PRACTICE ADVISORY[1]
November 30, 2012

Understanding *Oliva-Ramos v. Attorney General* and the Applicability of the Exclusionary Rule in Immigration Proceedings

SUMMARY

In *Oliva-Ramos v. Attorney General*, 694 F.3d 259 (3d Cir. 2012), the Third Circuit issued a landmark decision holding that evidence obtained through certain types of constitutional violations may not be used in removal proceedings. This decision recognizes the application of the "exclusionary rule" (requiring the suppression of evidence) in some removal proceedings. While the exclusionary rule generally does not apply in immigration cases, *Oliva-Ramos* recognized that Supreme Court precedent expressly contemplates the suppression of evidence acquired through "egregious" or "widespread" violations of immigrants' constitutional rights. *Oliva-Ramos*, 694 F.3d at 272 (quoting *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984)). In a matter of first impression for the Third Circuit, the court articulated a standard for assessing whether Fourth Amendment violations are "egregious" or "widespread," such that suppression is necessary to protect immigrants' rights and deter unconstitutional conduct in the future. Furthermore, the court held that the Immigration Judge and the Board of Immigration Appeals had violated due process in failing to permit Mr. Oliva-Ramos to subpoena and enter information relevant to these inquiries.

This practice advisory focuses on the Third Circuit's decision in *Oliva-Ramos* and is divided into several parts. First, the practice advisory provides a brief overview of the exclusionary rule and its applicability in the immigration context. Second, it summarizes the factual background of the *Oliva-Ramos* case. Third, the advisory identifies and analyzes the various holdings in the Third Circuit's *Oliva-Ramos* decision. To conclude, the advisory provides practice tips for immigration practitioners filing motions to suppress in immigration court or litigating suppression-related issues on appeal.

A BRIEF PRIMER ON THE EXCLUSIONARY RULE AND IMMIGRATION PROCEEDINGS[2]

The "exclusionary rule" requires suppression of evidence obtained in violation of the constitutional rights of the person against whom the evidence is to be used. *See Mapp v. Ohio*, 367 U.S. 643 (1961) (regarding suppression of evidence obtained in violation of Fourth Amendment). The rule does not apply, however, when the evidence is obtained through good faith reliance on a search

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[2] The Legal Action Center of the American Immigration Council (AIC) issued a practice advisory entitled Motions to Suppress in Removal Proceedings: A General Overview. We highly recommend reading this practice advisory for more information on the exclusionary rule in immigration proceedings, as we only summarize the discussion here. AIC Legal Action Center, *Motions to Suppress in Removal Proceedings: A General Overview* (Oct. 12, 2011) ("AIC Practice Advisory"), *available at* http://www.legalactioncenter.org/sites/default/files/practice-advisory-motions-to-suppress-in-removal-proceedings-a-general-overview.pdf. The AIC Practice Advisory provides a comprehensive overview of where the other circuit courts stand on these questions as of October 12, 2011, the date of its publication.

warrant issued by a judge or magistrate,[3] when the evidence was also "discovered by means wholly independent of any constitutional violation,"[4] when "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,'"[5] or when the evidence "would have been discovered as a matter of course if independent investigations were allowed to proceed."[6]

Though associated with criminal proceedings, the exclusionary rule is also relevant in the immigration context. The Supreme Court has held that the exclusionary rule generally does not apply in immigration proceedings, but has left open an exception to this rule for "egregious" or "widespread" violations.[7] Prior to the *Oliva-Ramos* decision, three circuits had explicitly adopted the "egregiousness" exception (the Second, Eighth, and Ninth).[8] The Ninth Circuit is the only circuit to have actually granted a motion to suppress in removal proceedings.[9] The First, Sixth, and Tenth Circuits have all acknowledged the exception to some degree without fully articulating the standard.[10] The Seventh Circuit maintains that the Supreme Court left the question open,[11] and the "validity of the exception remains an open question in the Fourth, Fifth, and Eleventh Circuits."[12] No circuit court has rejected the exception.[13]

The standard for egregiousness differs somewhat among the circuits that have articulated one. In *Almeida-Amaral v. Gonzales*, the Second Circuit held that there must be aggravating factors in addition to the Fourth Amendment violation to meet the "egregious" standard. 461 F.3d 231, 235-37 (2d Cir. 2006). In *Puc-Ruiz v. Holder*, the Eighth Circuit discussed similar relevant factors, noting that the factors mentioned were not exhaustive. 629 F.3d 771, 778-79 (8th Cir. 2010). In *Gonzalez-Rivera v. INS*, the Ninth Circuit maintained that the exclusionary rule should apply at least when the evidence was obtained through unconstitutional actions done in "bad faith." 22 F.3d 1441, 1449 (9th Cir. 1994). This practice advisory focuses on the standards expressed by the Third Circuit in *Oliva-Ramos*.

CASE BACKGROUND

I. The Home Raid

Erick Oliva-Ramos was the victim of a pre-dawn home raid by a U.S. Immigration and Customs Enforcement ("ICE") Fugitive Operations Team.[14] At 4:30 am on March 26, 2007, one of Mr.

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[3] *United States v. Leon*, 468 U.S. 897, 922 (1984); *see also Oliva-Ramos*, 694 F.3d at n.21.
[4] *Nix v. Williams*, 467 U.S. 431, 443 (1984).
[5] *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).
[6] *Nix*, 467 U.S. at 459.
[7] *Lopez-Mendoza*, 468 US. at 1050-51.
[8] AIC Practice Advisory 5.
[9] *Id.* at 5 (mentioning, *inter alia*, *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994), and *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994)).
[10] *Id.* at 7 (citing *Westover v. Reno*, 202 F.3d 475, 479 (1st Cir. 2000); *Navarro-Chalan* v. *Ashcroft*, 359 F.3d 19, 22-23 (1st Cir. 2004); *Kandamar v. Gonzales*, 464 F.3d 65, 66 (1st Cir. 2006); *United States v. Navarro*-Diaz, 420 F.3d 581, 587 (6th Cir. 2005); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1116 n. 9 (10th Cir. 2006).
[11] *E.g.*, *Gutierrez-Berdin v. Holder*, 618 F.3d 647, 652 (7th Cir. 2010).
[12] AIC Practice Advisory at 7 (citing *United States v. Oscar-Torres*, 507 F.3d 224, 227-28 n.1 (4th Cir. 2007); *Mendoza-Solis v. INS*, 36 F.3d 12, 12 (5th Cir. 1994); *Escobar v. Holder*, 398 F. App'x 50, 53-54 (5th Cir. 2010); *Ghysels-Reals v Att'y Gen.*, No. 10-12666, 2011 U.S. App. LEXIS 6154 at *4 (11th Cir. Mar. 24, 2011)).
[13] *Id.* at 5.
[14] The raid was part of Operation Return to Sender, one of many ICE programs focused on the mass removal of undocumented immigrants.

Oliva-Ramos's sisters, a lawful permanent resident ("LPR"), awoke to incessant buzzing at the door of the apartment she shared with Mr. Oliva-Ramos. *Oliva-Ramos*, 694 F.3d at 262. She remotely opened the building door and saw a team of armed, uniformed ICE officers approach her apartment. *Id.* The officers had an administrative arrest warrant for another relative, but not for Mr. Oliva-Ramos or any of the other individuals in the home at the time. *Id.* After waving the warrant, the officers requested permission to enter. The sister at the door did not think she had the right to refuse. *Id.*

The officers proceeded to round up everyone in the apartment and block the exits. *Id.* at 262-63. The officers did not explain to Mr. Oliva-Ramos why they were there, nor did the officers tell him he could refuse either to answer their questions or to leave with them. *Id.* In fact, the officers threatened to arrest the individuals in the apartment if they did not answer their questions. *Id.* at 263. The officers ordered Mr. Oliva-Ramos to retrieve his identification documents. Mr. Oliva-Ramos complied, believing he would be arrested if he failed to do so. *Id.*

Everyone in the home other than Mr. Oliva-Ramos's LPR sister was handcuffed and taken into ICE custody. *Id.* At no point was Mr. Oliva-Ramos told he had the right to remain silent. *Id.* Mr. Oliva-Ramos was charged with removability and taken to a detention facility. *Id.*[15]

II. Court Proceedings

Mr. Oliva-Ramos was charged with being present in the United States without being admitted or paroled, a charge he denied. To prove alienage, the Government submitted information obtained through the home raid and post-arrest interrogation of Mr. Oliva-Ramos. *Oliva-Ramos*, 694 F.3d at 264. Mr. Oliva-Ramos objected to the introduction of the Government's evidence, and moved to suppress all evidence obtained through the raid and arrest. *Id.* Mr. Oliva-Ramos argued the exclusionary rule should apply in his case since the Government's evidence was obtained through Fourth Amendment violations that were both egregious and widespread. *Id.* Mr. Oliva-Ramos requested an evidentiary hearing on his suppression motion pursuant to *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988), and also moved for termination on the basis of numerous regulatory violations. *Id.* Additionally, Mr. Oliva-Ramos moved to subpoena testimony of the ICE officers who arrested him as well as Government documents relevant to his claims. *Id.* at 266. The documents requested pertained to ICE policies and procedures for searches and seizures, specific information on his search and seizure, and records on the ICE officers who arrested him. *Id.* at 273.

The Immigration Judge ("IJ") held a hearing on the circumstances of the home raid but denied the motions to suppress and terminate proceedings after concluding the exclusionary rule had no application in the immigration context. *Id.* at 265-66. The IJ never ruled on the motion to subpoena witnesses and documents. *Id.* at 266. The IJ sustained the government's allegations of removability and ordered Mr. Oliva-Ramos removed. *Id.*

Mr. Oliva-Ramos appealed the decision to the Board of Immigration Appeals ("BIA"). The BIA acknowledged that *Lopez-Mendoza* permits exclusion of evidence as a remedy in "fundamentally unfair" circumstances, but the BIA characterized this exception as a matter of due process rather than a Fourth Amendment issue. *Id.* at 267. The BIA affirmed the IJ's finding that the officers entered the apartment with consent, and concluded the interrogation and warrantless arrest were permissible because ICE reasonably believed Mr. Oliva-Ramos was a flight risk. *Id.* at 267-68. The BIA rejected other regulatory claims advanced by Mr. Oliva-Ramos. *Id.* at 268-69.

[15] For a more detailed account of the facts of this case, see the Third Circuit's decision. *Id.* at 261-64.

While these proceedings were underway, a separate Freedom of Information Act ("FOIA") lawsuit brought by the Cardozo Law School Immigration Justice Clinic revealed evidence relevant to Mr. Oliva-Ramos's claim that constitutional violations like those he experienced were widespread. *Id.* at 273. Mr. Oliva-Ramos moved to enter this additional evidence. *Id.* at 269. The BIA denied his motion, discarding the *Lopez-Mendoza* plurality's discussion of egregious and widespread violations as dictum and holding that the BIA's "own precedents . . . recognize no such exception to the inapplicability of the exclusionary rule premised on widespread Fourth Amendment violations." *Id.* at 269-70. At the conclusion of the BIA proceedings, Mr. Oliva-Ramos submitted a Petition for Review to the Third Circuit.

Before the Third Circuit, Mr. Oliva-Ramos argued that the BIA misapplied Fourth Amendment law by categorically rejecting all his Fourth Amendment claims. *Id.* at 274. He contended that ICE violated the Fourth Amendment (and related regulations) by failing to obtain a warrant or proper consent before entering his home, and by seizing and arresting him without a warrant, probable cause, or reasonable suspicion. *Id.* These Fourth Amendment violations, Mr. Oliva-Ramos asserted, were both egregious and widespread, thus warranting suppression of all evidence obtained through the raid and post-arrest interrogation. *Id.* at 281. He further argued that the BIA erred in failing to permit him to introduce evidence in support of his egregious and widespread claims. *Id.* Additional claims unrelated to this practice advisory or not discussed by the Third Circuit are mentioned below.[16]

THE THIRD CIRCUIT'S DECISION[17]

I. The Exclusionary Rule

HELD: THE EXCLUSIONARY RULE APPLIES IN IMMIGRATION PROCEEDINGS WHERE THERE HAVE BEEN EGREGIOUS OR WIDESPREAD FOURTH AMENDMENT VIOLATIONS

The court began its legal analysis with an in-depth discussion of *Lopez-Mendoza*. The plurality opinion in *Lopez-Mendoza* held that the exclusionary rule *generally* does not apply in removal proceedings. 468 U.S. at 1050. As the Third Circuit pointed out, the *Lopez-Mendoza* plurality qualified this holding by suggesting that suppression may be warranted in cases of "widespread" or "egregious" Forth Amendment violations. *Oliva-Ramos*, 694 F.3d at 270-72. Considering this qualification together with the opinions of the four dissenting Justices who supported the application of the exclusionary rule in *all* cases, the court observed that "eight Justices agreed that the exclusionary rule should apply in deportation/removal proceedings involving egregious or widespread Fourth Amendment violations." *Id.* at 271. Given this near unanimity, the court held the BIA "erred in concluding that [this] discussion in Lopez-Mendoza lacked the force of law," *id.* at 275. The Third Circuit instructed the IJ or BIA on remand to "determine [first] whether agents violated Oliva-Ramos's Fourth Amendment rights and

[16] A recording of the oral argument before the Third Circuit can be found at http://www.ca3.uscourts.gov/oralargument/audio/10-3849RodolfovAttyGenUSA.wma.

[17] A few weeks after this decision was issued, the court issued two modifications of the opinion. These modifications did not change the substance of the decision but merely added names to the list of amici and corrected the name of the Immigration Judge.

second, whether any such violations implicated the Lopez-Mendoza exception for being widespread or egregious." *Id.*

HELD: A VIOLATION IS EGREGIOUS IF IT WAS FUNDAMENTALLY UNFAIR OR UNDERMINES THE RELIABILITY OF THE EVIDENCE IN DISPUTE

The Third Circuit stated its standard for egregiousness as follows: "evidence will be the result of an egregious violation within the meaning of Lopez-Mendoza, if the record evidence established either (a) that a constitutional violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its unfairness—undermined the reliability of the evidence in dispute." *Id.* at 278. The Court explicitly rejected the argument that a constitutional violation must "shock the conscience" under the Due Process Clause to merit suppression. *Id.* at 276, 278 (discussing conduct in *Rochin v. California*, 342 U.S. 165 (1952) as sufficient, but not necessary, for suppression).

The Third Circuit's standard is the same as the Second Circuit test established in *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006), save for a "slight modification." *Oliva-Ramos*, 694 F.3d at 277. The Second Circuit's test finds egregiousness when evidence shows "an egregious violation that was fundamentally unfair" or a violation that undermines evidence's reliability "regardless of its egregiousness or unfairness." *Almeida-Amaral*, 461 F.3d at 235. The Third Circuit recognized the circularity of determining egregiousness by standards that incorporate the language of "egregious" or "regardless of its egregiousness," and thus removed these references from its articulation of the standard. *Oliva-Ramos*, 694 F.3d at 278.

The court also discussed the Ninth Circuit's test for egregiousness, at least as it relates to the bad faith of officers' conduct. *Id.* at 276-77. The Ninth Circuit finds a constitutional violation to be the result of bad faith "when 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." *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1449 (9th Cir. 1994) (internal quotations omitted). The Third Circuit did not reject the proposition that bad faith is sufficient for egregiousness, but rather questioned whether the Ninth Circuit's test might be too narrow in circumstances such as those of Mr. Oliva-Ramos's case: "[F]ocusing only on [individual ICE officers'] good faith would permit conduct that may be objectively reasonable based on directives of the Department of Homeland Security, but nevertheless result in routine invasion of the constitutionally protected privacy rights of individuals." *Id.* at 277. The court emphasized that "the egregious inquiry under *Lopez-Mendoza* cannot be sanitized by the underlying agency policy even if the good faith of the immigration officer is established." *Id.* at 277 n.21. To be clear, however, the Ninth Circuit's rule is not confined to circumstances evincing bad faith. Rather, the Ninth Circuit makes clear that it has "not h[eld] that *only* bad faith violations are egregious, but rather that *all* bad faith constitutional violations are egregious." *Gonzalez-Rivera*, 22 F.3d at 1449 n.5. The Third Circuit's position can been seen as in line with this statement.

The "Fundamentally Unfair" Standard Allows Courts to Consider a Wide Range of Factors

The Third Circuit indicated that the fundamental unfairness inquiry requires "a flexible case-by-case approach" that focuses on the "totality of the circumstances." *Oliva-Ramos*, 694 F.3d at 279. In Mr. Oliva-Ramos's case, the court identified the following factors as relevant: the intentionality of the violation; the use of threats, force, or other forms of coercion to execute the seizure or home entry; the

extent to which agents reported to unreasonable shows of force[18]; racial or ethnic motivation behind the seizure or arrest; and the bad faith of the ICE officers. *Id.* 279 & n.24. In considering these factors, courts and agencies should "pay close attention to the 'characteristics and severity of the offending conduct.'" *Id.* at 279 (quoting *Almeida-Amaral*, 461 F.3d at 235). The court also recognized that pre-dawn raids "have traditionally been viewed with particular opprobrium unless the timing is justified by the particular circumstances." *Id.* at 281 (citing *United States v. Myers*, 398 F.2d 896, 897 (3d Cir. 1968)).

The court emphasized that "[t]hese factors are illustrative of the inquiry and not intended as an exhaustive list of factors that should always be considered, nor is any one factor necessarily determinative of the outcome in every case." *Id.* at 279. Although the court accepted the Second Circuit's formulation of this prong of the egregiousness standard, it drew from a broader swath of case law in fleshing out the meaning of "fundamental unfairness." *Id.* (drawing upon *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006), and *Puc-Ruiz v. Holder*, 629 F.3d 771, 778-79 (8th Cir. 2010)).

Importantly, the court indicated that a violation might also be egregious if the "stop" (or, one would expect, initial entry) was "based on race (or some other grossly improper consideration)," "even if the seizure is not especially severe." *Id.* at 278 (quoting *Almeida-Amaral*, 461 F.3d at 235). Thus, fundamental unfairness does not require that a violation be "especially severe," and agencies and courts should not confine their review to the moment of the seizure or search itself.

Lastly, the court made clear that "the probative value of the evidence obtained cannot be part of the calculus." *Id.* at 278.

The "Unreliable Evidence" Standard Is an Independent Ground for Suppression

The court made clear that "unreliability" and "fundamental unfairness" are independent bases for finding an egregious Fourth Amendment violation. *Oliva-Ramos*, 694 F.3d at 277-78. The Third Circuit joins all other courts that have rejected the argument that egregiousness requires both unreliability and fundamentally unfair conduct. *See Puc-Ruiz*, 629 F.3d at 778; *Singh v. Mukasey*, 553 F.3d 207, 217 (2d Cir. 2009); *Almeida-Amaral*, 461 F.3d at 234; *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451 (9th Cir. 1994).

HELD: WIDESPREAD VIOLATIONS PROVIDE AN INDEPENDENT RATIONALE FOR APPLYING THE EXCLUSIONARY RULE

The Third Circuit, by its own estimate, was the first court to hold explicitly that widespread violations are an "independent rationale" for the application of the exclusionary rule in the immigration context. Nonetheless, the court reasoned that such an application should be uncontroversial, as widespread violations were "as much a part of the *Lopez-Mendoza* discussion as 'egregious' violations." *Oliva-Ramos*, 694 F.3d at 279-80. Indeed, the Court observed that "most constitutional violations that are part of a pattern of widespread violations of the Fourth Amendment would also satisfy the test for an egregious violation." *Id.* at 280.

[18] It is unclear why the court spoke of "the extent to which the agents reported to unreasonable shows of force." *Oliva-Ramos*, 694 F.3d at 279. It may be that the court the decision should read "resorted to" rather than "reported to."

Factors relevant to the widespread inquiry include, *inter alia*: the existence of a "consistent pattern" (e.g. pattern of conducting early morning raids), the number of affected individuals, and the frequency and routine nature of the violation. *Id.* at 279-82. The Court also characterized the following as "[a]llegations of widespread violations . . . presented previously before this Court" which it had not ruled on in that prior case: "inadequately trained officers" relying on "outdated and inaccurate databases" to target individuals through home raids, possibly motivated by "inflated quotas" that "drove the programmatic abuses," including "'collateral arrests' of persons not targeted by the raids" and "excessive displays of force" and intimidation. *Id.* at 280 n.25.

In its discussion, the Third Circuit expressly noted evidence supporting Mr. Oliva-Ramos's arguments regarding widespread illegal raids under Operation Return to Sender, though it did not rule whether such evidence actually established a widespread violation. The court noted that the agency should have considered Mr. Oliva-Ramos's arguments that ICE "conceded that it has a policy of rounding up everyone in a home, without any particularized suspicion, in order to question all of the occupants about their immigration status," presumably referring to testimony of the ICE officer at Mr. Oliva-Ramos's hearing in addition to other evidence. *Id.* at 281. In addition, the BIA should have considered the information Mr. Oliva-Ramos attempted to procure and introduce on Fugitive Operation Teams statistics; ICE arrest statistics; and policies, directives, and memoranda regarding fugitive operations and collateral arrests. *Id.* at 280-81.

II. Underlying Fourth Amendment Violations and Related Regulatory Claims

The identification of an underlying Fourth Amendment violation is, of course, antecedent to an analysis of whether that violation is egregious or widespread. Because of their flawed analysis of the exclusionary rule, the IJ and BIA did not properly assess Mr. Oliva-Ramos's various Fourth Amendment claims. However, Mr. Oliva-Ramos also presented, and the IJ and BIA considered, numerous regulatory claims that incorporate Fourth Amendment standards for searches and seizures. The Third Circuit reviewed those regulatory claims and, in the process, made clear which legal standards should apply for both constitutional and regulatory purposes.[19]

HELD: IN DETERMINING WHETHER CONSENT IS VALID, THE JUDGE MUST ANALYZE THE TOTALITY OF THE CIRCUMSTANCES.

Mr. Oliva-Ramos argued that his sister's failure to deny entry to the officers did not constitute valid consent and thus ICE had violated the Fourth Amendment and 8 C.F.R. § 287.8(f)(2).[20] *Oliva-*

[19] One of the regulatory claims was unrelated to the Fourth Amendment. Mr. Oliva-Ramos argued ICE violated his right to counsel under 8 C.F.R. § 292.5(b), since he was told he was required to answer the officers' questions when in ICE custody, despite his desire to be represented by an attorney. The court agreed with the BIA's construction of the regulation, finding that the regulation provides a right to legal representation once an immigrant is placed in formal proceedings, and such proceedings "begin only after the Government has filed a Notice to Appear in immigration court." *Oliva-Ramos*, 694 F.3d at 286. The court affirmed the BIA's decision that ICE did not violate the regulation. For more on this topic, see the American Immigration Council's practice advisory on warrantless arrests and the timing of right to counsel advisals: http://www.legalactioncenter.org/sites/default/files/challenging_matter_of_e-r-m-f-__a-s-m-_0.pdf.

[20] "An immigration officer may not enter into . . . a residence . . . for the purpose of questioning the occupants . . . unless the officer has either a warrant or the consent of the owner or other person in control of the site to be inspected." 8 C.F.R. § 287.8(f)(2).

Ramos, 694 F.3d at 282-83. Reiterating longstanding Fourth Amendment law, the court held that it was an error to "find[] valid consent without analyzing the totality of the circumstances under the Fourth Amendment." *Id.* at 283 (relying upon *United States v. Drayton*, 536 U.S. 194 (2002), and *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). The court made clear that for both constitutional and regulatory purposes, the validity of consent depends on factors including, but not limited to: "age, education, and intelligence of the subject; whether the subject was advised of his or her constitutional rights; the length of the encounter; the repetition or duration of the questioning; and the use of physical punishment" as well as the setting, the officer's verbal and non-verbal actions, and the number of officers present. *Id.* Specifically, the court indicated that IJ's reliance on the I-213 form,[21] which stated that consent had been given, but to which no witness could testify, was insufficient to satisfy the "particularized scrutiny" demanded by the Fourth Amendment. *Id.*

HELD: IN DETERMINING WHETHER A PERSON HAS BEEN SEIZED, THE JUDGE MUST ANALYZE THE TOTALITY OF THE CIRCUMSTANCES AND DETERMINE WHETHER A REASONABLE PERSON WOULD HAVE BELIEVED HE WAS NOT FREE TO LEAVE.

Mr. Oliva-Ramos argued that he was seized inside his home within the meaning of the Fourth Amendment and in violation of 8 C.F.R. § 287.8(b)(1),[22] because "a reasonable person would have believed that he was not free to leave." *Oliva-Ramos*, 694 F.3d at 284. Once again, the court demanded a more exacting inquiry than that undertaken by the BIA, emphasizing that a person is seized if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). The court held that the BIA erred in relying on Mr. Oliva-Ramos's testimony that he did not *plan* to leave the apartment, distinguishing this from a feeling of freedom to leave. *Id.* (citing *Brendlin v. California*, 551 U.S. 249, 255 (2007)).[23]

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[21] The I-213 form, or "Record of Deportable/Inadmissible Alien," is a form created for all immigrants in removal proceedings. *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988).

[22] "An immigration officer, like any other person, 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).

[23] Mr. Oliva-Ramos also argued that has arrest was unconstitutional and in violation of ICE regulations since he was arrested without a warrant or probable cause. *Oliva-Ramos*, 694 F.3d at 285; *see* 8 C.F.R § 287.8(c)(2)(i) ("An arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States."); § 287.8(c)(2)(ii) ("A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained."). In addition, he argued statements used against him were coerced and thus in violation of 8 C.F.R § 287.8(c)(2)(vii) ("The use of threats, coercion, or physical abuse by the designated immigration officer to induce a suspect to waive his or her rights or to make a statement is prohibited."). *Oliva-Ramos*, 694 F.3d at 286. The court found the validity of Mr. Oliva-Ramos's arrest depended on whether the statements relevant to ICE's flight-risk determination were coerced, which in turn depended on whether Mr. Oliva-Ramos had been improperly seized in the first place. In light of this, the court vacated and remanded for further consideration in light of the underlying Fourth Amendment and regulatory determinations. *Id.* at 285-86.

III. Due Process Violations

HELD: DUE PROCESS GUARANTEES THE RIGHT TO SUBPOENA WITNESSES AND DOCUMENTS RELEVANT TO ONE'S LEGAL CLAIMS AND TO REOPEN PROCEEDINGS TO INTRODUCE SUCH EVIDENCE ONCE IT BECOMES AVAILABLE

Mr. Oliva-Ramos argued that the IJ violated his due process rights when she failed to rule on his motion to subpoena witnesses and documents. *Oliva-Ramos*, 694 F.3d at 272. In addition, Mr. Oliva-Ramos contended that the BIA violated his due process rights when it failed to remand to allow consideration of new evidence showing ICE's egregious and widespread constitutional violations. *Id.* The BIA denied Mr. Oliva-Ramos the right to present evidence in support of his claims by refusing to subpoena ICE agents and documentary evidence and by failing to consider evidence on the Fugitive Operations Program once obtained through FOIA.

The Third Circuit held that the IJ had erred in not granting the motion to subpoena witnesses and documents, indicating that "concerns for brevity, efficiency, and expedience must not be used to justify denying an alien the right to produce witnesses where that request is appropriate and the witnesses' presence appears necessary to satisfy basic notions of due process." *Id.* at 272. Furthermore, the court recognized that "[r]ather than tender a timely disclosure of [documents later obtained through FOIA] pursuant to the subpoena, the Government forced Oliva–Ramos to rely on a FOIA request to obtain documents that were in the exclusive custody and control of the Government and were clearly germane to his legal claims." *Id.* at 273. Because the documents and witnesses sought through both motions were "relevant" to Mr. Oliva-Ramos's legal claims, and were not sought in bad faith or to delay the proceedings, the court "grant[ed] Oliva-Ramos's motion to reopen the proceedings in order to permit him to subpoena the additional witnesses and to introduce newly available documents, and [] instruct[ed] the BIA to remand to the Immigration Judge in the event that additional evidentiary proceedings are appropriate." *Id.* at 273-74.

The court found the IJ's denial of the motion to subpoena particularly problematic because it also violated the agency's own regulations. *Id.* at 272 (finding violation of 8 C.F.R. § 1003.35(b)(3), which requires the IJ to issue subpoenas "[u]pon being satisfied that a witness will not appear and testify or produce documentary evidence and that the witness' evidence is essential.") Because the requested documents "could have shed light on" the issues of consent and seizure and because the testimony could have been used to "adduce additional facts that may have altered the analysis of alleged constitutional violations," Mr. Oliva-Ramos satisfied the requirements of the regulation. *Id.* at 272.

The court did not suggest, however, that an underlying regulatory violation was a *necessary* element of a successful due process claim. *Id.* (indicating that a due process claim is stronger "where the IJ's refusal to issue or enforce subpoenas is contrary to the very regulatory scheme governing the removal process"). Nor did the court suggest that a respondent would need to prove that the documents sought would in fact establish the basis for suppression, only that they would be relevant to the analysis. Indeed, the court emphasized it did "not suggest that the documents would have satisfied

Oliva-Ramos's burden had the IJ or BIA reviewed them," but "only not[ed] that the documents certainly appeared relevant to Oliva-Ramos's legal claims." *Id.* at 274.[24]

PRACTICE TIPS

1. **Exclusionary Rule Basics.** Where seeking to apply the "exclusionary rule" under the *Lopez-Mendoza* exception, a successful motion to suppress requires evidence of an underlying constitutional violation *as well as* evidence that the violation was egregious or widespread. Determining whether an underlying Fourth Amendment violation exists requires a close examination of Fourth Amendment jurisprudence in the relevant circuit.

   The Immigration Court Practice Manual's chapter on motions does not discuss motions to suppress. However, motions to suppress should be submitted as would any other motion before the IJ and must include a cover page and proposed order for the IJ's signature. Under BIA case law, the statements in a motion to suppress must be based on personal knowledge. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980). The BIA also requires that respondents present a prima facie case that the evidence was illegally obtained before DHS assumes the burden of justifying its actions. *See Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988).

   A sample motion to suppress can be found at: http://www.law.stanford.edu/sites/default/files/child-page/163220/doc/slspublic/Motion_to_Suppress_Final.pdf.

2. **Consent.** In establishing a Fourth Amendment violation during an immigration raid, one question that may arise is whether or not any alleged consent was valid under the law. Even in cases where some degree of assent was allegedly given to ICE officers' search or entry into a home, it is possible to argue there was no *valid consent* based on the totality of the circumstances. Take into account all the factors mentioned by the Third Circuit, which include: "the age, education, and intelligence of the subject; whether the subject was advised of his or her constitutional rights; the length of the encounter; the repetition or duration of the questioning; and the use of physical restraint;" the setting; verbal and non-verbal actions; the number of officers; and displays of force. *Oliva-Ramos*, 694 F.3d at 283 (citing *United States v. Prince*, 558 F.3d 270, 278 (3rd Cir. 2009), and *United States v. Kim*, 27 F.3d 947, 954 (3d Cir. 1994)). Although the Third Circuit did not rule on whether consent was valid or invalid in Mr. Oliva-Ramos's case, many of the factors mentioned seem to favor individuals who are victims of home raids.

   In the home raid context, it is also important to address both the validity of *consent to enter* and the conduct of ICE agents *inside the home*. Even if consent to enter is given, such consent may not enable ICE to conduct a search of the home and indiscriminately seize everyone found there. For more on the scope of consent, see *Georgia v. Randolph*, 547 U.S. 103 (2006), *Florida v. Jimeno*, 500 U.S. 248 (1991), and *Florida v. Bostick*, 501 U.S. 429 (1991). Additionally, note that administrative warrants are not judicial search or arrest warrants backed by probable cause and do not give ICE authority to enter or search a residence.

[24] Mr. Oliva-Ramos also argued that the IJ violated his due process rights when she failed to correct translation errors. The court, without much discussion, simply stated "errors in the transcript and related questioning did not deny Oliva-Ramos due process of law. Any such errors were clarified and the record demonstrates that Olivia-Ramos fully understood the questions . . . ." *Oliva-Ramos*, 694 F.3d at 274.

3. **Seizure.** Another Fourth Amendment violation to explore is whether the individual was illegally seized. ICE's authority to question individuals about their immigration status *when they are free to leave* does not translate into authority to detain and interrogate an individual without a warrant. When arguing that a person has been seized for the purposes of the Fourth Amendment, focus on all the circumstances supporting the argument that a reasonable person in those circumstances would not have felt free to leave. Factors to consider include: the number of officers, the use or appearance of threats, the display of weapons, the use of physical contact, and language or tone of voice. "Interrogations and detentions not amounting to arrest" are governed by 8 C.F.R § 287.8(b)(1). Important cases include *Brendlin v. California*, 551 U.S. 249 (2007), *Florida v. Bostick*, 501 U.S. 429 (1991), and *United States v. Mendenhall*, 446 U.S. 544 (1980).

4. **Egregious Violations.** The "egregiousness" test relates to the asserted constitutional *violation*, not the arresting officers' general behavior or demeanor. In other words, what matters is not whether the arresting officers acted in a socially egregious manner, but whether they committed an egregious violation of the Fourth Amendment. In arguing that a Fourth Amendment violation is egregious, consider the factors described in the Third Circuit's decision, including:

    - the intentionality of the violation;
    - the characteristics and severity of the offending conduct;
    - the use of threats, force, or other forms of coercion to execute the search or seizure;
    - the extent to which agents used unreasonable force;
    - whether the seizure or arrest was based on racial or ethnic factors (or some other grossly improper consideration);
    - the bad faith of the ICE officers.

    Oliva-Ramos, 694 F.3d at 279. Note, however, that the Third Circuit stated explicitly that its list of factors is not exhaustive. Other factors to consider might include the location of the violation (since, for example, special Fourth Amendment protections apply to the home); the time of day at which the violation occurred, *see United States ex rel. Boyance v. Myers*, 398 F.2d 896, 897 (3d Cir. 1968); and the duration of the search or seizure.

    The factors highlighted by other circuit courts should also be considered. Indeed, the Third Circuit itself drew from the caselaw of numerous circuits in identifying factors relevant for egregiousness. As a reminder, the circuit courts have highlighted different factors as relevant to the egregiousness inquiry:

    - **Second Circuit**: The Second Circuit has highlighted "additional aggravating factors" including: searches or seizures based on race or some other "grossly improper" consideration; a "particularly lengthy" search or seizure; and the "show or use of force." *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006); *see also Melnitsenko v. Mukasey*, 517 F.3d 42, 48 (2d Cir. 2008).
    - **Eighth Circuit**: Factors important in this circuit include "an unreasonable show or use of force," detention or arrest based on "race or appearance," and invasions of private property when there was "no articulable suspicion whatsoever." *Puc-Ruiz v. Holder*, 629 F.3d 771, 778-79 (8th Cir. 2010). This circuit also specified the listed factors are not exhaustive. *Id.* at 779.
    - **Ninth Circuit**: This circuit maintains that, at the very least, all evidence obtained from "bad faith" constitutional violations is egregious. *Gonzalez-Rivera v. INS*, 22 F.3d 1441,

1449 (9th Cir. 1994). A constitutional violation is in "bad faith" if it was a "deliberate" violation or if a "reasonable officer should have known" the conduct was in violation of the Constitution. *Id.* Key cases include *Gonzalez-Rivera v. INS* and *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008).

The only circuit to have found egregious violations is the Ninth Circuit. *See, e.g.*, *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *Arguelles-Vasquez v. INS*, 786 F.2d 1433 (9th Cir. 1986), *vacated as moot*, 844 F.2d 700 (9th Cir. 1988) (en banc). Other circuits have recognized the *Lopez-Mendoza* exception, but have not expounded upon its meaning. *See Kandamar v. Gonzales*, 464 F.3d 65, 66 (1st Cir. 2006); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1116 n. 9 (10th Cir. 2006); *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005); *see also Gutierrez-Berdin v. Holder*, 618 F.3d 647, 652 (7th Cir. 2010).

The following resources include further information on relevant caselaw:

- The American Immigration Council (AIC) maintains a list (with links and descriptions) of relevant federal, BIA, and IJ caselaw, available at http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-motions-suppress;
- The AIC's suppression practice advisory surveys exclusionary rule caselaw from all federal circuits: http://www.legalactioncenter.org/sites/ default/files/practice-advisory-motions-to-suppress-in-removal-proceedings-a-general-overview.pdf;
- The EOIR Benchbook also contains a discussion of cases relevant to motions to suppress, at both http://www.justice.gov/eoir/vll/benchbook/tools/Motions% 20to%20 Reopen%20Guide.htm, and http://www.justice.gov/eoir/vll/benchbook/ resources/ sfoutline/preliminary_issues_suppress.html.

In addition, for the last several years, Rex Chen, managing attorney at Catholic Charities of Newark, has organized a confidential joint defense group for people litigating suppression issues in immigration proceedings. The group has privileged and confidential discussions on a private listserv and a password-protected wiki, which includes shared research, case examples, and model pleadings. Interested practitioners should inquire with Rex Chen at rchen@ccannj.org.

5. **Widespread Violations.** According to the Third Circuit, factors to consider in identifying widespread Fourth Amendment violations include: the existence of a "consistent pattern," the number of affected individuals, and the frequency or routine nature of the violation. *Oliva-Ramos*, 694 F.3d at 279-82. ICE training programs, policies, directives, memoranda, and statistical data are all evidence relevant to the widespread inquiry. *Id.*

   While the Third Circuit indicated *most* widespread violations would also be egregious, it did not indicate that *all* widespread violations would be egregious. Factors relevant to identifying widespread violations may inform the egregiousness inquiry as well.

   Resources on widespread violations include:

   - Cardozo Immigration Justice Clinic, *Constitution on ICE: A Report on Immigration Home Raid Operations* (2009), *available at* http://www.cardozo.yu.edu/uploadedFiles/

Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20 Updated.pdf (analyzing significant amount of data on ICE arrests in New York and New Jersey and identifying widespread practices of miscount by ICE agents);

- Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 Wis. L. Rev. 1109 (2008) (assessing factors that have contributed to the increasingly widespread nature of constitutional violations in immigration enforcement);
- Katherine Evans, *The ICE Storm in US Homes: An Urgent Call for Policy Change*, 33 N.Y.U. Rev. L. & Soc. Change 561 (2009) (canvassing patterns of unconstitutional behavior by ICE officers in home raids);
- Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U. San Francisco L. Rev. 307 (2009) (describing abusive practices from numerous workplace raids);
- Margot Mendleson, Shayna Strom & Michael Wishnie., Migration Policy Institute, *Collateral Damage: An Examination of ICE's Fugitive Operations Program* (2009), *available at* http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf (analyzing impact of Fugitive Operation Program and highlighting lawsuits and other complaints regarding ICE practices such as unreasonable entry, illegal search and seizure, wrongful arrest, and racial profiling);
- NYCLU, NYU Immigrant Rights Clinic & Families for Freedom, *Justice Derailed: What Raids On New York's Trains And Buses Reveal About Border Patrol's Interior Enforcement Practices* (2011), *available at* www.nyclu.org/files/publications/ NYCLU_justicederailedweb_0.pdf (examining aggressive tactics of Customs and Border Patrol in transportation raids).

6. **Related Regulatory Violations.** Do not forget the importance of arguing both constitutional violations *and* regulatory violations. As a reminder, the regulatory violations discussed in *Oliva-Ramos* covered consent to enter (8 C.F.R. § 287.8(f)(2)), seizure (8 C.F.R § 287.8(b)(1)), warrantless arrest (8 C.F.R. § 287.8(c)(2)(i)), coerced statements (8 C.F.R. § 287.8(c)(2)(vii)), and the right to counsel (8 C.F.R. § 292.5(b)). The INA itself also sets limits on immigration officers' power to investigate, search, and arrest. INA § 287, 8 U.S.C. 1357.

   For suppression of evidence obtained in violation of DHS regulations, the BIA requires proof that the regulation was intended to serve "a purpose of benefit to the alien" and the violation "prejudiced interests of the alien which were protected by the regulation." *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980). The Third Circuit has held that certain types of regulatory violations may also provide the basis for a motion to terminate that does not require a showing of prejudice. *See Leslie v. Att'y Gen.*, 611 F.3d 171, 178 (3d Cir. 2010) (holding invalidation of removal order is required where agency violated rules and regulations promulgated to protect a respondent's constitutional or statutory rights, even if no prejudice to respondent can be demonstrated).

7. **Avoiding Admissions of Alienage**. Subsequent admissions of alienage (or other information the immigrant seeks to suppress) will moot arguments for suppression. Be cautious about what is said in hearings and indicated on forms and applications. Always be cognizant of the specific provision(s) of the INA under which your client is charged and the burden of proof the government must meet to sustain the charge(s). Even in filing a FOIA request or an application for an Employment Authorization Document, respondents should avoid including information related to country of origin. If a country of origin must be designated to process the application (e.g. Form DOJ-361, Certificate of Identity, required for FOIA requests of one's own records),

the respondent can reference the country that is *alleged* in the NTA. *See* Legal Action Center, Motions to Suppress in Removal Proceedings: A General Overview (2009), *available at* http://www.legalactioncenter.org/sites/default/files/ practice-advisory-motions-to-suppress-in-removal-proceedings-a-general-overview.pdf.

8. **Litigating the *Lopez-Mendoza* Exception.** Numerous circuits have yet to consider whether the exclusionary rule applies in immigration cases involving egregious or widespread constitutional violations. The Third Circuit's heavy reliance on the *Lopez-Mendoza* opinion is instructive. The court repeatedly emphasized that "eight Justices agreed that the exclusionary rule should apply in deportation/removal proceedings involving egregious or widespread Fourth Amendment violations." *Oliva-Ramos*, 694 F.3d at 271; *see also id.* at 274. Thus, in "those two circumstances, the plurality opinion can only be read as affirming that the remedy of suppression justifies the social cost." *Id.* at 271-72. The *Oliva-Ramos* decision contains a lengthy discussion of *Lopez-Mendoza* that will be useful to practitioners litigating the exception for the first time. *See id.* at 270-72, 274-75.