.S. 411, 418-419 (1981).

The Ninth Circuit has concluded that an immigration officer's conduct is egregious if it is "obtained by deliberate violations of the Fourth Amendment or by conduct a reasonable officer should know is in violation of the Constitution." See Orhorhaghe, 38 F.3d at 501; Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994) (all bad faith

violations of an individual's Fourth Amendment rights are sufficiently egregious to warrant application of exclusionary sanction). Conduct may be egregious even if the immigration officer does not employ the use of physical force against the individual. See Orhorhaghe, 38 F.3d at 502 n.20.

Examples of Egregious Violations:

In Orhorhage, the Ninth Circuit found that the warrantless entry into the respondent's apartment without securing his voluntary consent, and based solely on the fact that he had a Nigerian sounding name, was an egregious Fourth Amendment violation. See id.

In United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975), the U.S. Supreme Court held that appearance of Hispanic ancestry was, without more, insufficient to justify an investigatory stop. The Ninth Circuit has similarly found that stopping someone based solely on race constitutes an egregious violation that warrants suppression of evidence. See Gonzalez-Rivera, 22 F. 3d 1441 (holding that evidence had to be suppressed where Border Patrol stopped Hispanic and all other reasons for the stop had low probative value).

In United States v. Heredia-Castillo, 616 F.2d 1147, 1150 (9th Cir. 1980), agents argued that their reasonable suspicion was based on: the presence of illegal aliens in the area earlier in the day; the car driver's illegal presence; and the officer's suspicion that the defendant was the driver's brother. The Ninth Circuit found that the presence of illegal aliens earlier in the day was less significant and that the drivers of the car's prior illegal presence had little, if any, bearing on the question of the defendant's legality. See id. Moreover, the officer gave no basis for his belief that defendant was the driver's brother. See id. Concluding that the Government has enumerated several facts which might cast a certain suspicion on every person in the area who appeared to be of Hispanic ancestry, the Ninth Circuit found that the officer's generalized suspicion was not reasonable. See id.

Examples of Reasonable Suspicion:

In United States v. Pulido-Santoyo, 580 F.2d 352, 354 (9th Cir. 1978), the Ninth Circuit suggested that a Hispanic appearance and the general prevalence of illegal aliens in the area might not be a sufficient basis to stop a car and question its passengers; however, in that case, the investigating agent additionally knew that, only a few minutes earlier, several aliens had escaped on foot. The Court upheld the legality of that investigatory stop. See id.

In a recent unpublished decision, the Ninth Circuit held that the IJ did not clearly err in finding that the agent did not stop Petitioner solely because of his race and that two legitimate, non-racial factors motivated the agent's stop: the petitioner appeared lost and was walking toward the Canadian border on a road frequented by undocumented aliens. See Perez-Quiroz v. Gonzales, 221 Fed. Appx. 676, 2007 WL 625172 (9th Cir. 2007) (unpublished). Where there is a close question, there is no egregious violation of the Fourth Amendment warranting exclusion of the evidence in a civil deportation proceeding. See id.

Conclusion

The Court thus finds that the respondent has / has not presented a prima facie case of a Fourth Amendment violation warranting suppression of his statements. See Lopez-Mendoza, 468 U.S. at 1050-51 (holding that evidence may be excluded if the alien demonstrates that "egregious violations of Fourth Amendment . . . that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained" occurred). Thus, the burden now shifts / does not shift to the Government to justify the manner in which it obtained the evidence. See Barcenas, 19 I&N Dec. at 611; see also Ramirez-Sanchez, 17 I&N Dec. at 505. DHS has / has not given the Court a reasonable explanation for this Constitutional violation.

In conclusion, the following statements will be suppressed: ___[Identify Statements]___.

C. Warrantless Arrest

Section 287(a)(2) of the Act authorizes an immigration officer to arrest an alien without a warrant "if he has reason to believe that the alien . . . is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . . ." INA § 287(a)(2).

The "reason to believe" language has been interpreted as requiring that the arresting officer have probable cause to arrest the alien. See Martinez, 831 F.2d at 828. Under the Fourth Amendment, probable cause, amounts to more than a bare suspicion but less than evidence that would justify a conviction. See Black's Law Dictionary 557 (2d Pocket ed. 2001). In Martinez, the Ninth Circuit concluded that the immigration officers had probable cause to arrest the petitioner after she admitted she was an alien and failed to present her residency card, in violation of the statute requiring that all legal permanent residents carry their residency cards on their person. Id.

In addition, the alien must be "likely to escape" before an immigration officer may effectuate a warrantless arrest. See INA § 287(a)(2). In Matter of Au, Yim and Lam, 13 I&N Dec. 294, 300-01 (BIA 1969), the BIA concluded that the respondents were likely to escape before a warrant could be obtained because they had attempted to flee when they first saw the immigration officers approach them.

Example: Here, the arresting officers had probable cause to arrest the respondent prior to arriving at his apartment complex and consequently had more than sufficient time to request an arrest warrant before arresting him; yet they obtained a warrant almost twenty-four hours after his arrest. Moreover, the respondent did not at any time attempt to flee the officers, but rather invited them into his apartment so that they could question him there. The officers therefore did not have any reason to believe that the respondent was likely to escape before a warrant could be obtained for his arrest.

Conclusion

The Court thus finds that the respondent has / has not presented a prima facie case of a Fourth Amendment violation warranting suppression of his statements. See Lopez-Mendoza, 468 U.S. at 1050-51 (holding that evidence may be excluded if the alien demonstrates that "egregious violations of Fourth Amendment . . . that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained" occurred). Thus, the burden now shifts / does not shift to the Government to justify the manner in which it obtained the evidence. See Barcenas, 19 I&N Dec. at 611; see also Ramirez-Sanchez, 17 I&N Dec. at 505. DHS has / has not given the Court a reasonable explanation for this Constitutional violation.

In conclusion, the following statements will be suppressed: ___[Identify Statements]___.

D. Searches

1. Consent

A search conducted with the consent of a person who is not in custody is valid if the consent is voluntarily given, without any duress or coercion, express or implied. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The Government has the burden of showing that such consent was voluntary, based on the totality of all the surrounding circumstances. See id. at 222-23.

2. Border Searches

Section 287(c) of the Act empowers immigration officials to search, without a warrant, the person and personal effects of arriving passengers if they have reasonable cause for suspecting that such a search would disclose grounds for exclusion from the United States. See INA § 287(c).

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1. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against the unreasonable searches and seizures." U.S. Const. amend. IV. Law enforcement officers may not arrest a person in his home without an arrest warrant, even though they have probable cause to arrest him. *See Payton v. New York*, 445 U.S. 573 (1980). Recognized exceptions include consent, hot pursuit of a fleeing felon, imminent destruction of evidence, and the risk of danger to the police or to other persons inside or outside the dwelling. *See Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (citations omitted).

2. Evidence may also be excluded if the alien demonstrates that violations of the Fourth Amendment by DHS officers are widespread. *See Lopez-Mendoza*, 468 U.S. at 1050-51; *Orhorhaghe*, 38 F.3d at 493.

3. Example (Unpublished Ninth Circuit): "By her own account of the events, Petitioner admitted her identity, alienage, and lack of a driver's license before the police searched her car. The police therefore had probable cause to arrest Petitioner before the alleged violation of her Fourth Amendment rights. Her arrest for driving without a license and subsequent statements were thus not 'fruit of the poisonous tree.'" *See Fernandez-Perez v. Gonzales*, 226 Fed. Appx. 737, 739, 2007 WL 901469 at *1 (9th Cir. 2007) (unpublished) (emphasis added) (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

4. In *Illinois v. Wardlow*, the U.S. Supreme Court held

> [w]hile "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.

Illinois v. Wardlow, 528 U.S. 119, 123-24 (2000) (citing Terry v. Ohio, 392 U.S. 1 (1968) and United States v. Sokolow, 490 U.S. 1 (1989)).