Motion to Suppress Principles in the Immigration Context

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Part I: Basic Principles of a Motion to Suppress

1. GENERAL OVERVIEW

A motion to suppress seeks to prohibit the use of evidence unlawfully obtained by the government, a remedy available under a principle known as the "exclusionary rule." Motions to suppress attack the methods the government uses to *obtain* evidence.

Because removal proceedings are civil in nature, motions to suppress are not always available to the same extent as in criminal proceedings. However, the Supreme Court, Board of Immigration Appeals, and numerous federal circuit courts have recognized many contexts in which the "exclusionary rule" applies in immigration court.

2. SUPPRESSABLE EVIDENCE

A motion to suppress may target any evidence the government attempts to introduce, whether physical, documentary, or testimonial. By filing a motion to suppress, respondents charged with being in the United States without being admitted or paroled can seek to exclude the government's evidence of *alienage* on the basis that it was illegally obtained. Because the government has the burden of proof with regard to this threshold issue, 8 C.F.R. § 1240.8(c), a removal proceeding cannot go forward without such evidence. In most cases, the government establishes alienage through the introduction of Form I-213, in which the examining officer summarizes the respondent's arrest and interview. In other cases, the government seeks to establish alienage through the testimony of an immigration officer, documents obtained from the respondent's country of origin, or other information provided by the respondent.

A motion to suppress must seek to exclude actual pieces of evidence. It cannot contest a court's jurisdiction over the respondent or prevent a hearing from going forward, even if the individual was discovered as a result of unlawful conduct. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984).

> **Tip**: If your client may have grounds to file a motion to suppress, it is crucial that you deny the charges and the relevant allegations in the Notice to Appear (NTA) and that neither you, your client, nor any other witness concedes alienage at any point in the case. If you file a Freedom of Information Act (FOIA) request or an application for an Employment Authorization Document (EAD), be careful not to include any information bearing on alienage. If the agency requires your client's country of origin to process the application, note that the country provided is that alleged in the NTA.

a. Identity related evidence

The government sometimes argues that respondents cannot suppress "identity-related" evidence, such as a passport, fingerprints, birth certificate, or other documents establishing who they are, relying on the Court's statement that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest. . . ." *Lopez-Mendoza*, 468 U.S. at 1039.

Courts are divided on how to understand this statement from *Lopez-Mendoza*:

- Four circuits have interpreted the phrase to mean that an unconstitutional search or seizure cannot deprive a court of the ability to exercise personal jurisdiction over the body of a defendant. *See Pretzantzin v. Holder*, 725 F.3d 161, 166 (2d Cir. 2013); *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007); *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111 (10th Cir. 2006); *see also* W. LaFave, 1 Search & Seizure § 1.9(b) (4th ed. 2011). However, even these courts may refuse to suppress "jurisdictional identity evidence"—the information required to identify an individual in proceedings, *see Pretzantzin*, 725 F.3d at 170, or fingerprints obtained for administrative, rather than investigatory, purposes following an illegal arrest, *see infra* n.14.

- Four other circuits have interpreted *Lopez-Mendoza* as holding that evidence establishing the identity of a defendant or respondent, such as evidence concerning the defendant or respondent's name, cannot be suppressed under any circumstances. *See United States v. Navarro-Diaz*, 420 F.3d 581, 584-85 (6th Cir. 2005); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *United States v. Bowley*, 435 F.3d 426, 430-31 (3rd Cir. 2006). Note, however, that *Navarro-Diaz* and *Bowley* were both careful to state that they did not involve an "egregious" Fourth Amendment violation. The concept of "egregiousness" is discussed below. Furthermore, one judge in the Fifth Circuit recently noted that that court's precedent on identity evidence was based on an "erroneous interpretation" of *Lopez-Mendoza*. *See United States v. Hernandez-Mandujano*, 721 F.3d 345, 351-56 (5th Cir. 2013) (Jolly, J., concurring).

- The Eleventh Circuit has independently reached the latter conclusion, without relying on the statement from *Lopez-Mendoza*. *United States v. Farias-Gonzalez*, 556 F.3d 1181 (11th Cir. 2009).

- Several courts, including the Ninth Circuit, have distinguished between evidence procured for the purpose of investigating a crime such as unlawful reentry, which is suppressible, and evidence obtained solely for identification

purposes, which is not. *See, e.g., United States v. Garcia-Beltran*, 389 F.3d 864, 867-68 (9th Cir. 2004); *United States v. del Toro Gudino*, 376 F.3d 997, 1000-01 (9th Cir. 2004); *Guevara-Martinez*, 262 F.3d at 756; *Olivares-Rangel*, 458 F.3d at 1114-16; *Oscar-Torres*, 507 F.3d at 230-31 (indicating that fingerprints "intended for use in an *administrative* process—like deportation—may escape suppression"). However, this distinction may have little practical significance. *See United States v. Ortiz-Hernandez*, 427 F.3d 567, 577-78 (9th Cir. 2005) (affirming suppression of a criminal defendant's fingerprints based on a prior unlawful arrest, but reversing denial of government's motion to compel a second set of fingerprints based on identity and other information obtained through initial fingerprints).

b. Fruit-of-the-Poisonous Tree Doctrine

Fruit-of-the-Poisonous-Tree Doctrine: An extension of the exclusionary rule established in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). This doctrine holds that evidence gathered with the assistance of illegally obtained information must be excluded from trial. Thus, if an illegal interrogation leads to the discovery of physical evidence, both the interrogation and the physical evidence may be excluded, the interrogation because of the exclusionary rule, and the physical evidence because it is the "fruit" of the illegal interrogation. This doctrine is subject to three of important exceptions.

The evidence will not be excluded (1) if it was discovered from a source independent of the illegal activity; (2) its discovery was inevitable; or (3) if there is attenuation between the illegal activity and the discovery of the evidence.

The purpose of the fruit-of-the-poisonous-tree doctrine is to deter illegal police conduct by preventing the government from benefiting from the constitutional violation. Thus, the rule requires the exclusion of evidence obtained as a direct consequence of the constitutional violation. Even if a noncitizen's name cannot be suppressed, there is no justification for allowing the admission of *other* evidence (for example, evidence of alienage) that is obtained as a consequence of the constitutional violation.

Even where federal immigration officers engage in unlawful behavior, not all subsequently discovered evidence will be considered the "fruit of the poisonous tree." If the evidence was discovered by "exploitation" of the underlying misconduct, it is subject to possible suppression; by contrast, where the evidence came to the authorities' attention by means "sufficiently distinguishable to be purged of the primary taint," it will not be excludable. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

In some cases, the causal nexus between the unlawful conduct and the resulting

evidence is clear. For example, if immigration agents illegally entered a home without a warrant and questioned a resident about his immigration status, a concession of unlawful alienage might be subject to suppression. *Id*. at 485-86; *but see Carcamo v. Holder*, 713 F.2d 916, 923 (8th Cir. 2013) (noting that an unreasonable home search is not necessarily "egregious"). However, intervening events could destroy the causal link. If the same resident refused to answer questions in her home but voluntarily accompanied the agents to an immigration office, the government could argue that a resulting confession was sufficiently distinguishable from the initial warrantless entry to permit its introduction as evidence. *Wong Sun*, 371 U.S. at 491.

The government sometimes argues that the fruit-of-the-poisonous-tree rule does not apply to any evidence obtained through knowledge of a noncitizen's name or certain other types identity evidence – even when such evidence was obtained through a constitutional violation. Some courts have accepted arguments such as these. *See, e.g.*, *Pretzantzin v. Holder*, 725 F.3d 161, 170-71 (2d Cir. 2013) (suggesting that independent evidence obtained using only an individual's name would be admissible); *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1186 (11th Cir. 2009); *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999). However, where an individual has made a prima facie case for suppression, the government should bear the burden of proving that it obtained such evidence using only non-suppressible information. *Pretzantzin*, 725 F.3d at 170.

c. Evidence possessed by the government prior to the misconduct

Courts are divided on this important question, which can arise in challenges to the introduction of fingerprint samples, records of prior admissions, or other pre-existing information in government databases that might establish a respondent's alienage. In 2010, the Supreme Court agreed to resolve the split in a non-immigration related criminal case, but ultimately dismissed the petition without rendering a decision. *Tolentino v. New* York, 131 S. Ct. 1387 (2011) (dismissing writ of certiorari as improvidently granted). As previously noted, some courts have taken the position, primarily in criminal cases, that government records can be excluded like any other object or statement introduced for an evidentiary purpose. *United States v. Oscar-Torres*, 507 F.3d 224, 227-30 (4th Cir. 2007); *United States v. Olivares-Rangel*, 458 F.3d.

As for the argument that a noncitizen lacks standing to challenge the admission of his or her immigration file, that position misunderstands the rules governing Fourth Amendment standing. So long as an individual experiences a Fourth Amendment violation, he or she has standing to challenge the admission of any evidence obtained through that violation – even evidence in which he or she has no reasonable expectation of privacy. Thus, if the government was led to search the

immigration file as a direct result of a Fourth Amendment violation, the noncitizen would have standing to challenge the admission of that immigration file as the fruit of the illegal conduct.

Part II: Motion to Suppress - Claims for Violations of the Fourth Amendment and/or Related Provisions of Federal Law

The Fourth Amendment prohibits government agents from making "unreasonable searches and seizures." For suppression purposes, it applies to all conduct by law enforcement officials prior to an individual's *lawful* arrest for immigration purposes.

1. EXCLUSIONARY RULE LIMITATIONS

The "exclusionary rule" is a judicially created remedy to prevent the introduction of evidence obtained as a result of a Fourth Amendment violation. Its purpose is not to provide relief to the victim but to deter government officers from engaging in similar misconduct in the future. *Elkins v. United States*, 364 U.S. 206, 217 (1960). Consequently, for the exclusionary rule to apply, a court must weigh the cost of excluding evidence against the benefit of deterring future government misconduct. *Illinois v. Krull*, 480 U.S. 340, 352-353 (1987).

a. Removal Proceedings Generally

In INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), the Supreme Court held that the exclusionary rule generally does not apply in removal proceedings to evidence obtained in violation of the Fourth Amendment.

Citing ***Matter of Sandoval***, 17 I&N Dec. 70 (BIA 1979), the Justices noted that failing to remove otherwise unlawfully present respondents would effectively sanction ongoing violations of federal immigration law; could "complicate" the streamlined nature of removal hearings; and would require immigration officers to document the precise circumstances of each arrest, which could preclude the use of large scale operations to detect undocumented immigrants. *Id*. at 1048-50. Note that the Court incorrectly stated that unlawful presence "without more, constitutes a crime," and that granting the Petitioner's motion would immediately "subject him to criminal penalties." *Id*. at 1047. *See Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States."); *Matter of Davila*, 15 I&N Dec. 781, 782 (BIA 1976) ("Remaining in this country longer than permitted does not constitute a criminal offense.").

b. "Egregious" and "widespread": exceptions where the exclusionary rule applies to removal proceedings

The Justices recognized an important exception for "egregious" Fourth Amendment violations and the need for reevaluation of their holding if widespread constitutional violations became evident. Today, the egregiousness exception provides the basis for many motions to suppress in immigration cases.

In the final section of Justice O'Connor's majority opinion, she and three other Justices noted that no violation of legacy INS's internal regulations had been alleged, and stated that their conclusions about the value of the exclusionary rule might change if confronted with evidence that Fourth Amendment violations by immigration officers were "widespread." *Lopez-Mendoza*, 468 U.S. at 1050 (Opinion of O'Connor, J.).

Lower courts and the BIA have applied the "egregious violation" exception in removal proceedings to suppress evidence obtained in violation of the Fourth Amendment, and at least one federal court of appeals has remanded a suppression case to allow the petitioner to submit additional evidence of widespread constitutional violations. *See infra* at 9-11, 13-14.

As numerous circuit courts have recognized, eight of nine Justices believed that the exclusionary rule should remain available for "egregious" violations at a minimum, which arguably makes the exception binding. *See, e.g., Puc-Ruiz v. Holder*, 629 F.3d 771, 778 n.2 (8th Cir. 2010); *Orhorhaghe v. INS*, 38 F.3d 488, 493 n.2 (9th Cir. 1994); *Oliva-Ramos v. Att'y Gen.,* 694 F.3d 259, 271-72 (3d Cir. 2012). To date <u>no</u> circuit has explicitly rejected the exception.

The BIA has recognized evidence may be suppressed based on egregious violations, even within the jurisdiction of courts of appeals which have not yet issued a published decision on the issue. *See*, *e.g.*, *David Antonio Lara-Torres*, A094-218-294, 2014 WL 1120165 (BIA Jan. 28, 2014) (unpublished).

Citing language from the final phrase of the exception in *Lopez-Mendoza*, the government may argue that a Fourth Amendment violation cannot be considered "egregious" unless it both (a) transgresses notions of fundamental fairness, *and* (b) undermines the probative value of the evidence obtained. However, every circuit that has considered this argument has rejected it. For example, in *Gonzalez-Rivera*, the Ninth Circuit held that "a fundamentally unfair Fourth Amendment violation is considered egregious regardless of the probative value of the evidence obtained." *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451 (9th Cir. 1994); *see also Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010); *Singh v. Mukasey*, 553 F.3d 207, 217 (2d Cir. 2009); *Almeida-Amaral v. Gonzales*, 461

F.3d 231, 234 (3d Cir. 2006); *Oliva-Ramos v. Att'y Gen.*, 694 F.3d 259, 277-78 (3d Cir. 2012).

This is true regardless of even if the evidence in question is a Form I-213. The government may seek to argue, based on *Matter of Barcenas,* 19 I&N Dec. 609 (BIA 1988), that "[a]bsent any indication that a Form I–213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability." *Barcenas*, 19 I&N Dec. at 611. This argument, which is based upon a misreading of both suppression case law generally and *Barcenas* in particular, has not been adopted by any court.

Much confusion exists over the relevance of the Due Process Clause to an "egregious" Fourth Amendment violation. Some immigration judges have suggested that evidence discovered through an egregious Fourth Amendment violation is suppressible because its introduction would undermine the "fair" hearing requirement of the Due Process Clause. *See, e.g.,* Matter of [Redacted], Order of Williams, J., Aug. 5, 2010, at 15, 17, *available at* www.law.umaryland.edu/programs/clinic/initiatives/immigration/documents/suppression-decision.pdf.

While this approach may have been analytically correct at one time, Supreme Court cases decided after *Lopez-Mendoza* indicate that claims cognizable under the Fourth Amendment should not be analyzed under the Due Process Clause. *Graham v. Connor*, 490 U.S. 386, 395 and n.10 (1989); *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998).

Note, however, that the Due Process Clause provides an independent basis for excluding evidence in some circumstances, including coerced confessions.

c. Circuits who recognize the "egregious" exception

The Second, Third, Eighth, and Ninth Circuits have adopted the exception for egregious Fourth Amendment violations as the law of the circuit. However, only the Ninth Circuit has found facts sufficiently egregious to require suppression without remanding a case for further proceedings.

The **Ninth Circuit** holds that the exclusionary rule should remain available in removal proceedings for—at a minimum—all evidence obtained from "bad faith" constitutional violations. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 n.5 (9th Cir.1994) ("We emphasize that [we do not] hold that *only* bad faith violations are egregious, but rather that *all* bad faith constitutional violations are egregious.") (emphasis in original). It defines "bad faith" violations as those involving (1)

"deliberate" violations of the Fourth Amendment or (2) "conduct a *reasonable officer should have known* is in violation of the Constitution." *Id*. at 1449 (emphasis in original). The first test—for deliberate violations—is a subjective one, dependent on the officer's intent. The second test is an objective one, dependent on the state of the law at the time the alleged violation took place. *See, e.g., Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018-1019 (9th Cir. 2008). Notably, numerous Ninth Circuit opinions have relied upon the extensive Fourth Amendment training that immigration officers receive to conclude that the offending agent should have known his conduct violated the Constitution. *See, e.g., Id*. at 1018-19.

The Ninth Circuit is the only federal appellate court to order the suppression of evidence for a Fourth Amendment violation. In ***Arguelles-Vasquez v. INS***, 786 F.2d 1433 (9th Cir. 1986) (subsequently vacated as moot) and ***Gonzalez-Rivera v. INS***, 22 F.3d 1441 (9th Cir. 1994), the court ordered evidence excluded where Border Patrol officers pulled over a vehicle solely on account of the occupants' ethnic appearance. In ***Orhorhaghe v. INS***, 38 F.3d 488 (9th Cir. 1994), the court ordered exclusion where immigration officers initiated an investigation based upon the petitioner's presumed national origin. And in ***Lopez-Rodriguez v. Mukasey***, 536 F.3d 1012 (9th Cir. 2008), the court found an egregious violation where immigration officers entered the petitioner's home without consent or a judicially issued warrant. *See also Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996) (recognizing the validity of the egregious violation exception in cases arising in the Ninth Circuit). In an unpublished decision, the court also has found that suppression may be warranted where an immigration officer issues a detainer for an individual in criminal custody without seeking to determine the individual's citizenship or immigration status in the United States. *Armas-Barranzuela v. Holder*, 566 Fed. Appx. 603 (9th Cir. 2014).

Generally speaking, the Ninth Circuit's "bad faith" test for egregiousness is more favorable than the standard employed by the Second, Third and Eighth Circuits, (the Eighth Circuit has explicitly rejected the Ninth Circuit's "bad faith" standard. *Carcamo v. Holder*, 713 F.3d 916, 923 (8th Cir. 2013)) insofar as it does not require the individual seeking suppression to demonstrate "aggravating" factors beyond the constitutional violation. However, attorneys should be aware of a Ninth Circuit opinion that could make it more difficult to satisfy the standard in cases where the law may be subject to some ambiguity. In ***Martinez-Medina v. Holder***, 673 F.3d 1029 (9th Cir. 2011), the court declined even to consider whether a sheriff's deputy violated the Fourth Amendment by detaining individuals who conceded unlawful presence because of the "lack of clarity" in the law over state officers' authority to make arrests for civil violations of the INA. *Id.* at 1035. The court reasoned that it need not determine whether a Fourth Amendment violation had occurred because a reasonable officer could not have been expected to know

that his conduct was unconstitutional. This approach departed from, but did not overrule, the court's longstanding practice of determining whether the Fourth Amendment was violated *before* determining whether the violation was egregious. *Orhorhaghe*, 38 F.3d 448, 493 n.5 (9th Cir. 1994) (citing *Gonzalez-Rivera*, 22 F.3d at 1445-52).

d. "widespread" Fourth Amendment violations

Justice O'Connor also stated in the final section of *Lopez-Mendoza* that the Court's conclusions about the value of the exclusionary rule might change if Fourth Amendment violations by immigration officers became "widespread." *County of Sacramento*, 523 U.S. at 849 n.9. Lamentably, but perhaps not surprisingly, much evidence exists that such violations have occurred with growing frequency, particularly within the last decade. See, e.g., Stella Burch Elias, *Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 Wisc. L. J. 1109 (2009), *available at* http://hosted.law.wisc.edu/lawreview/issues/2008_6/2_-_elias.pdf; Jennifer Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010). *See also* Brief of *Amici Curiae* LatinoJustice PRLDEF, No. 10-1479, *Argueta, et al. v. ICE, et al.* (3rd Cir. Dec. 10, 2010), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Argueta-amicus-brief.pdf; Brief of *Amici Curiae* LatinoJustice PRLDEF, No. 10-3849, *Oliva-Ramos v. Att'y Gen*. (3d Cir. Mar 11, 2011), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Oliva-Ramos-amicus-brief-redacted.pdf; Cardozo Immigration Justice Clinic, *Constitution on ICE* (2009), *available at* http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf.

To date, we are not aware of any court that has excluded evidence on this ground. In *Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008), the Second Circuit declined to consider whether the nationwide prevalence of constitutional violations mandated reconsideration of *Lopez-Mendoza* because the petitioner had not raised the claim before the agency.

2. VIOLATIONS OF THE INA AND FEDERAL REGULATIONS

The Supreme Court's decision in *Lopez-Mendoza* only addressed the applicability of the exclusionary rule for violations of the Fourth Amendment. Justice O'Connor specifically noted that no challenge was raised under federal regulations (*INS v. Lopez-Mendoza*, 468 U.S. at 1051 (Opinion of O'Connor, J.)), and the Court's decision did not disturb prior Board precedent establishing a separate test for suppression for regulatory violations.

Statutory violations

In the criminal context, the Supreme Court has suppressed evidence obtained in violation of statutes that "implicate important Fourth and Fifth Amendment interests" and are "connected to the gathering of evidence." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348-49 (2006) (discussing cases). The Court also has suggested that suppression may be particularly warranted if, among other factors, the violation gives the police a "practical advantage" and suppression is the "only means" of vindicating the rights protected by the statute. *Id*. at 348-350.

As discussed, *Lopez-Mendoza*, which addressed a Fourth Amendment violation, arguably does not apply to statutory violations—meaning the heightened "egregious violation" requirement is inapplicable. Instead, attorneys may argue that the suppression standard for statutory violations is similar to that applied to regulatory violations.

Regulatory violations

In ***Matter of Garcia-Flores***, 17 I&N Dec. 325, 327 (BIA 1980), the Board held that evidence obtained in violation of federal regulations could be suppressed if (1) the violated regulation was promulgated to serve "a purpose of benefit to the alien," and (2) the violation "prejudiced interests of the alien which were protected by the regulation." *Matter of Garcia-Flores*, 17 I&N Dec. at 328-29 (citing *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979)). *See also Martinez-Camargo v. INS*, 282 F.3d 487, 491 (7th Cir. 2002); *Puc-Ruiz v. Holder*, 629 F.3d 771, 780 (8th Cir. 2010).

The government may argue that termination based on regulatory violations is barred by 8 C.F.R. § 287.12, which states that the § 287 regulations "do not, are not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal." While the First Circuit has accepted this argument in dicta, other courts of appeals and the BIA have not addressed the issue in published decisions. *See Navarro-Chalan v. Ashcroft*, 359 F.3d 19 (1st Cir. 2004). In cases outside of the First Circuit, the BIA has accepted and rejected this argument in various unpublished decisions. *Compare Thiago Assereui de Oliveira*, A088 190 201, 2010 Immig. Rptr. LEXIS 6292, *2-*3 (BIA Nov. 2, 2010) (unpublished) (noting, in response to government's argument against termination based on a violation of § 287.6, that "DHS has not cited any authority indicating that 8 C.F.R. § 287.12 was intended to overrule *Matter of Garcia-Flores*") and *Mirna Linares-Tlazola*, A095 748 797, 2012 Immig. Rptr. LEXIS 6501, *10 (BIA Jan. 30, 2012) (unpublished) (overturning an IJ decision, in part because § 287.8 is "not enforceable by the respondent to seek termination of proceedings or to suppress evidence," based on § 287.12). Where the government raises the impact of § 287.12 on regulatory

suppression claims, respondents can make several counterarguments. First, § 287.12 does not expressly address the use of § 287 regulations in administrative proceedings. *Compare* 8 C.F.R. § 287.12 (discussing "criminal or civil" matters) *with* 8 C.F.R. § 204.6(j)(3)(iv) (referring to "civil or criminal actions" *and* "governmental administrative proceedings" separately). The history of the regulation also suggests that it was not intended to overrule preexisting agency and judicial precedent providing for regulatory suppression in immigration proceedings. In response to public comment indicating concern that the regulation would prevent victims of regulatory violations from pursuing remedies, the agency stated that the regulation would not eliminate existing remedies and was "consistent with the holding in *United States v. Caceres*, 440 U.S. 741 (1979)." 59 Fed. Reg. 42406, 42414 (Aug. 17, 1994). *Caceres* held that evidence obtained in violation of an agency's regulations need not be suppressed in a *criminal* proceeding, but discussed agencies' obligation to follow their own regulations, especially where "compliance . . . is mandated by the Constitution or federal law" and also where individuals' rights are affected. 440 U.S. at 749, 751 n.14. *Caceres* and the cases it cites were relied upon by the BIA in establishing its own rule for termination based upon regulatory violations. *See Garcia-Flores*, 17 I&N Dec. at 328. Finally, regardless of the intended purpose of § 287.12, an agency may not "sidestep" its binding obligations under a regulation while that regulation remains in effect. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

Part III: Practical Considerations when Executing a Motion to Suppress

1. DETERMINING THE FACTS

Establishing the circumstances of your client's interactions with immigration officers (and, in some cases, other law enforcement officials) encountered prior to the initiation of removal proceedings is critical to assessing the viability of a motion to suppress. During your initial interview, you should question your client about his or her encounter(s) with ICE, CBP and/or other law enforcement officials, the nature of any questioning, your client's responses, any documents provided or received by your client, any restraints imposed on your client, whether your client received any warnings, whether there was a warrant for your client's arrest, and the sequence of developments that led to the issuance of a Notice to Appear. If possible, you should try to elicit this information while the facts are still fresh in your client's mind.

2. BURDEN OF PROOF OF REMOVABILITY

When a respondent is charged with being present in the United States without being admitted or paroled, the government need only prove the respondent's identity and alienage, at which point the burden shifts to the respondent to establish

the time, place, and manner of entry. 8 C.F.R. § 1240.8(c); *Matter of Cervantes-Torres*, 21 I&N 351, 354 (BIA 1996). A motion to suppress must seek to prevent the government from establishing alienage.

3. BURDEN OF ESTABLISHING UNLAWFULLY OBTAINED EVIDENCE

When a motion to suppress is filed, the respondent bears the burden of showing that evidence used to establish removability was unlawfully obtained. *Matter of Tsang*, 14 I&N Dec. 294, 295 (BIA 1973). First, a respondent must make a *prima facie* case that the evidence in question was obtained unlawfully. *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). In the context of a motion to suppress in immigration court, a *prima facie* case is one that, on the facts alleged, is sufficient to create a rebuttable presumption that an egregious or widespread violation occurred. To establish a *prima facie* case, the motion must (a) be specific and detailed, (b) contain allegations based on the respondent's personal knowledge, and (c) list the evidence to be suppressed. *Id.* at 822. Where the written evidence submitted "could support a basis for excluding the evidence in question," then the individual seeking suppression "must" support the evidence with testimony. *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). If the individual then makes a *prima facie* case, the government will be called upon to justify how it obtained the evidence at issue. *Id.*; *see also Cotzojay v. Holder*, 725 F.3d 172, 178 (2d Cir. 2013). Where an immigration judge finds that a respondent has not made a *prima facie* case, the decision may be subject to challenge before the BIA if the judge does not provide sufficient factual findings and reasoning to support the determination. *See*, *e.g.*, *Jose Fonseca Velasquez*, A200-586-281, 2014 WL 1278449 (BIA Mar. 10, 2014).

4. WHEN TO FILE

Before filing a motion to suppress, attorneys should deny the allegations (including alienage) in the NTA at the first master calendar hearing. Subsequently, after the government offers a Form I- 213 or other evidence of the respondent's alienage, attorneys should disclose their intention to file a motion to suppress and, if needed, request time to file the motion.

5. SIMULTANEOUS FILINGS

Respondents must submit evidence in support of their suppression claims.

<u>Affidavit(s)</u>

Though couched in non-legal language, supporting affidavits should address all legal elements of the suppression motion—for example, that valid consent for a search was not obtained, or that the respondent was engaged in no activity that

could create a reasonable suspicion of unlawful presence. Where necessary, include a certificate of interpretation as required under Chapter 3.3(a) of the Immigration Court Practice Manual.

Motion to terminate

Attorneys should also file a motion to terminate proceedings along with a motion to suppress. If suppression is granted and the government presents no untainted evidence of alienage, the immigration judge can grant the motion to terminate and dismiss the charges against the respondent. *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

6. HEARINGS IN RELATION TO MOTIONS TO SUPPRESS

Matter of Benitez, 19 I&N Dec. 173 (BIA 1984), held that respondents are not entitled to a separate hearing on a motion to suppress. However, ***Matter of Barcenas***, 19 I&N Dec. 609, 611 (BIA 1988), held that when a movant submits evidence that "could" provide a basis for excluding the evidence in question, the claims "must" be supported by testimony. Arguably, immigration judges must therefore allow respondents to testify in support of a motion to suppress which makes a *prima facie* case that the evidence in question was unlawfully obtained, even if a separate suppression hearing is not required.

Tip: Before a client testifies, attorneys may wish to file a motion in limine seeking to prohibit questioning regarding alienage or removability, or the use of such testimony as part of the government's case-in-chief. For an example of a decision granting such a motion, visit http://www.legalactioncenter.org/sites/default/files/docs/lac/IJ-Marks-order-8-25-11.pdf. If such a motion is denied, attorneys should prepare their clients to exercise the privilege against self-incrimination guaranteed by the Fifth Amendment.

7. THE RIGHT TO REMAIN SILENT IN REMOVAL PROCEEDINGS

Yes. Even in civil removal proceedings, respondents cannot be required to answer questions that could subject them to criminal liability. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (holding that the privilege against self-incrimination may be "asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."). Thus, a respondent charged with being present without being admitted or paroled cannot be required to respond to questions that might establish alienage, because the answer could result in prosecution for criminal violations of the INA, such as illegal entry. See, e.g., INA § 275; *Matter of Velasquez*, 19 I&N Dec. 377, 379 (BIA 1986) ("Since it is a crime to enter the United States without inspection, the immigration judge found the respondent had properly invoked the privilege."). By contrast, the privilege against self-incrimination may not be invoked against questions relating to a visa

overstay, because only civil consequences attach to such a violation. *Matter of Davila*, 15 I&N Dec. 781, 782 (BIA 1976); *Matter of Santos*, 19 I&N Dec. 105, 109-110 n.2 (BIA 1984).

In general, the respondent must assert the privilege against self-incrimination on a question-by- question basis. *Matter of R-*, 4 I&N Dec. 720, 721 (BIA 1952). However, some immigration judges allow attorneys to assert the privilege on the client's behalf. The privilege may be asserted for both questions directly related to the respondent's alienage and for questions that could elicit a "link in the chain of evidence" needed to convict the individual of a crime. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 191 (2003). Importantly, a witness cannot be compelled to state why an answer might tend to incriminate him (*Matter of R-*, 4 I&N Dec. at 721); nor can an immigration judge or trial attorney validly offer immunity to respondents to prevent them from invoking the privilege. *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979). If asked a question to which the answer could help prove citizenship of a foreign country, clients should say, "I decline to answer under the Fifth Amendment."

A respondent's silence may lead to adverse inferences regarding alienage. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043-44 (1984). However, until the government presents evidence of alienage, such silence is not alone sufficient to establish removability. *Matter of Guevara*, 20 I&N Dec. 238, 244 (1991). Thus, if the government's only evidence of alienage is excluded pursuant to a motion to suppress, and if the respondent does not concede alienage, the government will have failed to meet its burden and a motion to terminate proceedings should be granted.

8. CONCESSION OF ALIENAGE

Such an admission would constitute untainted evidence on which the government can base a finding of removability. *Matter of Carrillo*, 17 I&N Dec. at 32. Absent highly unusual circumstances, a formal admission by a respondent's attorney—such as during the pleading stage or in a motion to change venue—is binding upon the respondent in removal proceedings. *Matter of Velasquez*, 19 I&N 377, 382 (BIA 1986). However, in unpublished cases, the BIA has reopened or remanded based on ineffective assistance of counsel where a previous attorney sought to suppress evidence but nonetheless conceded removability. *See Olga Mercedes Solano-Vargas*, A099-577-390, 2010 Immig. Rptr. LEXIS 7380 (BIA Oct. 12, 2010) (unpublished); *In re Jose Ramirez-Guadalupe*, A072-723-388, 2008 Immig. Rptr. LEXIS 9036 (BIA Sep. 18, 2008) (unpublished). If your client is considering a motion to suppress, it is crucial that you deny the charges and the relevant allegations in the NTA and that neither you nor your client concede alienage at any point of the case.

a. Effect of applications for relief

Federal regulations state that an application for relief made during a hearing "shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his or her alienage or deportability." 8 C.F.R. § 1240.11(e). Similarly, regulations state that bond hearings "shall be separate and apart from, and shall form no part of" an individual's removal hearing. 8 C.F.R. § 1103.19(d). However, the regulations do not bar the government from relying on applications submitted prior to the initiation of proceedings, or other filings submitted to the court. *See*, *e.g.*, *Vanegas-Ramirez v. Holder*, 768 F.3d 226 (2d Cir. 2014) (finding admissions in a change of venue motion to be independent evidence of removability).

9. COMPELLING ARRESTING OR EXAMINING OFFICERS TO TESTIFY

Generally you may not compel arresting or examining officers to testify. However, if the government offers a Form I-213 to establish alienage, attorneys may ask the immigration judge to subpoena or order a deposition of the agent who prepared the form so that he may be cross-examined. 8 C.F.R. § 1003.35(a)-(b) (granting immigration judges power to order depositions and issue subpoenas). A party applying for a subpoena must state what he or she expects to prove and show "diligent" but unsuccessful efforts to produce the same. 8 C.F.R. § 1003.35(b)(2).

Respondents generally are not entitled to cross-examine the preparers of Form I-213, because the form is considered "inherently trustworthy." *Matter of Barcenas,* 19 I&N Dec 609, 610 (BIA 1988). However, an exception exists if information on the form "is manifestly incorrect or was obtained by duress," *Barradas v. Holder*, 582 F.3d 754, 763 (7th Cir. 2009), or if other circumstances indicate lack of trustworthiness. *Espinoza v. INS*, 45 F.3d 308, 310-11 (9th Cir. 1995) (quoting Fed. R. Evid. 803(8)(C)). In many suppression cases, the alleged misconduct itself may provide a basis to question the reliability of the Form I-213—for example, whether or not immigration officers obtained consent before entering a home.

10. RE-INITIATION OF PROCEEDINGS WHEN REMOVAL PROCEEDINGS ARE TERMINATED FOLLOWING A SUCCESSFUL MOTION TO SUPPRESS

Matter of Perez-Lopez, 14 I&N Dec. 79 (BIA 1972), held that the government may commence new removal proceedings following the termination of an earlier case if it has new, untainted evidence of removability. However, the government must establish "that it gained or could have gained the knowledge it relies upon

from a source independent of its wrongful act." *Matter of Perez-Lopez*, 14 I&N Dec. at 80 (citing *Wong Sun v. United States,* 371 U.S. 471, 485 (1963)).