

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HARTFORD, CONNECTICUT**

File: A [REDACTED]

In the Matter of:

[REDACTED]

Respondent

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**IN REMOVAL
PROCEEDINGS**

CHARGE(S): Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (“INA” or “Act”): An alien present in the United States without being admitted or paroled ... is inadmissible.

Section 237(a)(1)(A) of the INA: An alien who at the time of entry ... was ... inadmissible ... is deportable.

APPLICATION(S): Motion to Suppress
Motion to Terminate Removal Proceedings

ON BEHALF OF RESPONDENT:
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ON BEHALF OF DHS:
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

A Notice to Appear (“NTA”) was served upon [REDACTED] (“Respondent”), in person, on June 6, 2007.¹ In the NTA, the Department of Homeland Security (“DHS” or “the Government”) alleges that Respondent is a native and citizen of Mexico who entered the United States at an unknown place on an unknown date and was not then inspected by an immigration officer. Accordingly, the Government charged Respondent with removability pursuant to INA § 212(a)(2)(6)(A)(i). The NTA was filed with the Court on August 20, 2008, thereby vesting it with jurisdiction over these proceedings. See 8 C.F.R. § 1003.14(a) (2008). On October 20, 2008, Respondent filed his responsive pleadings as well as submitted a brief in support of his motion to suppress

¹ A date-stamp on the NTA indicates it was not filed with the Court until August 20, 2008.

evidence and terminate removal proceedings.

The Form I-213 recounts Respondent's arrest as such: The Hartford, Connecticut Fugitive Operations Unit arrested Respondent while attempting to locate an alien fugitive (A# [REDACTED] with the last known address of [REDACTED] New Haven, Connecticut.

In submissions in support of his motion to suppress evidence and terminate proceedings, Respondent asserts that Immigration and Customs Enforcement ("ICE") agents egregiously violated his Fourth Amendment right against unreasonable searches and seizures. Specifically, he avers that ICE agents illicitly entered his home without a warrant and without consent. He also claims that ICE agents egregiously violated his Fifth Amendment right to equal protection and fundamental fairness in his immigration proceedings. Specifically, Respondent asserts that he was targeted solely on the basis of his race and because ICE agents coerced him into making certain statements. Moreover, he claims that ICE agents' violation of ICE regulations and sub-regulatory rules, which bear on his fundamental rights, require termination of his removal proceedings.²

The DHS submitted a response to Respondent's Motions to Suppress Evidence and Terminate Proceedings. Therein, the DHS contended Respondent had failed to establish a *prima facie* showing that: 1) his Fourth Amendment rights had been egregiously violated by ICE agents, 2) his Fifth Amendment rights had been egregiously violated by ICE agents, and 3) ICE agents had violated any applicable regulation necessitating the suppression of evidence or the termination of proceedings.

Respondent has also filed a number of subpoena requests relating to immigration agents involved in his arrest and detention, dated October 20, 2008.

II. Testimonial Summary

A. Respondent's Testimony

Respondent has lived in Connecticut for approximately a year.³ He lives with his wife, children, cousin, and nephew on the second floor of [REDACTED] New Haven, Connecticut. He speaks Spanish and attended high school. Respondent speaks only a meager amount of English. He still lives with his 'distant cousin' and has been living with him for four years. Respondent last saw him a few days prior to the date testimony

² Respondent also contends that his arrest was conducted in a manner that egregiously violated his First and Tenth amendment rights. The Court has been unable to find precedent for the proposition that First and Tenth Amendment claims may be properly entertained in a removal proceeding. In fact, the Second Circuit has expressly declined to fashion an exclusionary rule for evidence obtained in violation of an individual's First Amendment rights in the context of removal proceedings. See *Montero v. I.N.S.*, 124 F. 3d 381, 386 (2d. Cir. 1997). "Beyond violations of the Fourth Amendment, it is clear from *Lopez-Mendoza* that the exclusionary rule is applicable, if at all, only to deprivations that affect the fairness or reliability of the deportation proceeding." *Id.* Thus, because it is not within the competence of this Court to resolve such claims, they will not be considered.

³ His affidavit states that he has lived in Connecticut for eight years.

was proffered. Respondent asserted his Fifth Amendment privilege to the following inquires: information regarding his 'distant cousin' mentioned in his affidavit, including the cousin's name, the whereabouts of his nephew's girlfriend, and the nature of the identification that he provided to the ICE agents.

The following is a synopsis of his testimony as it relates to the discrete constitutional claims he has advanced:

On June 6, 2007, Respondent was home with his wife, two children, and nephew. His 'distant cousin' was at work. Respondent, his wife, and his children were all in the same room, sleeping. He was awakened by the sound of knocking originating from the door facing the front. Then he heard knocking on the back door. Respondent went to the back door and asked 'who's there' in Spanish. He heard 'police' in reply, also spoken in Spanish. He then asked 'who are you looking for' and the officers answered that they were looking for someone named 'Chavez.' Respondent opened the door "a little bit" and observed two policemen. The "heavysset" officer pushed the door open. Respondent stepped back to avoid being hit by the door. Respondent did not ask the officers to come inside. The officers did not ask Respondent any further questions and entered into his apartment. The officers asked about where the front door led and then questioned Respondent about his immigration status, in English. Respondent's son translated the request for his father. Respondent complied and provided the officers with identity documentation containing his name and birth date. He was then arrested, as were his nephew and his nephew's girlfriend.

On re-direct examination, Respondent stated that he was awakened by knocking coming from the first floor door facing the street. He estimated that he opened the door three or four inches to observe the officers at the front door.

B. Respondent's Declaration

Respondent attested to the following in his Declaration, dated October 19, 2008:

Respondent is a 34 year old man who is 'of Latino appearance'. He attended school until the age of 15.

Respondent has lived on the second floor of [REDACTED] [REDACTED] [REDACTED] New Haven, Connecticut, for eight years. He lives there with his family, composed of his wife, their son and daughter, his nephew [REDACTED] [REDACTED] [REDACTED] and a 'distant cousin'.

Early in the morning of June 6, 2007, Respondent was asleep in his bedroom with his wife and two children. Every occupant of the house was present save for his 'distant cousin,' who ordinarily left for work at 6 a.m. At approximately 6:30 a.m., Respondent was awakened by someone 'beating' on the front door. In response, he arose and went to the living room, partially dressed. Respondent states that 'they started ringing the doorbell and beating as if they were going to break down the door. Then I heard beating on the back door.' He yelled "who is it?" through the back door and someone answered

“police” through the back door. Respondent opened the back door ‘just a little bit,’ to ascertain who was at the door, observed two uniformed officers, and shouted back ‘who are you looking for?’ One of the officers said ‘we’re looking for Chavez.’ Respondent answered that there was no one named Chavez living in the apartment.

Then, one of the officers ‘pushed open the door and entered [the] apartment’. Respondent was forced to step back to avoid being hit by the door.⁴ The officer came inside the apartment and stationed himself in front of the back door, with his arms outstretched, blocking the door ‘to prevent anyone from leaving.’ The officer momentarily dropped one arm to allow his fellow officer in, and then resumed outstretching his arm. Respondent’s wife and son came running into the living room.

Respondent, the only person at the door, never told the officers that they had his permission to enter the apartment. No other occupant gave the officers permission to enter and none of the officers showed him a warrant.

The second officer came inside the apartment, walked to the front door, and asked in English where it led. Respondent’s son answered that ‘it’s the front door’. The officer opened the front door, then closed it, and left the apartment through the back door.

Moments later, a male officer, armed with a pistol, and a female officer, came up the back stairway. The first officer, who was carrying a firearm, stationed at the back door, moved his arm to allow them ingress, but then raised his arm again. Respondent ‘did not feel free to leave.’

Respondent did not give his ‘consent for any of the officers to enter. No one in [his] house consented to their entry. None of the officers showed [him] a warrant.’ His wife asked the officers what was happening but they did not respond.

The officer at the back door asked Respondent a question in English. His son told him that the officer was asking whether he had immigration papers. Respondent told the officer, through his son, that he did not want to answer. The officer continued to ask questions even after he was informed Respondent did not want to answer. Respondent ‘did not feel free to leave because the officers had blocked off all of the exits to [the] apartment before they began questioning [him].’

Respondent was standing in the living room and could see the doors of all the bedrooms. While one of the officers was questioning him, he observed a male officer trying to open the door to his cousin’s room. The door was locked, and the officer ‘hit the door with his hand and then kicked repeatedly at the door.’ Respondent later discovered that this kicking caused ‘permanent damage to the lock.’⁵ His cousin was not in the room.

The male officer who kicked the cousin’s door went to the door of [REDACTED]

4 This piece of information is stated in Respondent’s declaration dated September 7, 2008, as a constituent exhibit in his Motion to Advance, filed October 14, 2008.

5 His declaration dated September 7, 2008 states that the officer ‘broke the lock by kicking the door.’

bedroom. The door was unlocked, and he and a female officer entered the room. Several moments later, [REDACTED] and his girlfriend emerged from the room in handcuffs. The two were taken outside via the back door. Respondent was asked for his identification by an officer and Respondent complied by showing identification. The officer then handcuffed Respondent.

C. Testimony of [REDACTED] [REDACTED] [REDACTED] (A# [REDACTED] [REDACTED] [REDACTED])

Mr. [REDACTED] has attained one year of high school education. He asserted his Fifth Amendment privilege to the following inquires: the whereabouts of his girlfriend and the name of an 'unidentified relative,' who is a distant cousin of Respondent, and who was mentioned in his affidavit.

The following is a synopsis of his testimony as it relates to the discrete constitutional claims he has proffered:

On the morning of June 6, 2007, Mr. [REDACTED] was sleeping in his room when he heard knocking coming from the front door on the first floor. He was roused but remained lying in his bed. He then heard footsteps coming up the stairs to the second floor. He could hear voices but he could not discern what the voices were saying. Someone knocked twice on his door and then came into his room. The door to his room was unlocked. Mr. [REDACTED] said nothing. Agents who entered his bedroom told him that they were looking for a man identified as 'Chavez' and Mr. [REDACTED] answered he did not know the individual. He did not say anything else. He was then asked for identification, which he provided to the officers. The agents then instructed him to get dressed and accompany them and he was informed that he would be placed under arrest. Mr. [REDACTED] was then handcuffed.

On re-direct, he stated no one explained to him why he was being handcuffed; he was only told to accompany the officers.

D. Declaration and Supplemental Declaration of [REDACTED] [REDACTED] [REDACTED] (A# [REDACTED] [REDACTED] [REDACTED])

Mr. [REDACTED] attested to the following in his Declaration, dated November 28, 2007:

He is 22 years old and a resident of New Haven, Connecticut. He has not graduated from high school. He lives on the second floor of [REDACTED] [REDACTED] [REDACTED] New Haven, Connecticut, where he has lived for the past six years. He lives with his uncle, [REDACTED] [REDACTED] [REDACTED] wife, and their two children, as well as a 'distant cousin' of [REDACTED] [REDACTED] [REDACTED]

On the morning of June 6, 2007, Mr. [REDACTED] was asleep in his bedroom with his girlfriend, [REDACTED] [REDACTED] [REDACTED]. At around 6:30 a.m., he heard banging on the door to the apartment. Before he rose out of bed, two agents entered into his room. He

asked "who is it?" One of the agents shouted "where is Chavez?" and showed him a photo of the individual. Mr. ██████ replied that he did not know anyone named Chavez. He and his girlfriend were ordered to get out of bed, and then handcuffed and led to the living room. He "did not give [his] consent for the agents to enter."

In the living room, ██████ and his wife were speaking to the officers. They were accompanied by their twelve year old son. Mr. ██████ believes that there were four officers in total and some of the officers were armed. Officers blocked all of the exits to the apartment. He was then taken "straight outside to a van".

Mr. ██████ attested to the following in his Supplemental Declaration, dated February 20, 2008:

His apartment has three bedrooms: one is his, another is for his uncle and his uncle's family, and the other bedroom is for his uncle's 'distant cousin'. The apartment also has a living room, a kitchen, and a bathroom. The apartment has two doors; one in the front facing the street, and another door in the back that faces the parking lot. The walls in his apartment are thin, which allow the voices and footsteps of people in the hallway, living room, and kitchen, to be heard from inside his bedroom.

At the point that the officer 'blocked all exits to the apartment,' no one had asked Mr. ██████ any questions. He states that '[a]ll the officers knew about me when they entered my bedroom and ordered me into the living room was that I appeared Latino and spoke Spanish.'

E. Affidavit provided by the DHS

On February 12, 2009, with respect to Respondent's motions, the Government submitted an affidavit from Richard McCaffrey, a Supervisory Detention and Deportation Officer.

The following is a synopsis of the contents of that affidavit:

Richard McCaffrey has worked in the immigration enforcement field for fifteen years. In 2006, ICE Detention and Removal Operations ("DRO") implemented 'Operation Return to Sender,' which was aimed at apprehending immigration absconders. The operation was planned for June 6, 2007, and a target list was prepared.

At no time during the June 6, 2007, operation did Mr. McCaffrey "observe or become aware of the use of 'unnecessary' force in the interaction between officers involved in the operation and the aliens." Furthermore, "at no time during or after the completion of ... this operation" did Mr. McCaffrey "observe or learn that any house or apartment was entered without informed, voluntary consent," and he did not observe and was not informed "that any consent was withdrawn."

With regards to Respondent's arrest, Mr. McCaffrey was initially outside 200

Peck Street, along with ICE agents, and “there may have been outside law enforcement officers there as well.” He proceeded to the rear of the building, entered the common hallway area, and observed and interacted with the first floor occupants of the apartment.

Mr. McCaffrey explains that “[e]ach officer who requested consent to enter a building was specifically instructed to radio that information into [the] command center as soon as possible ... [and] the name of the person granting consent was then recorded at the command center for inclusion into the Form I-213.”

Mr. McCaffrey has “reviewed the Form I-213” for Respondent.

Lastly, “n[one] of the officers involved in making an entry into [Respondent’s] apartment can recall further detail about the encounter beyond that stated in the I-213 due to the passage of time.”

The DHS also sought to introduce both a photocopy of a Mexican passport purported to be Respondent’s as well as a computer screen printout from ENFORCE, an immigration-enforcement related data collection program. However, the Court will not consider these untimely submissions. First, the materials were only offered to the Court well after Respondent had testified. The Court had provided multiple notices to both parties regarding the limits for submission of supplementary materials and the administrative record was closed. The Court also notes that the Government has not established an adequate foundation for introduction of either document into the evidentiary record.⁶

III. Exhibit List

Exhibit List – Respondent’ Exhibits in Support of his Brief in Support of his Motions, dated October 20, 2008

Exhibit A – Declaration of law student Intern Stella Burch.

Exhibit B – Declaration of Respondent.

Exhibit C – Policy Document from Junta for Progressive Action & Unidad Latina en Accion, “A City to Model: Six Proposals for Protecting Public Safety and Improving Relationships Between Immigrant Communities and the City of New Haven” (2005).

Exhibit D – William Yardley, “New Haven Mayor Ponders ID Cards for Illegal Immigrants,” N.Y. Times, Oct. 8, 2005.

Exhibit E – Jennifer Medina, “New Haven Welcomes Immigrants, Legal or Not,” N.Y.

⁶ In its submission, the Government states that the proffered passport was “obtained in conjunction with [Respondent’s] arrest,” but has not attempted to demonstrate that the document was obtained in a sufficiently unconnected manner, and thus upon independent grounds, to the contested seizure, arrest, and detention of Respondent.

Times, Mar. 5, 2007.

Exhibit F – New Haven Police Department General Order 06-02.

Exhibit G – Mary O’Leary, “Group Wants ID Cards Ready Sooner,” New Haven Register, Dec. 26, 2006.

Exhibit H – Mary O’Leary, “Leader of Hispanic Church Welcomes All, Including Undocumented,” New Haven Register, July 1, 2007.

Exhibit I – “Time to Fix Immigration,” N.Y. Times, Oct. 14, 2005.

Exhibit J – Allan Appel, “Mayor, Chief Promise to Build on Immigrant Plan,; New Haven Independent, Jan. 19, 2007.

Exhibit K – Transcript of NBC news clip: “In Depth: Whose America? Local Governments Find Different ways of Dealing with Illegal Immigrants Who Congregate on Streetcorners Looking for Work,” NBC Nightly News, March 20, 2007.

Exhibit L – Anthony Fiola, “Looking the Other way on Immigrants; Some Cities Buck Federal Policies,” Washington Post, April 12, 2007.

Exhibit M – Robert Jamieson, “Is Seattle Ready to Be Immigrant Sanctuary?” The Seattle Post-Intelligencer, April 12, 2007.

Exhibit N – Michele Wucker, “A Safe Haven in New Haven,” N.Y. Times, April 15, 2007.

Exhibit O – Letter from Julie Myers to John DeStefano, dated July 2, 2007.

Exhibit P – Copy of email messages between unidentified ICE agent and Trooper Carmine Verino, of the Connecticut Department of Public Safety.

Exhibit Q – City of New Haven Board of Aldermen Minutes, Finance Committee, May 17, 2007.

Exhibit R – Henry Fernandez, “Today I am Proud to Call New Haven My Hometown,” New Haven Independent, June 5, 2007.

Exhibit S – Statement of Mayor John DeStefano, Jr. to Board Of Alderman Finance Committee on Municipal Identification Program, May 17, 2007.

Exhibit T – Melissa Bailey, “City ID Plan Approved,” New Haven Independent, June 5, 2007.

Exhibit U – Mary E. O’Leary, “Ortiz Again Claims No Knowledge of Raid,” New Haven

Register, June 19, 2007.

Exhibit V – City of New Haven, Elm City Resident Card Fact Sheet.

Exhibit W – Mary O’Leary, “Municipal ID Cards Likely,” New Haven Register, May 18, 2007.

Exhibit X – Abbe Smith, “More than 1,000 March Downtown,” June 17, 2007.

Exhibit Y – Mara Revkin, “Offering Noncitizens a Local Identity,” American Prospect, July 30, 2007.

Exhibit Z – Mary E. O’Leary, “Cityirate, Claims It’s Retaliation Over IDs,” New Haven Register, June 7, 2007.

Exhibit AA – Nina Bernstein, “Promise of ID Cards is Followed by Peril of Arrest for Illegal Immigrants,” N.Y. Times, July 23, 2007.

Exhibit BB – Copy of Letter from the Connecticut Congressional Delegation to Secretary Chertoff, June 11, 2007.

Exhibit CC – Mark Spencer, “New Haven’s Immigration Drama Grows,” Hartford Courant, June 15, 2007.

Exhibit DD – Copy of Letter from Julie Myers to National Immigration Forum, July 6, 2007.

Exhibit EE – Mark Zaretsky, “Fear Grips Immigrant Community,” New Haven Register, June 17, 2007.

Exhibit FF – Jennifer Medina, “Arrests of 31 in U.S. Sweep Bring Fear in New Haven,” N.Y. Times, June 8, 2007.

Exhibit GG – Copy of Letter from Secretary Chertoff to Senator Chris Dodd, June 14, 2007.

Exhibit HH – Department of Homeland Security Office of Inspector General, An Assessment of United States Immigration and Customs Enforcements’ Fugitive Operations Teams, March 2007.

Exhibit II - Print-out from ICE Office of Detention and Removal Operations National Fugitive Operations Program.

Exhibit JJ – Melinda Tuhus, “Despite Raids, IDs for All,” In These Times, Aug. 2007.

Exhibit KK – Elizabeth Hamilton, “Passion for Justice,” Hartford Courant, July 23, 2007.

Exhibit LL – Donna Schaper, “Punishing Immigrants, Whatever Happened to Land of Welcome and Opportunity,” Hartford Courant, June 17, 2007.

Exhibit MM – Copy of the ICE Pre-Operations Plan.

Exhibit NN – Robert C. Davis & Edna Erez, “Immigration Populations as Victims,” National Institute of Justice (1998).

Exhibit OO – Orde F. Kittrie, “Federalism, Deportation, and Crime Victims Afraid to Call the Police,” 91 Iowa L. Rev. 1449, 1450-51 (2006).

Exhibit PP – Robert C. Davis, Edna Erez & Nancy Avitabile, “Access to Justice for Immigrants Who are Victimized: The Perspectives of Police and Prosecutors,” 12 Crim. Justice Policy Rev. 183 (2001).

Exhibit QQ – Virginia MOU and its adverse Implications for Immigrant Women and Girls, Tahirih Justice Center.

Exhibit RR – Nawal H. Ammar, et al., “Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA,” 7 Int’l J. of Pol. Sci. and Management 230 (2005).

Exhibit SS – “City of New Haven, Board of Aldermen Approve Acceptance of Funds for Municipal Identification Program”.

Exhibit TT – Statement by Richard D. Clarke, Former White House National Security Coordinator for Security and Counter-Terrorism in the Clinton and Bush Administrations, Oct. 19, 2007.

Exhibit UU – Mary E. O’Leary, “City IDs Don’t Prove Voter Eligibility, Blumenthal Rules,” New Haven Register, Sept. 7, 2007.

Exhibit VV – Mary O’Leary, “Group may Urge Illegal Aliens to Make City their Destination,” New Haven Register, June 14, 2007.

Exhibit WW – In re: Herrera-Priego, USDOJ EOIR (New York, N.Y., July 10, 2003) (Lamb, IJ).

Exhibit XX – Letter from Karen V. Lang to Congresswoman Zoe Lofgren Letter on ICE raids, dated March 14, 2007.

Exhibit YY – Declaration of Father James Manship, St. Rose of Lima Catholic Church, New Haven, Connecticut, dated June 20, 2007.

Exhibit ZZ – M-69: The Law of Arrest, Search, and Seizure for Immigration Officers,

last updated January 1993 by Patrick McDermott, William Odencrantz, Liz Hacker, and Judith Patterson. Available on Lexis-Nexis, at INS Manuals 80-89.

Exhibit AAA – Declaration of Student Intern Jane Lewis, dated Oct. 20, 2008.

Exhibit BBB – Floor Plan of Respondent’s Apartment.

Respondent’s Motion to Supplement the Record, filed October 20, 2008

Exhibit A – Declaration of Sara Edelstein

Exhibit B – Declaration of Respondent

Omnibus Appended Materials to Respondent’s Motion to Supplement the Record – November 14, 2008

Exhibit A – Declaration of law student intern Sara Edelstein.

Exhibit B – ‘Target List’ of June 2007 ICE enforcement operation in New Haven, CT.

Exhibit C – Danahar v. Freedom of Information Com’n, 2008 WL 4308212 (Conn. Super., Sept. 5, 2008).

Exhibit D – Letter from Henri Alexandre, Assistant Attorney General of the State of Connecticut, to Michael Wishnie, dated October 20, 2008.

Exhibit E – Series of E-mails dated June 11, 2007.

Exhibit F – Letter from Douglas P. Morabito, Assistant United States Attorney, to Micheal Wishnie, dated Oct. 15, 2008.

Exhibit G – Declaration of Lawrence Mulvey, Police Commissioner of Nassau Country, New York.

Omnibus Brief and Exhibits to Supplement Record – December 3, 2008

Exhibit A – Declaration of law student intern Hunter Smith.

Exhibit B – Target List, for the June 2007 enforcement operation in New Haven, CT.

Exhibit C – Vaughn Index, ULA v. DHS, No. 3:07-cv-1224 (MRK), Dkt. # 53, 1-2 (D. Conn., filed November 6, 2008).

Exhibit I – Declaration of law student intern Sara Edelstein.

Exhibit J – Letter from Michael Wishnie and Deborah Marcuse to Michael Cameron,

dated October 30, 2007.

Respondent has also submitted two additional exhibits dated March 3, 2009: Respondents' omnibus brief in response to the Government's evidentiary submissions, and Respondent's motion to supplement the record.

IV. Legal Standards

A. Motion to Suppress in Removal Proceedings

1. Respondent's *prima facie* burden

A motion to suppress must be made in writing and be accompanied by a detailed affidavit that explains the reasons why the evidence in question should be suppressed. Matter of Wong, 13 I & N Dec. 820, 822 (BIA 1971). The individual seeking to suppress evidence initially bears the burden of proof and must establish a *prima facie* case that the evidence should be suppressed. Matter of Tang, 13 I & N Dec. 691 (BIA 1971). To establish a *prima facie* case, the individual seeking suppression must provide specific, detailed statements based upon personal knowledge; such allegations cannot be general, conclusory, or be based on counsel. Id.; see also Matter of Barcnas, 19 I & N Dec. 609 (BIA 1988); Matter of Wong, 13 I & N Dec. at 821-22; Matter of Tang, 13 I & N Dec. at 692.

"Where a party wishes to challenge the admissibility of a document, the mere offering of an affidavit is not sufficient to sustain his burden. First, if an affidavit is offered, which, if accepted as true, would not form a basis for excluding the evidence, the contested document may be admitted into the record . . . If the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then the claims must also be supported by testimony. The respondent's declaration alone is therefore insufficient to sustain his burden." Id. at 611-612. Even a technically defective arrest of an alien does not necessarily render the deportation proceeding null and void. See Avila-Gallegos v. Immigration and Naturalization Service, 525 F.2d 666 (2d. Cir. 1975). Lastly, it is important to note "[r]espondents may only litigate what happened to them." INS v. Delgado, 466 U.S. 210, 2221 (1984).

2. Responsive Government Burden

When a respondent comes forward with proof establishing a *prima facie* case for suppression, the DHS then must assume the burden of justifying "the manner in which it obtained the evidence." Barcnas, 19 I & N Dec. at 611. Furthermore, an alien in removal proceedings is entitled to cross-examine witnesses the Government deploys against them. INA § 240(b)(4)(B).

As to the first point, the Court is aware of no authoritative precedent revealing the precise quantum of evidence the Government must proffer 'to justify the manner in which it obtained the evidence.' However, logic informs that to meet the *prima facie* case

established by the respondent (of an egregious constitutional violation), the burden on the Government must therefore be equivalent.

Then, it is the Government's obligation to submit a facially sustaining affidavit, as well as make reasonable attempts to produce supporting testimony from the agents with knowledge of the contested events. See Barcenas, 19 I. & N. Dec. at 611.

As to the second point, evidence is generally admissible in immigration proceedings if it is probative and its use is fundamentally fair,⁷ Matter of Velasquez, 19 I. & N. Dec. 377, 380 (BIA 1996). Furthermore, an "immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case..." 8 C.F.R. §1240.7(a).

However, INA § 240(b)(4) provides an alien in removal proceedings "shall have a reasonable opportunity to examine the evidence against the alien ... and to cross-examine witnesses presented by the Government..." 8 U.S.C. § 1229a(b)(4)(B).⁸

This statutory provision is steeped in Fifth Amendment due process rights. "It is well established that the Fifth Amendment affords aliens due process of law during deportation proceedings." See Singh v. Mukasey, 553 F. 3d 207, 214 (2d. Cir. 2009). A failure in admitting unsupported evidence may constitute a constitutional due process violation if its inclusion prejudices the respondent.⁹ See Farrokhi v. INS, 900 F. 2d 697,

7 Some courts have required the DHS to make reasonable attempts to produce witnesses before finding the admission of affidavits or sworn statements to be fundamentally fair. See Singh v. Mukasey, 553 F. 3d 207, 212 n.1 (2d. Cir. 2009) (Without further broaching the subject, noting that the First, Fifth and Ninth Circuits have agreed that the government violates principles of fundamental fairness when it submits an affidavit without first attempting to secure the presence of those potential witnesses for cross-examination); see also Ocasio v. Ashcroft, 375 F. 3d 105, 107 (1st. 2004) ("One of these outer limits is that the INS may not use an affidavit from an absent witness 'unless the INS first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing.')" (quoting Olabanji v. INS, 973 F. 2d 1232, 1234 (5th Cir. 1992); Saidane v. INS, 129 F. 3d 1063, 1065 (9th Cir. 1997)). In particular, federal circuit courts have expressed concern that INA § 240(b)(4)(B)'s purpose would be thwarted "if the government's choice of whether to produce a witness or to use a hearsay statement were wholly unfettered." See, e.g., Baliza v. INS, 709 F. 2d 1231, 1234 (9th Cir. 1983). We note that the Government has not introduced any evidence that it has made reasonable efforts to produce the affiant or the author of the Form I - 213 in this case, Mr. George Lewis, for in-court examination, or that either is otherwise unavailable.

8 We note that, subsequent to the commencement of proceedings, and assuming a petitioning party has met the statutory preconditions, if an IJ is satisfied that a witness will not appear to testify and that his or her testimony is essential, the IJ possesses exclusive jurisdiction to issue subpoenas requiring, *inter alia*, the attendance of that witness. 8 C.F.R. § 1003.35(b)(1),(3). Respondent has filed numerous subpoena requests. See Respondents' Subpoena Requests (April 2, 2008); Respondents' Subpoena Requests (October 20, 2008). However, these requests were made before Respondent testified and established his requisite *prima facie* case; thus, the Court was not satisfied that the ICE agents' evidence was 'essential.' And our disposition of Respondent's Motion to Suppress Evidence and Motion to Terminate Proceedings obviates the need to gauge if the ICE agents' evidence is now indeed 'essential.' In any event, the Government has in no uncertain terms refused to produce any of the agents involved for testimony.

9 The Notice to Appear (Form I - 862), the seminal document referring an alien to his or her rights in a removal proceeding, and the filing of which commences removal proceedings, states that the alien 'will have the opportunity ... to cross-examine any witnesses presented by the Government.'

702 (4th Cir. 1990).

So, while the rules of evidence do not govern removal proceedings, Felzcerek v. INS, 75 F. 3d 112, 116 (2d. Cir. 1996), and “an IJ has some latitude to receive evidence without demanding live testimony ... an IJ’s evidentiary rulings must comport with due process.” Marku v. Board of Immigration Appeals, No. 03-40871, 2005 WL 1162978, *1 (2d. Cir. May 16, 2005) (unpublished decision). The Court also has a concomitant responsibility to help establish and develop the record. See Yang v. McElroy, 277 F. 3d 158, 162 (2d. Cir. 2002). The United States Court of Appeals for the Second Circuit has previously recognized that a fact finder who assesses testimony together with witness demeanor is in the best position to evaluate credibility. See Zhou Yun Zhang v. United States INS, 386 F. 3d 66, 73 (2d. Cir. 2004).

Ultimately, once a respondent has satisfied his initial obligation to provide a personal-knowledge based affidavit and sworn testimony, and successfully establishes a *prima facie* case that his constitutional rights were egregiously violated, the Government then has a reciprocal obligation to the Respondent (and the Court) to produce and make available agents involved in the enforcement operation at issue for examination in court (insofar as it seeks to admit evidence of alienage authored by an agent, or it submits a written declaration or affidavit by the agent). See Lopez-Rodriguez, 536 F. 3d at 1015-17. (court determination, that IJ’s full adoption of Respondent’s testimony, characterized as ‘conclusive’ factual findings, regarding the contested entry into her private residence, where Government failed to produce any of the agents involved in the raid, to be supported by substantial evidence.

B. “Egregiousness”

1. Supreme Court

The Supreme Court ruled, in I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984), that the exclusionary rule is not generally applicable in removal proceedings. Lopez-Mendoza, 468 U.S. at 1050. However, a plurality of the Court made plain that their conclusion did “not deal with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”¹⁰ Id. As the issues in the case addressed “the exclusion of credible evidence gathered in connection with peaceful arrests” by immigration officials at a workplace factory site, no such concerns were implicated. Id.

2. United States Court of Appeals for the Second Circuit

The Second Circuit “adopted the reservations of the Lopez-Mendoza plurality as part of the ‘law of [the] circuit,’” Pinto-Montoya v. Mukasey, 540 F. 3d 126, 131 (2d. Cir. 2008), holding that evidence ought to be suppressed only when the evidence established either “that an egregious violation that was fundamentally unfair had

¹⁰ Black’s Law Dictionary defines ‘egregious’ as “extremely or remarkably bad; flagrant.” Black’s Law Dictionary (8th ed. 2004).

occurred, or [] that the violation . . . undermined the reliability of the evidence in dispute.” Almeida-Amaral v. Gonzales, 461 F. 3d 231, 235 (2d. Cir. 2006).

As to the “fundamental fairness” prong, the Court posited that, since the egregiousness of a constitutional violation “cannot be gauged solely on the basis of the [invalidity] of the stop, but must also be based on the characteristics and severity of the offending conduct,” not all Fourth Amendment violations authorized the suppression of evidence in removal proceedings. Id. Instead, the Court devised a sliding scale: A seizure suffered for no reason at all would constitute an egregious violation only if it was sufficiently severe, or if the stop was based on race or some other “grossly improper consideration.” Id.

The Court noted that their formulation was non-exhaustive but remarked suppression would require “more than a violation;” it would “demand[] egregiousness.” Id. at 236; cf. Gonzales-Rivera v. INS, 22 F. 3d 1441 (9th Cir. 2004).¹¹ The Court listed two factors that might render a seizure “gross or unreasonable” in excess of its unlawfulness and meet the ‘egregious’ threshold: a “particularly lengthy” initial illegal stop and the show or use of force. Id. Ultimately, the Court concluded the petitioner had failed to marshal sufficient evidence to support any such finding.

The Court, in dicta, did state that if the stop in question was based on race, the violation would have been egregious. However, as the petitioner “offered nothing other than his own intuition to show that race played a part in the arresting agent’s decision,” his argument failed. Id. at 236; see also Pinto-Montoya, 540 F. 3d at 131 (finding that the court in Almeida-Amaral concluded “that petitioner’s mere assertion, without more, that he was stopped on the basis of race was insufficient to establish that the stop was race-based.”).

Another Second Circuit case that followed, Melnitsenko v. Mukasey, 517 F. 3d 42 (2d. Cir. 2008), focused the analysis on alleged violations where race did not play a consideration. The Court concluded that a three-hour detention of an alien, at a checkpoint about 100 miles from the Canadian-United States border, was not an egregious constitutional violation and that the agent’s actions at bar were less severe than the agent’s actions in Lopez-Mendoza, as petitioner was neither arrested nor taken to jail during the complained-of seizure. Id. at 47 (even assuming that “once she was stopped, she was escorted to a trailer by four or five uniformed officers and interrogated, fingerprinted, and photographed, for three hours without any evidence of Miranda or other warnings given,” and “even assuming the Checkpoint itself was illegal,” the complained-of conduct fell short of egregious conduct.) Id.

¹¹ The Ninth Circuit’s characterization of ‘egregiousness’ is less circumscribed than the Second Circuit’s. In the Ninth Circuit, “all bad faith violations [*i.e.* where ‘evidence is obtained by deliberate violations of the fourth amendment, or by conduct a *reasonable officer should have known* is in violation of the Constitution’] of an individual’s fourth amendment rights are considered sufficiently egregious to require application of the exclusionary sanction in a civil proceeding.” Gonzales-Rivera v. INS, 22 F. 3d at 1449 (internal quotations and citations omitted) (emphasis in original).

C. Consent

1. “It is well settled under the Fourth Amendment that a search conducted without a warrant issued upon probable cause is ‘per se unreasonable’ . . . subject only to a few specifically established and well-delineated exceptions.” Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Payton v. New York, 445 U.S. 573, 586 (1980) (“It is a basic principle of Fourth Amendment law that searches and seizures inside a home, absent a warrant, are presumptively unreasonable.”). “It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” Schneckloth, 412 U.S. at 218.

Consent must be given voluntarily and by an individual possessing the requisite authority. See Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). Voluntariness is a question of fact determined by a ‘totality of all the circumstances.’ United States v. Isiofia, 370 F. 3d, 226, 231 (2004) (quoting Schneckloth, 412 U.S. at 227). While knowledge of the right to refuse consent is not a *sine qua non* to a finding of voluntariness, “it may be a factor in ascertaining whether the consent was coerced.” Schneckloth, 412 U.S. at 248-49.

Specific factors bearing on whether consent was freely given, in the context of an initial entry encounter with police at the door of a private residence, include 1) whether the officers knocked, 2) whether the officers identified themselves (in a non-coercive manner), 3) whether the officers engaged in threatening or abusive actions to induce a resident to open the door and admit them, 4) whether the door was opened for the officers, and 5) whether the police entry was protested. See United States v. Valencia, 645 F. 2d 1158, 1165 (1980); United States v. Ledbetter, No. 02-1757, 2003 WL 22221347, *2 (2d. Cir. Sept. 26, 2003) (unpublished decision); United States v. Crespo, 834 F. 2d 267, 269 (2d. Cir. 1987) (district court’s finding that agents’ display of weapons and kicking of door caused the door to be opened by the threat of force and not with consent, met with approval by reviewing court).

“Fourth Amendment privacy interests are most secure when an individual is at home with doors closed and curtains drawn tight.” United States v. Gori, 230 F. 3d 44, 51 (2d. Cir. 2000); Matter of Louissaint, 24 I & N Dec. 754, 761 (BIA 2009) (Pauley, J., concurring) (citing Payton as an exemplar for the axiom that “[t]he home is an area of utmost privacy, uniquely protected under our law.”). In Gori, the majority took umbrage with the dissent’s characterization of their opinion and emphatically stated that “the mere opening of a “door to a home does not transform[] the entire home into a public place. [The dissent] generalizes the holding and reach of the opinion beyond its scope or ambition, where the critical fact was that the interior of the apartment was exposed to public view when the door was voluntarily opened.” Id. at 52.

An individual, by words or acts, may limit the scope of consent he has given, or revoke his consent, in whole or in part. See United States v. Moran Vargas, 376 F. 3d 112, 113-14 (2d. Cir. 2004). Finally, though consent can be constructed from an individual’s words, acts, or conduct, Krause v. Penny, 837 F. 2d 595, 597 (2d. Cir. 1988).

“The ultimate question presented is whether the officer had a reasonable basis for believing that there had been consent to the search.” Garcia, 56 F. 3d 418, 423 (1995) (internal quotations and citations omitted).

2. There are also regulatory restrictions regarding consent in the immigration context. Regarding ‘site inspections,’ which are “enforcement activities undertaken [by the BTSD] to locate and identify aliens illegally in the United States . . . where there is a reasonable suspicion, based on articulable facts, that such aliens are present.” 8 C.F.R. 287.8(f)(1). Subsection (f)(2) delimits the authority of an immigration officer to enter into a private residence to act in their official capacity:

An immigration officer may not enter into the non-public areas of a business, a residence including the curtilage of such residence . . . except as provided in section 287(a)(3) of the Act, for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States unless the officer has either a warrant or the consent of the owner or other person in control of the site to be inspected. When consent to enter is given, the immigration officer must note on the officer's report that consent was given and, if possible, by whom consent was given. If the immigration officer is denied access to conduct a site inspection, a warrant may be obtained.

8 C.F.R. 287.8(f)(2).

D. Seizure

1. “A person is seized by the police . . . when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied.” Brendlin v. California, 127 S. Ct. 2400, 2405 (2007).

Ordinarily, the pertinent test is whether “a reasonable person would have believed that he was not free to leave if he [did] not respond[]” to the questions put to him. Pinto-Montoya, 540 F. 3d at 131 (citing INS v. Delgado, 466 U.S. 210, 216 (1984)); see also United States v. Mendenhall, 446 U.S. 544, 554 (1980). “Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968) . “[A]n initially consensual encounter between a police officer and a citizen can be transformed into a [Fourth Amendment] seizure...” Delgado, 466 U.S. at 215.

“When a person ‘has no desire to leave’ for reasons unrelated to the police presence, the ‘coercive effect of the encounter’ can be measured better by asking whether ‘a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” Brendlin, 127 S. Ct at 2405-06 (quoting Florida v. Bostick, 501 U.S. 429, 435-36 (1991).

2. When a police officer has restrained the freedom of an individual sufficient to

constitute a 'seizure' under the Fourth Amendment, it must be 'reasonable'. U.S. v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (citing Terry, 392 U.S. at 16). "[T]he reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." Id. The Fourth Amendment forbids "stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens." Brignoni-Ponce, 422 U.S. at 884; see also Rajah v. Mukasey, 544 F. 3d 427, 441 (2d. Cir. 2008).¹²

In evaluating the validity of a stop, the Court must consider "the totality of the circumstances-the whole picture." United States v. Cortez, 449 U.S. 411, 417 (1981).

"Pertinent factors identifying a police seizure can include the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects . . . and a request by the officer to accompany him to the police station or a police room." Gilles v. Repicky, 511 F. 3d 239, 245 (2007).

When stopping an individual, the Fourth Amendment requires "a police officer's actions be justified at its inception." U.S. v. Swindle, 407 F. 3d 562, 567 (2d. Cir. 2005) (quoting Terry, 392 U.S. at 20). "The settled requirement is . . . that reasonable suspicion must arise before a search or seizure is actually affected." Swindle, 407 F. 3d at 568 (citing Florida v. J.L., 529 U.S. 266, 271 (2000)).

3. The Immigration and Nationality Act ("INA"), and its attendant regulations, echo this sentiment. INA § 287(a)(1) states "[a]ny [authorized immigration officer] shall have power without warrant to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States..." With regards to interrogation and detention not amounting to arrest, interrogation is defined as "questioning designed to elicit specific information [not amounting to arrest]... an immigration officer . . . has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away." 8 C.F.R. 287.8(b)(1).

However, "[i]f the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning." 8 C.F.R. 287.8(b)(2).

E. Arrest

1. A warrantless arrest is unreasonable under the Fourth Amendment unless the arresting officer has probable cause to believe a crime has been or is being committed. Devenpeck v. Alford, 543 U.S. 146, 152 (2004). "Probable cause exists where the

¹² The Second Circuit, in Rajah, noted that the Supreme Court has left unanswered whether "suspicion must be of illegal alienage or may be of mere alienage." Id. at 441.

arresting officer has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime.” U.S. v. Delossantos, 536 F. 3d 155, 158 (2d. Cir. 2008) (internal quotations and citations omitted). “Because the standard is fluid and contextual, a court must examine the totality of the circumstances of a given arrest. . . . These circumstances must be considered from the perspective of a reasonable police officer in light of his training and experience.” Id. (internal quotations and citations omitted).

2. INA § 287(a)(2) allows authorized officers to arrest without warrant “any alien in the United States, if he has reason to believe that the alien so arrested 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...” This subsection also allows officers to make arrests for felonies that have been committed or are in the process of being committed, but subjects them to several limitations. See INA § 287(a)(4), (a)(5)(B).

The concomitant regulations specify “[o]nly designated immigration officers are authorized to make an arrest.” 8 C.F.R. § 287.8(c)(1) “An arrest shall only be made when the designated immigration officer has reason to believe that the person arrested has committed an offense against the United States or is an alien illegally in the United States.” 8 C.F.R. § 287.8(c)(2)(i). A warrant for arrest must be obtained unless the officer has reason to believe that the person is likely to escape before a warrant can be obtained. 8 C.F.R. § 287.8(c)(2)(ii). The officer must identify himself or herself as an immigration officer authorized to make an arrest, state that the person is under arrest, and extrapolate the reason for the arrest, upon ensuring the communications can be made in safety. 8 C.F.R. § 287.8(c)(2)(iii).

F. Regulatory Violations

Regulatory violations counsel suppression of evidence when they are “egregious or fundamentally unfair or impaired the reliability of the evidence of ... deportability.” Rajah, 544 F. 3d at 446.¹³ It is noteworthy that no Court of Appeals has actually determined that deportation or removal proceedings should be terminated based on a violation of a regulation or internal agency guideline. It is true that the Second Circuit, in Waldron v. INS, 17 F.3d 511 (2d. Cir. 1993), determined that, when a regulation is promulgated to protect a fundamental right derived from the Constitution or federal statute, and the INS fails to adhere to it, the challenged proceedings is invalid and a

¹³ Respondent also avers that ICE agents failed to inform him that he was entitled to be represented by counsel during any interrogation-by-examination, in derogation of 8 C.F.R. § 292.5(b) and his Fifth Amendment rights. The Second Circuit has not made an express determination on this ground, but noted in Melnitsenko that the petitioner’s argument that “she was escorted to a trailer by four or five uniformed officers and interrogated, fingerprinted and photographed, for three hours without any evidence of any Miranda or other warnings given,” did not enhance the officers’ conduct to constitutionally ‘egregious’ conduct. Melnitsenko, 517 F. 3d at 47; see also Lopez-Mendoza, 468 U.S. at 1037 (Supreme Court concluded arrest of petitioner in violation of his Fourth Amendment rights, followed by brief detention and transfer to country jail for questioning, all without warning petitioner of his right to remain silent, did not constitute ‘egregious’ constitutional violation.).

remand is required. See Waldron, 17 F.3d at 518. However, there is no clear holding sanctioning that a violation of a regulation could result in termination of proceedings, thereby allowing a respondent to continue his unlawful presence in the United States, absent egregious conduct.

G. Exclusionary Rule

Evidence obtained from an unlawful search or seizure is generally subject to exclusion as “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 484-85 (1963). Courts will also suppress evidence that is the indirect product of the illegal police activity as ‘fruit of the poisonous tree.’ See United States v. Oscar-Torres, 507 F. 3d 224, 227 (4th Cir. 2007) (citing Wong Sun, 371 U.S. at 471).

The relevant constitutional question for later-discovered evidence is “whether the connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint.” United States v. Ceccolini, 435 U.S. 268, 273-74 (1975). “The so-called ‘attenuation doctrine’ allows introduction of evidence obtained after an unlawful arrest when ‘the causal link’ between a Fourth Amendment violation and a subsequent confession, identification, or other form of evidence is so long or tortuous that suppression of the evidence is unlikely to have the effect of deterring future violations of the same type.” Mosby v. Senkowski, 470 F. 3d 515, 521 (2d. Cir. 2006) (internal quotations and citations omitted).

The United States Supreme Court has enumerated several factors germane to the attenuation analysis, including 1) “the temporal proximity of the arrest and the confession,” 2) “the presence of intervening circumstances,” and “particularly,” 3) “the purpose and flagrancy of the official misconduct.” Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

In the context of obtaining fingerprints as an incident of arrest, gathered in the absence of a warrant or probable cause, the Supreme Court has, on multiple occasions, held that, when an illegal arrest is used as an investigatory subterfuge to obtain fingerprints, the fingerprints are regarded as an inadmissible fruit of an illegal detention. See Davis v. Mississippi, 394 U.S. 721, 727-28 (1969); Hayes v. Florida, 470 U.S. 811, 817-18 (1985); see also United States v. Olivares-Rangel, 458 F. 3d 1104, 1115 (10th Cir. 2006).

Succinctly phrased by the United States Court of Appeals for the Tenth Circuit, “[t]he exclusionary rule applies whenever evidence has been obtained ‘by exploitation’ of the primary illegality instead of ‘by means sufficiently distinguishable to be purged of the primary taint.’ Evidence may be obtained ‘by exploitation’ of an unlawful detention even when the detention is not for the sole purpose of gathering evidence.” Olivares-Rangel, 458 F. 3d at 1115 (10th Cir. 2006) (internal citations omitted).

Moreover, the Fourth Circuit has advanced even farther and held “an alien's fingerprints taken as part of routine booking procedures but intended to provide evidence

for a criminal prosecution are still *motivated* by an investigative, rather than an administrative, purpose,” and, accordingly, are “subject to exclusion.” Oscar-Torres, 507 F. 3d at 232 (citing Olivares-Rangel, 458 F. 3d at 1114.).

While the Second Circuit has not expressly pronounced its position on this issue, it has in previous cases indicated its disapproval of a rigid illicit-purpose requirement. See United States v. Ortiz-Gonzalbo, 133 F. 3d 908, 909 (2d. Cir. 1997) (unpublished opinion) (rejecting a district court’s ruling that a defendant’s fingerprints are not excludable unless the police made the illegal arrest for the purpose of obtaining the fingerprints, and instead sustaining the lower court’s denial of a motion to suppress on alternate grounds); Johnson v. Ross, 955 F. 2d 178, 182 (2d. Cir. 1992) (Newman, J., concurring) (“In some circumstances, evidence is deemed tainted by prior police misconduct even if the reliability of the subsequent evidence is not challenged.”). Furthermore, that these indications have arisen in criminal case precedent does not seem to be the paramount, or even prominent, factor in the Second Circuit’s analysis. See United States v. Alvarez-Porras, 643 F. 2d 54, 63 (2d. Cir. 1981) (“where flagrantly illegal arrests were made for the precise purpose of securing identifications that would not otherwise have been obtained, nothing less than barring any use of them can adequately serve the deterrent purpose of the exclusionary rule.”) (quoting United States v. Edmons, 432 F. 2d 577, 584 (2d. Cir. 1977)).

H. ‘Body’ or ‘Identity’ Evidence

The United States Supreme Court concluded, in Lopez-Mendoza, that “the ‘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.” Lopez-Mendoza, 468 U.S. at 1039.

The United States Court of Appeals for the Tenth Circuit has interpreted this statement to mean, based on the cases cited in Lopez-Mendoza, to support the proposition, that the Court was referencing the Ker-Frisbie doctrine, that illegal police activity affects only the admissibility of evidence, and not the jurisdiction of the trial court or otherwise serves as a basis for dismissing the prosecution. Olivares-Rangel, 458 F.3d at 1110.

This view is in accord with both the Eighth Circuit, which has also concluded “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. Guevera-Martinez, 262 F. 3d 751, 754 (8th Cir. 2001), as well as the Fourth Circuit, which has concluded “Lopez-Mendoza does not prohibit suppression of evidence of a defendant’s identity.” United States v. Oscar-Torres, 507 F. 3d 224, 228 (4th Cir. 2007). Thus, the United States Court of Appeals for the Fourth, Eighth, and Tenth Circuits all agree that “the Supreme Court’s statement that the “body” or identity of a defendant are “never suppressible” applies only to cases in which the defendant challenges the jurisdiction of the court over him or her based upon the unconstitutional arrest, not to cases in which the defendant only challenges the admissibility of the identity-related

evidence.” Olivares-Rangel, 458 F. 3d at 1111.

Each of these Circuits have scrutinized two especially compelling keystones supporting their conclusion: 1) The Supreme Court’s founding of its own statement on past cases elucidating the long-standing rule known as the Ker-Frisbie doctrine, and 2) the fact that in Lopez-Mendoza, a consolidated appeal, the alien who objected to evidence offered against him was deemed to have a ‘more substantial’ claim than the alien who only objected to being hauled into deportation hearings and entered no objection to the evidence offered against him. See United States v. Oscar-Torres, 507 F. 3d at 228 (quoting Lopez-Mendoza, 468 U.S. at 1040); Guevera-Martinez, 262 F.3d at 754 (“These cases [relied upon by the Court in Lopez-Mendoza] deal with jurisdiction over the person, not evidence of the defendant's identity illegally obtained. The language in Lopez-Mendoza should only be interpreted to mean that a defendant may be brought before a court on a civil or criminal matter even if the arrest was unlawful.”).¹⁴

While the Second Circuit has not explicitly voiced a stance on this issue, it has previously quoted United States v. Crew, 445 U.S. 463, 474 n.20 (1980), in a criminal context, recognizing that “[i]n some cases, of course, prosecution may effectively be foreclosed by the absence of the challenged evidence. But this contemplated consequence is the product of the exclusion of specific evidence tainted by the Fourth Amendment violation and is not the result of a complete bar to prosecution.” Brown v. Doe, 2 F.3d 1236, 1243 (2d. Cir. 1993).

I. Custody / Bond Applications and Requests

With respect to custody and bond determinations, “[c]onsideration by the Immigration Judge of an application or request of a respondent regarding custody or bond ... shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding. 8 C.F.R. § 1003.19(d). Premised on this regulation, the Board has concluded that evidence presented only in an alien’s removal proceeding cannot be considered during the separate bond proceeding. See In re Adeniji, 20 I & N Dec. 1102, 1115 (BIA 1991).

J. Consideration of Constitutional Claims

While “courts should not decide constitutional issues unnecessarily,” courts ought to adjudicate such claims when they are “unavoidable.” Jean v. Nelson, 472 U.S. 846, 854 (1985). For example, it is true that the federal rules of evidence do not apply in removal proceedings; however, evidence is properly admitted only so long as it “does not violate the alien’s right to due process of law.” Aslam v. Mukasey, 537 F. 3d 110, 114 (2d. Cir. 2008) (internal quotations omitted). The United States Court of Appeals for the Second Circuit has implicitly approved of frontal review by an Immigration Court of

¹⁴ Oscar-Torres collects cases from the Third, Fifth, and Sixth Circuits that have diametrically determined that Lopez-Mendoza bars suppression of all evidence of identity. Oscar-Torres, 507 F. 3d at 228 (collecting cases). Oscar-Torres also recognizes that the Ninth Circuit has inconsistently come to different conclusions on the issue in different cases. Id. at 228 n.2.

constitutional claims driving a motion to suppress evidence, at least insofar as the motions are premised on alleged Fourth and Fifth Amendment violations. See, e.g., Almeida-Amaral, 461 F. 3d at 232; Pinto-Montaya, 540 F. 3d at 127.

V. Respondent has established his requisite *prima facie* burden of an egregious Fourth Amendment violation.

A. The Court found Respondent's testimony to be credible. Respondent testified based on personal knowledge and was candid and forthright in providing testimony on direct examination and, more importantly, on cross-examination. His testimony was internally consistent, consistent with his declaration, and consistent with the testimony and declarations provided by Mr. [REDACTED]

Respondent testified that he was sleeping in his room with his wife and children in the early morning of June 6, 2007. He was awakened by knocking on the front door and then heard knocking on the back door. Respondent went to the back door and asked for the identity of the knocker. After he was informed it was the police, Respondent asked who they were looking for. Upon being told that the police were looking for someone named 'Chavez,' Respondent opened the door ajar a few inches. Then, an officer forcibly pushed the door open. No one asked Respondent permission to enter his home. Respondent was then asked about his immigration status through translation by the Respondent's son. Respondent was later arrested.

Again, Respondent's oral narrative is in substantial agreement with his declaration that he submitted to the Court. While there are a few particular dissimilarities between Respondent's testimony and his declaration, on the whole, his testimonial account is substantially similar, especially concerning material facts, to his declaration. Furthermore, notwithstanding Respondent's invocation of his Fifth Amendment privilege, his testimony presents a comprehensive and workable account of what transpired in his home that morning. The cogency of his testimony is further bolstered by its congruence with Mr. [REDACTED] testimony.

Respondent also testified openly about an unidentified relative, whom he described as his distant cousin, who was living with him in the apartment. Importantly, both Respondent and Mr. [REDACTED] credibly testified that this individual was not present on the premises during the early morning raid.

In sum, Respondent's motion was facially adequate and his *prima facie* burden sustained by specific and credible testimony, based on his own personal knowledge.¹⁵ The Court emphasizes the importance of our credibility determination in our accompanying determination that Respondent has successfully demonstrated a *prima facie* case that his Fourth Amendment rights were egregiously violated when immigration agents entered his apartment without a warrant, probable cause, or consent.

¹⁵ Respondent did invoke his Fifth Amendment privilege when asked what identification documents he supplied to the immigration agents. He was clearly entitled to do so, and the Court finds that he has satisfied his evidentiary obligations notwithstanding his failure to inform the Court on this matter.

B. An egregious constitutional violation must be ‘sufficiently severe,’ or ‘gross or unreasonable,’ in addition to being unlawful. Almeida-Amaral, 461 F. 3d at 235-37. Here, Respondent heard knocking on the doors of his home and asked the knockers to identify themselves. He was told, in Spanish, that it was the police. Respondent asked the officers why they were at his front door at six-thirty a.m. in the morning. The voice answered only that they sought someone named ‘Chavez.’ Respondent opened the door slightly ajar. Without requesting permission to enter, an officer forcefully barged into Respondent’s home.

That this pre-dawn enforcement raid targeted a private residence is especially pertinent to our decision. The touchstone of the Fourth Amendment is ‘reasonableness’ and, by natural extension, one’s reasonable expectation of privacy. Nowhere is that expectation of privacy more sacrosanct than in the confines of one’s home, and nowhere is that right more jealously guarded against encroachment. We are not addressing a claim made by an alien seeking admission into the country, outside of a restaurant, driving on the street, or at a workplace site. We are addressing a claim that immigration agents forcefully entered a private home without a warrant, without probable cause, and without consent. Notably, there are scant facts that might furnish a plausible basis upon which communicated consent might reasonably have been interpreted by the agents. Respondent testified that he opened the door ajar a few inches. Agents immediately and forcibly pushed the door wide open, requiring Respondent to step back to avoid being hit by the door. Respondent did not consent to their entry and the DHS concedes that they had no warrant to enter the home.

However, our conclusion that the agents’ entry violated Respondent’s Fourth Amendment rights is not the end of our inquiry. As outlined *supra*, the constitutional violation (when not based on race or some other improper consideration) must be ‘gross’ or ‘unreasonable’ in addition to being without a plausible legal ground. Thus, the Court must examine the actual conduct of the immigration agents involved in the violation, including their physical entry into Respondent’s home and their ensuing questioning and arrest of the Respondent.

The aggressive nature of the forced entry, which required a resident to move back out of fear of being struck by the door¹⁶ into a private residence at dawn, strongly implicates, on a stand-alone basis, “unreasonable,” unlawful conduct. However, the subsequent conduct of the immigration officers lends further support to our conclusion that Respondent has displayed the necessary aggravating circumstances. Specifically, examination of the agents’ subsequent conduct, confirms that the Respondent’s Fourth Amendment rights were flagrantly violated.

¹⁶ This fact may very well distinguish this case in Ninth Circuit Judge Bea’s view, dissenting from the denial of rehearing *en banc* of Rodriguez v. Mukasey, 536 F. 3d 1012 (9th Cir. 2008) (commenting that, in Rodriguez, “[t]he agents neither broke the door down nor pushed it open so forcefully as to injure either woman in any way.” See generally, Lopez-Rodriguez v. Holder, No. 06-70868, 2009 WL 792777 (9th Cir. 2009) (Bea, J., dissenting from the denial of rehearing *en banc*). Furthermore, in Rodriguez, the unlawful entrance was limited, at least initially, to a common area. That is not the case here.

The agents impermissibly entered into Respondent's home. Then, standing in the comfort of his home, Respondent was asked, in English, where the front door led and for 'immigration papers.' Respondent was unable to understand what the officers were asking and his son had to translate the officers' questions. Respondent affirmatively informed the officers that he did not want to answer. But the officers ignored his request and continued to ask him questions.

In the context of one's own home, an officer's refusal to abide by an occupant's stated desire not to answer questions posed to him, instead insisting upon him further questions, occasions a much greater risk of coercion, as an occupant's freedom is by definition restrained by the persistent questioning, insofar as he or she cannot (and surely should not be expected to) simply walk away. See 8 C.F.R. 287.8(b)(1); see also Brendlin v. California, 551 U.S. 249, 255-56 (2007) (recognizing that the general touchstone of what constitutes a seizure – whether or not a reasonable person would have believed he was not free to leave – is modified “when a person ‘has no desire to leave’ for reasons unrelated to the police presence.” Then, “the ‘coercive effect of the encounter’ can be measured better by asking whether ‘a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.’”) (quoting Bostick, 501 U.S., at 435-36).

Put another way, Respondent's passive acquiescence by turning over identity documentation upon agents' persistent demands, in his own home and when he has not voiced consent to their entry, can be directly and readily tied to the 'show of government authority,' whether or not the agents have an 'unambiguous intent to restrain.' (though Respondent plainly testified that each point of entry and exit from his apartment was actively and physically blocked by agents). *Id.* It is also highly unlikely such evidence may be gained from an independent source when an individual who exercises his right not to speak, but eventually falters, makes statements or submits evidence not borne from his free will. Finally, the Court finds it troubling that the agents continued to ask questions in English of Respondent, after it was plain that he did not understand what they were asking and his young son either spoke directly to the agents or translated their questions for his father.

Additionally, Respondent personally observed a male officer attempting to enter his cousin's locked bedroom by 'hit[ting] the door with his hand and then kick[ing] repeatedly at the door.' Respondent later discovered that this kicking caused 'permanent damage to the lock.'¹⁷

To be sure, the Court cannot factor into its analysis whether Respondent produced identification, or the nature and quality of such identification. However, we conclude that Respondent satisfied his *prima facie* burden on events preceding Respondent's compliance with the agents' demand that he produce for them identity documentation. After consideration of all the facts present in the record, up to that point, we find

¹⁷ Respondent's declaration, filed October 20, 2008, states that the officer's kicking caused permanent damage to the lock. Resp. Decl., Pg. 8.

sufficient evidence to sustain Respondent's demanding initial burden. We note that the DHS has not submitted any evidence evincing what pieces of information the agents possessed or reasonably believed they possessed when 1) they forced open the front door of the apartment, and 2) when they continued to question Respondent after he expressly communicated that he did not wish to answer their questions. The propinquity between the two events suggests that the agents possessed the same quantum of information during both instances.

A review of the facts at bar reflect that, unlike in Lopez-Mendoza, the evidence gathered here was not in connection with 'peaceful arrests' made by immigration officers. However the term 'peaceful'¹⁸ may be defined, it cannot be reasonably squared with the agents' conduct in this case.

To conclude, Respondent has established a *prima facie* case for the suppression of evidence directly connected to the unlawful entry of his home, such as the Form I – 213. Respondent submitted a motion to suppress that specified the requisite constitutional basis for his motion, gave a detailed and specific account of the events leading to his arrest, specified the evidence to be suppressed, and cogently supported his position with testimony.

VI. The DHS has submitted an inadequate affidavit pertaining to the agents' entrance into Respondent's home, and categorically refused to produce the affiants or other officers possessing personal knowledge of the relevant issues.

Pervading throughout our entire analysis is the DHS's inability or unwillingness to sustain its evidentiary burden. The Court simply lacks knowledge of large chunks of the event at issue and, at this stage of the proceedings, this shortage is directly attributable to the paucity of evidence submitted by the DHS. The only evidence that they have adduced to support their burden of "justifying the manner" in which they obtained the contested evidence consists only of a bare-bones affidavit from an individual with no personal knowledge of what transpired the morning of June 6, 2007, at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. Consequently, the Court has been hamstrung from capturing a full understanding of the events as they transpired that morning. Neither the affiant, nor anyone else, has been made available to testify in court. Respondent has unqualifiedly been denied his opportunity to cross-examine anyone associated with his arrest and detention.

The DHS submitted an affidavit from Richard McCaffrey, a supervisory immigration officer for ICE. Much of the affidavit address the normal operating protocols Detention and Removal Operation ("DRO") officers are instructed to adhere to while acting in their official enforcement capacity. However, the affidavit says little about the training and teaching of 'ICE personnel from programs other than DRO' that 'may be tasked with assisting in fugitive operations.' It has even less to say about what training non-ICE personnel, such as local law enforcement authorities, who may participate in

¹⁸ Black's law dictionary defines 'peaceful' as "[a] state of public tranquility; freedom from civil disturbance or hostility." Black's Law Dictionary (8th ed. 2004).

such activities, are given. Moreover, some of the 'Team Leaders,' the individuals vested with the responsibility of knocking on a door of a private residence, identifying themselves as police, and obtaining consent from an authorized individual, are not DRO officers.

More fundamentally, Mr. McCaffrey wholly lacks personal knowledge with respect to the event of entry at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. He states only that he went to the first floor apartment where he saw an Officer Hamilton already inside the apartment.

Then, the only support he can lend to the DHS's contention that there was a consensual entry is that he has 'reviewed' Respondent's Form I - 213, the precise document Respondent is seeking to exclude. As to the officers actually involved in the initial entry of Respondent's apartment, "None of the officers involved in making an entry into [Respondent's] apartment can recall further detail about the encounter ... due to the passage of time." The upshot here is that the evidence proffered by the DHS is scant. Furthermore, this scant evidence is unsubstantiated hearsay and, at points, hearsay upon hearsay.

The deficiencies in the Government's threadbare submission are exacerbated by their categorical and unexplained refusal to offer or make available agents to testify in open court. No cited reason or motivation was stated; the Court might generously educe that since none of the officers can recall anything about the incident, there might be little to be gained from their testimony. However, this does not explain why Respondent was denied an opportunity to cross-examine the affiant who provided testimony *against* him. Thus, Respondent, who satisfied his initial burden, was deprived a reasonable opportunity to confront and cross-examine Mr. McCaffrey (who is also listed as the examining officer on the Form I - 213), which due process requires.¹⁹ Granted, Mr. McCaffrey's affidavit has little to say about the contested entry into Respondent's apartment; still, the DHS's utter lack of an explanation raises the specter of whether 'reasonable efforts' were made to obtain his testimony or the testimony of anyone else.

The Court has demanded Respondent file a satisfactory declaration based on his personal knowledge, present himself before the Court and provide testimony, be subject to the Government's cross-examination, and sustain his *prima facie* burden of establishing that his constitutional rights were egregiously violated. Respondent has complied with each of these demands and met his obligations. Case law dictates that the burden now falls on the Government to produce evidence in support of its burden of "justifying the manner in which it obtained the evidence." Barcenas, 19 I & N Dec. at 611. The Government has simply failed to do so.

The Court would be afield to juxtapose our decision in relation to the Supreme Court's identification of one benefit of utilizing the exclusionary rule in immigration

¹⁹ The Form I -213 further states Respondent was apprehended by Ms. Michelle Vetrano-Antuna, Mr. James E. Brown, and Mr. George Lewis. It further states that the narrative contained therein was composed by Mr. Lewis.

hearings: deterrence of immigration agents' unconstitutional conduct. Lopez-Mendoza, 468 U.S. at 1041. This issue falls outside the Court's judicial ken. We remark, however, that this case, as it has been factually presented, does not appear to be on the margins. Here, the raid was conducted in the early morning hours while the occupants, some of them children, would likely be, and indeed were, sleeping. Agents forcibly entered, without warrant or consent, into a private home. The agents failed to ask preliminary questions that might demonstrate probable cause, or at least reasonable suspicion. Respondent unequivocally expressed to the agents that he did not wish to answer their questions or comply with their instructions. The agents continued questioning Respondent in a language in which he has little competence. The agents positioned themselves to block the doorways. Neither Respondent, nor anyone else present in the apartment, was the targeted fugitive alien sought by the agents.

The Court finds that there was an egregious violation of the Fourth Amendment that was fundamentally unfair. See Almeida Amaral, 461 F.3d at 236. It realizes that reasonable people can differ on their interpretation of the term egregious. In considering all the evidence in the record, this Court finds that the Respondent's Fourth Amendment rights were egregiously violated.

VII. Conclusion

Considering the totality of the circumstances, the Court determines that Respondent has demonstrated a *prima facie* case that the immigration agents' conduct worked an egregious violation to his Fourth Amendment rights.²⁰ Thus, the Court finds that the contested Form I – 213 must be suppressed.

Furthermore, based on the record before us, it appears that Respondent was placed in removal proceedings exclusively upon the information that he provided to immigration agents during the course of their interrogation.

The Form I – 213 explicitly states that determination of Respondent's status in the United States was informed by his "inability" to procure relevant documentation, and an inculpatory "self-admission".²¹ In turn, the factual allegations contained in the NTA and the claimed grounds of removability hew closely to the information contained in the Form I – 213.

Furthermore, the Government has not produced additional evidence to sustain the charge of removability independent of the Form I – 213.²²

Finally, we agree with Respondent that his removal proceedings must be terminated, because the Government has not introduced admissible independent evidence supporting the factual allegations stated in the NTA, and thus it has failed to meet its

20 Because of our disposition in this case, *supra*, we have no occasion to evaluate Respondent's other constitutional, regulatory, and sub-regulatory claims.

21 The third basis listed is 'LESC system checks'.

22 *See* discussion of the Government's belated filing, *supra*.

burden of establishing Respondent's removability by clear and convincing evidence. See INA § 240(c)(3)(A).

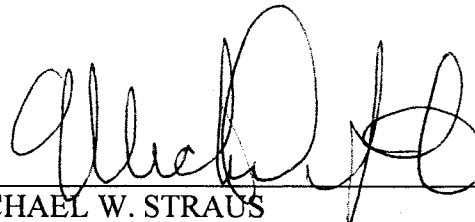
VIII. Orders

Based on the foregoing, the following **ORDERS** shall enter:

IT IS ORDERED that Respondent's Motion to Suppress be **GRANTED**;

IT IS FURTHER ORDERED that Respondent's Motion to Terminate removal proceedings be **GRANTED**.

June 1, 2009
Date



MICHAEL W. STRAUS
Immigration Judge