Motions to Suppress Supplement

Developments in Circuit Case Law

TEACHING, INTERPRETING AND CHANGING LAW SINCE 1979

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INTRODUCTION TO THIS CIRCUIT LAW SUPPLEMENT

While an updated version of ILRC's *Motions to Suppress* manual is on its way, we are providing this collection of case law from all the federal circuits in advance. Defending immigrants whose rights are violated by government agents is crucial in these times. With law enforcement regularly engaging in unlawful practices, seizing and detaining individuals in ways that violate their constitutional, statutory, and regulatory rights, the motion to suppress is a particularly relevant tool. The motion to suppress and terminate proceedings provides a way to both protect clients and hold the government accountable.

The following materials, though not in their final form and context, are summaries of the most recent caselaw available in each circuit. They focus on arrests and seizures in the immigration context and address Fourth and Fifth Amendment violations, ICE detainers and the role of local law enforcement officers, and the rights available to immigrants in several different situations. These summaries are helpful tools that can help practitioners in identifying violations warranting the suppression of evidence that might otherwise be damaging to a client's case.

Although the law varies somewhat widely between the circuits, they all identify instances in which government officials may be going beyond the scope of their authority and violating essential immigrants' rights. We believe it critical, therefore, that advocates have access to these materials and protect their clients whenever possible, whether it is in the Ninth or First Circuit; at home or in their car; in public places or at the border.

The summaries are sorted by circuit and, because each circuit has precedents regarding different areas, not every topic is covered in every circuit. Nevertheless, these materials provide an important overview of the relevant law and are a useful and quick resource for an initial research and to locate helpful precedents. These are "raw" documents which will be inserted in our Manual's updated edition, but, until then, we want to make this information available and ready for use. For more information on Motions to Suppress, you can order the ILRC's *Motion to Suppress* manual at www.ilrc.org.

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MOTION TO SUPPRESS MANUAL UPDATES: FIRST CIRCUIT

§ 2.1 Overview

The general rule is that an immigration judge presiding over removal proceedings (formerly called *deportation* proceedings) cannot use the exclusionary rule to suppress evidence alleged to be obtained in violation of the Fourth Amendment.[1] But there are circumstances under which the exclusionary rule will still apply. In *Lopez Mendoza*, the Supreme Court announced possible exceptions where the exclusionary rule may apply in removal proceedings, including where there is a policy of **widespread abuse**, or an **egregious violation** of the Fourth Amendment or other liberties that "might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[2] In *Kandamar v. Gonzales*, 464 F. 3d 65, 70 (1st Cir. 2006), the First Circuit limited the scope of *Lopez-Mendoza* by stating that it provides "only a 'glimmer of hope of suppression.'"[3] And unlike other circuit courts, the First Circuit has not yet established a particular test for determining whether a constitutional violation is "egregious." However, in *Garcia-Aguilar v. Lynch*, 806 F. 3d 671, 676 at fn. 4 (1st Cir. 2015) the First Circuit pointed to *Kandamar*, 464 F. 3d at 71, stating that therein it had "noted some factors that [it] might find important" in such an analysis, such as threats, coercion or physical abuse.

§ 2.5 The Warrant Requirement in Immigration Arrests

In order to make an arrest without a warrant, INA § 287(a)(2) requires that the officer have reason to believe that the person is likely to escape before a warrant could be obtained. In reality, most arrests made by ICE and CBP are done *without* an arrest warrant. Officers often circumvent the warrant requirement after the fact by arguing that the suspect was likely to escape, and courts are often deferential to agents' interpretations.[4] However, this assertion can be challenged in a removal proceeding where sufficient facts exist proving that ICE or CBP knew of the person's location prior to the warrantless arrest.[5] Circuit courts and the Board of Immigration Appeals have required affirmative evidence, such as an attempt to flee, before finding a subject was likely to escape.[6] The United States Supreme Court's decision in *Arizona v. United States* held that a warrantless immigration arrest must also be accompanied by reason to believe the subject is likely to escape, indicating the likelihood of flight is a consideration to be taken seriously.[7]

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[1] See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding the exclusionary rule inapplicable to "technical violations" of the Fourth Amendment in deportation proceeding).
[2] *Id*. at 1050-51.
[3] Citing the income tax case *United States v. Adams*, 740 F.3d 40, 43 (1st Cir.), cert. denied, —— U.S. ——, 134 S.Ct. 2739, 189 L.Ed.2d 775 (2014): "[s]uppression of evidence is strong medicine, not to be dispensed casually."
[4] *Contreras v. United States*, 672 F.2d 307, 309 (2nd Cir. 1982) (because of the difficulty of making an on-the-spot determination as to the likelihood of escape without any opportunity to verify information provided or to conduct a full-scale interview, an INS officer's determination will not be upset if there is any reasonable basis for it).
[5] *Id*.
[6] See, e.g., *Mountain High Knitting v. Reno*, 51 F.3d 216 (9th Cir. 1995); *Pearl Meadows Farm, Inc. v. Nelson*, 723 F. Supp. 432 (N.D. Cal. 1989). See also *Matter of Cachinguango & Torres*, 16 I&N Dec. 205 (BIA 1978); *Matter of King & Yang*, 16 I&N Dec. 502 (BIA 1978).
[7] *Arizona v. United States*, 527 U.S. ___, 132 S. Ct. 2492, 2509 (2012). ("[Immigration officers] may arrest an alien for being "in the United States in violation of any [immigration] law or regulation," for example, but only where the alien "is likely to escape before a warrant can be obtained") (quoting 8 USC § 1357). But see *United States v. De La Cruz*, 835 F. 3d 1, 6 (1st Cir. 2016) ("… the failure to obtain an administrative arrest warrant as contemplated by 8 USC § 1357, without more, does not justify the suppression of evidence").

§ 2.6 Searches and Search Warrants

The First Circuit has ruled that a defendant lacks a legitimate expectation of privacy in a place when he does not have permission to be present.[8]

§ 2.7 Was the Fourth Amendment Violation Egregious

Even after *Lopez-Mendoza*,[9] the First Circuit has refrained from overturning a district court's denial of motions to suppress.[10] The First Circuit also defers to the BIA's own determination of whether an agent's conduct was egregious.[11] For example, in *Corado-Arriaza v. Lynch* the First Circuit affirmed the BIA's assessment that Corado-Arriaza's statements made while being interrogated should not be suppressed despite his feeling intimidated and not free to leave. In this case the BIA had ruled that, even though Corado-Arriaza was led into a small boiler room by his employer and handcuffed by armed ICE officers, this did not reach the level of egregiousness necessary for there to be a violation of the Fourth Amendment.[12]

Footnote 169 in the manual should be *Navarro-Chalan v. Ashcroft*, 359 F.3d 19 (**1st** Cir. 2004) not the 9th.

In *Navarro-Chalan v. Ashcroft*, the **First Circuit** held that there was no egregious violation where the immigrant disclosed his name and identity before the arrest.

§ 2.11 Due Process Rights Secured by Regulations

The First Circuit has categorically refused to extend the suppression remedy to violations of the Code of Federal Regulations.[13]

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[8] *United States v. Battle*, 637 F.3d 44 (1st Cir. 2011) (no expectation of privacy in estranged girlfriend's apartment); *United States v. McCarthy*, 77 F.3d 522, 535 (1st Cir.1996) (finding no legitimate expectation of privacy because defendant left items in a trailer after the trailer's owner told defendant to leave); *United States v. Rahme*, 813 F.2d 31, 34 (2nd Cir.1987) (finding no legitimate expectation of privacy in hotel room after hotel guest failed to pay room bill), cited with approval in *McCarthy*, 77 F.3d at 535; see also *United States v. Lnu*, 544 F.3d 361, 366 (1st Cir.2008) (finding no legitimate expectation of privacy in storage locker because defendant failed to pay rent and facility operator had removed lock and imposed a lien on contents); *United States v. Melucci*, 888 F.2d 200, 202 (1st Cir.1989) (finding no legitimate expectation of privacy in storage locker because defendant failed to pay rent and facility operator removed lock); *cf. Olson*, 495 U.S. at 99, 110 S. Ct. 1684 (commenting that an overnight guest may have a legitimate expectation of privacy because "[t]he houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest").

[9] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984).

[10] See *United States v. Mendez-de Jesus*, 85 F.3d 1, 2 (1st Cir. 1996) ("In reviewing motions to suppress, we review legal determinations de novo, but factual findings for clear error, and will uphold a lower court's denial of a motion to suppress so long as 'any reasonable view of the evidence supports it.'"); *United States v. Gonzalez*, 609 F.3d 13, 18 (1st Cir. 2010), citing *Mendez-de Jesus*.

[11] *Corado-Arriaza v. Lynch* (1st Cir. 2016); *Garcia-Aguilar v. Lynch*, 806 F. 3d at 676.

[12] *Corado-Arriaza v. Lynch* (1st Cir. 2016).

[13] *Corado-Arriaza v. Lynch* (1st Cir. 2016): "These regulations, even if violated, do not furnish aliens with a right to suppression in removal proceedings." Citing *Navarro-Chalan*, 359 F.3d at 23 ("[8 CFR §§ 287.3(c) and 287.8(b)(1)] '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'" (quoting 8 CFR § 287.12)).

§ 3.8 The Warrant Requirement in Immigration Arrests and Searches

The INA requires immigration officials to obtain a criminal or administrative arrest warrant prior to making an arrest. The Act, however, makes certain exceptions to the warrant requirement, such as when an immigrant is caught in the act of trying to physically enter the U.S. without inspection.[14] An immigration officer may also circumvent the warrant requirement where he or she has "reason to believe"—which courts uniformly recognize as the equivalent of "probable cause"—that a violation of the immigration law has occurred, *but only if* he or she also believes the suspect is likely to escape before a warrant can be obtained.[15] The most commonly used exception by ICE and CBP officials who make arrests away from the border is the "likelihood of escape" exception. However, the First Circuit has ruled that officers failing to obtain an administrative arrest warrant or having no reason to believe an immigrant is likely to escape alone is not enough to justify suppressing evidence gained during this arrest.[16]

[14] INA § 287(a)(1)–(5); 8 USC § 1357(a)(1)–(5).
[15] INA § 287(a)(2); 8 USC § 1357(a)(2).
[16] *De La Cruz* 835 F. 3d at 7 ("… the failure to obtain an administrative arrest warrant as contemplated by 8 USC § 1357, without more, does not justify the suppression of evidence"); *Adams*, 740 F.3d at 43 ("[t]he cases in which the Supreme Court has approved a suppression remedy for statutory violations are hen's-teeth rare").

MOTION TO SUPPRESS MANUAL UPDATES: SECOND CIRCUIT

§ 2.1 Overview of the Chapter

In the Second Circuit, the violation must have some aggravating factor, such as a particularly lengthy seizure or a show or use of force, or gross impropriety, such as being based on race or ethnicity, to be considered egregious.[1]

The Second Circuit also allows for suppression of evidence if "the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute."[2]

§ 2.3 Identifying a Seizure in the Immigration Context

According to the Supreme Court, a person is "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances, a reasonable person would have believed that he or she was not free to leave.[3]

The Second Circuit found that a seizure occurred where a Border Patrol agent yelled at a person to stop.[4] However, the Second Circuit found that petitioners had not been seized by immigration agents where the agents merely stood at the end of an exit ramp and questioned people disembarking an airplane, but did not threaten or make a show of force, did not command people to stop, and did not engage in some other form of coercion or display of authority.[5]

§ 2.4 Was the Seizure an Arrest

The Second Circuit acknowledges, however, that intrusive and aggressive police conduct such as drawing weapons or using handcuffs does not constitute an arrest "when it is a reasonable response to legitimate safety concerns on the part of the investigating officers."[6] For example, an individual who is handcuffed and frisked after a struggle with police officers has merely been stopped, not arrested, if the officers have reliable information that the individual is carrying a weapon and the individual flees after being approached by the officers.[7] In addition, an officer's subjective intent regarding whether to arrest an individual does not factor into the analysis of determining when exactly that individual was arrested.[8]

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[1] *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2nd Cir. 2006). See also *Cotzojay v. Holder*, 725 F.3d 172 (2nd Cir. 2013) (nighttime warrantless entry without consent and absent exigent circumstances would be egregious Fourth Amendment violation even if no physical harm or threat). Compare *Maldonado v. Holder*, 763 F.3d 155, 160–61 (2nd Cir. 2014) (finding no egregious violation where undercover officer used unmarked vehicle to pick up aliens seeking work as day laborers, drove them to parking lot, and arrested them, as aliens had assembled willingly and entered vehicle without duress).

[2] *Singh v. Mukasey*, 553 F.3d 207, 215 (2nd Cir. 2009) (citing *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131 (2nd Cir. 2008)).

[3] *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

[4] *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 n. 2 (2nd Cir. 2006).

[5] *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 132 (2nd Cir. 2008).

[6] *United States v. Vargas*, 369 F.3d 98, 102 (2nd Cir. 2004) (citing *United States v. Miles*, 247 F.3d 1009, 1012 (9th Cir. 2001)).

[7] *United States v. Vargas*, 369 F.3d 98, 102 (2nd Cir. 2004) ("We agree with the District Court that the officers used a greater degree of force than is typical of a Terry stop. However, the force was reasonable under the circumstances and the stop did not become a full arrest until after the officers discovered [the defendant] was carrying a firearm").

[8] *United States v. Vargas*, 369 F.3d 98, 102 (2nd Cir. 2004) (citing *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001)).

§ 2.5 The Warrant Requirement in Immigration Arrests

In the Second Circuit, there is probable cause to arrest an individual for violation of immigration laws where, after a proper stop for interrogation, any of the following occurs:

- The individual admits that he or she is an alien, but fails to produce any of the required documents and is unable to give any details as to his or her status,[9] or
- The individual produces identification that appears to be fabricated and fails to produce any evidence that he or she has a right to be or remain in the U.S.,[10] or
- The individual admits that he or she entered the U.S. illegally,[11]or
- The individual possesses an expired visa, but is unable to produce any evidence demonstrating the validity of the visa.[12]

An immigration agent, at a minimum, has reasonable suspicion that an individual has violated immigration laws where the A-number on the individual's Social Security application belongs to another immigrant.[13]

Of course, to arrest the individual in any of the above circumstances, the agent must also have a reasonable belief that the individual "is likely to escape before a warrant can be obtained for his arrest."[14] In the Second Circuit, "the clear and undisputed deportability of an alien may provide a sufficient basis for an INS officer to believe that escape is likely before a warrant can be obtained."[15]

§ 2.6 Searches and Search Warrants

In *Contreras v. U.S.*, the Second Circuit held that the defendant had consented voluntarily to immigration agents' entry into her apartment when they all went inside for the purpose of giving the defendant the opportunity to change her clothes before accompanying the agents to their office.[16]

§ 2.7 Was the Fourth Amendment Violation Egregious

In the Second Circuit, the standard for egregiousness "is stringent, entails a shock to the conscience, and is rarely satisfied."[17]

Considerations include where and when the intrusion took place, whether the violation was intentional, whether the seizure was gross or unreasonable and without plausible legal ground, whether the invasion involved threats, coercion, physical abuse, or unreasonable shows of force, and whether the seizure or

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[9] *United States v. Sanchez*, 635 F.2d 47, 62–63 (2nd Cir. 1980) ("We conclude that [defendant's] failure to produce any of the required documentation and his inability to give any details whatever as to his status justified [investigator's] placing him under arrest").
[10] *United States v. Hernandez-Rojas*, 470 F. Supp. 1212, 1220 (E.D.N.Y.), aff'd, 615 F.2d 1351 (2nd Cir. 1979).
[11] *United States v. Galindo-Hernandez*, 674 F. Supp. 979, 985 (E.D.N.Y. 1987) ("In this case it is clear that once [defendant] admitted he had entered the United States illegally, there was probable cause to effect his arrest").
[12] *United States v. Galindo-Hernandez*, 674 F. Supp. 979, 985 (E.D.N.Y. 1987) ([Defendant's] expired visa, coupled with his inability to produce any documentation in refutation thereof, provided sufficient grounds for his arrest").
[13] *Chi Yuan Chen v. Gonzales*, 224 Fed. Appx. 116, 118 (2nd Cir. 2007).
[14] *United States v. Galindo-Hernandez*, 674 F. Supp. 979, 985 (E.D.N.Y. 1987) (quoting 8 USC § 1357).
[15] *United States v. Galindo-Hernandez*, 674 F. Supp. 979, 985 (E.D.N.Y. 1987) (citing *Contreras v. U.S.*, 672 F.2d 307, 309 (2nd Cir. 1982)) (internal citations omitted).
[16] *Contreras v. United States*, 672 F.2d 307, 309 (2nd Cir. 1982).
[17] *Maldonado v. Holder*, 763 F.3d 155, 159 (2nd Cir. 2014).

arrest was based on race or ethnicity.[18] The absence of physical threat or harm to an individual is a relevant consideration, not a dispositive one.[19]

It should be noted that the Second Circuit "has never found a violation sufficiently severe, and therefore egregious, to require suppression in a removal hearing,"[20] though it has suppressed evidence on the basis of unreliability.[21] In Second Circuit precedent, exclusion of evidence is appropriate "if record evidence established either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation-regardless of its egregiousness or unfairness-undermined the reliability of the evidence in dispute."[22]

The following cases provide an overview of the types of circumstances that the Second Circuit deems insufficiently egregious:

- *Maldonado v. Holder*, 763 F.3d 155 (2nd Cir. 2014): Immigration officers, in a joint sting operation with local police, used an unmarked vehicle and an undercover officer to pick up aliens seeking work as day laborers. The undercover officer drove the aliens to an abandoned parking lot, where they were arrested. According to the Second Circuit, there was no selection on the basis of race because the aliens had assembled willingly and entered the vehicle without duress. Other people "were excluded by no criteria other than [the aliens'] self-selection."

- *Rajah v. Mukasey*, 544 F.3d 427 (2nd Cir. 2008): The Attorney-General instituted the National Security Entry-Exist Registration System, which included the Special Call-In Registration program, after the terrorist attacks on September 11, 2011. The Program required alien males from certain designated countries who were over the age of 16 and who had not qualified for permanent residence to appear for registration and fingerprinting and to present immigration related documents. Aliens who participated in the Program were subsequently placed in deportation proceedings. The Second Circuit held that there was no violation, much less one that was egregious or that undermined the probative value of the evidence collected, where the government obtains documents or statements in the course of an alien's compliance with a statutorily authorized registration program.

- *Melnitsenko v. Mukasey*, 517 F.3d 42 (2nd Cir. 2008): A three-hour stop at a border checkpoint was not sufficiently severe to be egregious, even assuming that the checkpoint itself was illegal.

- *Pinto–Montoya v. Mukasey*, 540 F.3d 126 (2nd Cir. 2008) (*per curiam*): Petitioners had not been seized within the meaning of the Fourth Amendment—and, therefore there could be no violation, let alone an egregious one—where immigration agents merely stood at the end of an exit ramp and questioned people disembarking an airplane, but did not threaten or make a show of force, did not command people to stop, and did not engage in some other form of coercion or display of authority.

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[18] *Cotzojay v. Holder*, 725 F.3d 172, 182–83 (2nd Cir. 2013).
[19] *Cotzojay v. Holder*, 725 F.3d 172, 182–83 (2nd Cir. 2013).
[20] *Cotzojay v. Holder*, 725 F.3d 172, 180 (2nd Cir. 2013).
[21] See *Singh v. Mukasey*, 553 F.3d 207 (2009) (holding that reliability of defendant's statements had been substantially undermined where defendant had been questioned throughout the night for several hours, not about his own immigration status or information related to simple, specific, and objective facts, but about issues that were "more nuanced and susceptible to corruption during the course of an improper interview").
[22] *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2nd Cir. 2006).

- *Tawfik v. Mukasey*, 299 F. App'x 45 (2nd Cir. 2008): Petitioner failed to demonstrate egregious violations of his Fourth Amendment Rights even though he was not informed of the right to have counsel present during his interrogation, as he had been notified in writing that he could bring counsel.

- *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2nd Cir. 2006): An alien's Brazilian passport and his statement to a Border Patrol agent admitting that he was a Brazilian citizen were allowed into evidence in the alien's removal proceeding, even though the Second Circuit determined that the agent lacked reasonable suspicion to stop the alien. This violation of the alien's Fourth Amendment rights was not sufficiently egregious to warrant suppression. Furthermore, the reliability of the disputed evidence was not affected by the violation, as the alien's mother submitted an affidavit confirming that the alien was a native and citizen of Brazil.

The Second Circuit acknowledges, however, that "[a] nighttime, warrantless raid of a person's home by government officials may, and frequently will, constitute an egregious violation of the Fourth Amendment."[23] Further, the violation arising from such a raid may be egregious "regardless of whether government agents physically threaten or harm residents" if the entry was done without consent and in the absence of exigent circumstances.[24]

Evidence obtained independent of the egregious Fourth Amendment violation, however, is admissible.[25] An alien's voluntary concession of facts supporting his removability on a motion to change venue of his removal proceeding constitutes independently admissible evidence of the alien's removability, notwithstanding the fact that the removal proceeding resulted from an illegal search and arrest.[26]

§ 2.9 Evidence Obtained in Violation of Due Process

The Second Circuit acknowledges that the exclusionary rule can apply in removal proceedings outside the context of a Fourth Amendment violation, but only to deprivations that affect the fairness and reliability of a removal proceeding.[27] In the Second Circuit, "[t]he due-process test for the admissibility of evidence in a removal hearing is whether the evidence is probative and whether its use is fundamentally fair."[28] Fairness is closely related to the reliability and trustworthiness of the evidence.[29]

§ 2.10 Right to Remain Silent

An alien's voluntary concession of removability during his removal proceeding constitutes independently admissible evidence, notwithstanding the fact that the proceeding resulted from an unlawful arrest.[30]

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[23] *Pretzantzin v. Holder*, 736 F.3d 641, 646 (2nd Cir. 2013).
[24] *Cotzojay v. Holder*, 725 F.3d 172, 183 (2nd Cir. 2013).
[25] See *Pretzantzin v. Holder*, 736 F.3d 641, 652 (2nd Cir. 2013) (holding that evidence of birth certificate and arrest records were inadmissible absent showing that government obtained that evidence independently of any Fourth Amendment violation).
[26] *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 235–36 (2nd Cir. 2014).
[27] *Montero v. INS*, 124 F.3d 381, 386 (2nd Cir. 1997).
[28] *Felzcerek v. INS*, 75 F.3d 112, 115 (2nd Cir. 1996) (quoting *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990).
[29] *Felzcerek v. INS*, 75 F.3d 112, 115 (2nd Cir. 1996).
[30] *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 235–36 (2nd Cir. 2014). See *Katris v. Immigration & Naturalization Serv.*, 562 F.2d 866, 867–69 (2nd Cir. 1977); *Avila-Gallegos v. Immigration & Naturalization Serv.*, 525 F.2d 666, 666–67 (2nd Cir. 1975); *La Franca v. Immigration & Naturalization Serv.*, 413 F.2d 686, 688–89 (2nd Cir. 1969).

An alien's voluntary concession of facts supporting his removability on a motion to change venue of his removal proceeding constitutes independently admissible evidence of the alien's removability, notwithstanding the fact that the removal proceeding resulted from an illegal search and arrest.[31]

§ 2.12 Warrantless Arrests: Examination & Notifications under 8 CFR § 287.3

ICE is only required by 8 CFR § 287.3(c) "to *inform* aliens of the right to legal representation when an alien is placed into formal removal proceedings," not to take active steps to ensure that aliens have counsel present during their examinations.[32]

§ 2.13 Consulting with a Consulate

In *U.S. v. Umeh*, the Southern District of New York held that the Vienna Convention on Consular Relations does not create any judicially enforceable individual rights.[33] Therefore, a defendant cannot himself assert that the Government's failure to notify his consulate of his arrest violates the Treaty. Furthermore, the Government's violation of the Treaty in failing to advise the defendant of his rights to notify and communicate with his consulate does not entitle the defendant to any relief, absent evidence that consultation with the consulate would have changed any actions that the defendant took in the case or would have altered the outcome of the case in any way.[34]

§ 2.14 Interrogations and Agency Conduct during Stops and Arrests

In 2014, the Second Circuit in *Maldonado v. Holder* declined to terminate immigration proceedings after petitioners asserted that ICE violated their right under 8 CFR § 292.5(b) to have retained counsel present during examinations because petitioners did "not actually assert that they *asked for* and were *denied* counsel during their examinations."[35] Thus, if an alien wishes to terminate his or her immigration proceeding on the ground that ICE violated the alien's right to have retained counsel present during examinations, the alien must assert that he or she asked for and was denied counsel during examination, not merely demonstrate that he or she lacked counsel during examination.

§ 3.2 ICE Collaboration with State and Local Law Enforcement Agencies

In January 2017, New York State Attorney General Eric Schneiderman released a Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions.[36] According to the model provisions provided in the Guidance, New York law enforcement agencies can limit their participation in federal immigration enforcement activities in the following ways: (1) by refusing to enforce non-judicial civil immigration warrants issued by Immigration and Customs Enforcement ("ICE") or Customs and Border Protection ("CBP"), (2) by denying federal requests to hold uncharged individuals in custody more than 48 hours, (3) by limiting access of ICE and CBP agents to individuals currently in custody, and (4) by limiting information gathering and reporting that will be used exclusively for federal

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[31] *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 235–36 (2nd Cir. 2014).
[32] *Maldonado v. Holder*, 763 F.3d 155, 163–64 (2nd Cir. 2014).
[33] *U.S. v. Umeh*, 762 F.Supp.2d 658, 664 (S.D.N.Y 2011).
[34] *Hernandez v. U.S.*, 280 F. Supp.2d 118, 124-5 (S.D.N.Y 2003).
[35] *Maldonado v. Holder*, 763 F.3d 155, 163–64 (2nd Cir. 2014).
[36] Guidance Concerning Local Authority Participation In Immigration Enforcement And Model Sanctuary Provisions, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, Jan. 19, 2017, available at https://ag.ny.gov/sites/default/files/guidance.concerning.local_.authority.particpation.in_.immigration.enforcement.1.19.17.pdf.

immigration enforcement.[37] Attorney General Schneiderman updated the Guidance in March 2017 with a Supplemental Memorandum.[38]

Vermont Attorney General Thomas Donovan has released a Guidance to Vermont Cities and Towns Regarding Immigration Enforcement.[39] Dannel Mallow, the Governor of Connecticut, has released a State Guidance for Law Enforcement in Connecticut regarding President Donald Trump's Executive Order, *Enhancing Public Safety in the Interior of the United States*.[40]

§ 3.6 Current Authority of Local Police to Make Immigration Stops

In *Maldonado v. Holder*, immigration officers, in a joint sting operation with local police, used an unmarked vehicle and an undercover officer to pick up aliens seeking work as day laborers. The undercover officer drove the aliens to an abandoned parking lot, where they were arrested. According to the Second Circuit, there was no selection on the basis of race because the aliens had assembled willingly and entered the vehicle without duress. Other people "were excluded by no criteria other than [the aliens'] self-selection." In his dissenting opinion, Circuit Judge Gerard Lynch argues that the arresting officers lacked the reasonable suspicion required for a lawful seizure, as *Arizona v. United States* held that "it is not a crime for a removable alien to remain present in the United States"[41] and there was "no suggestion in this record that either the undercover officer or the arresting officers in the parking lot knew anything at all about any of the petitioners … other than that they were willing to engage in casual labor (and, presumably, that they appeared Hispanic)."[42]

§ 3.8 The Warrant Requirement in Immigration Arrests and Searches

In the Second Circuit, there is probable cause to arrest an individual for violation of immigration laws where, after a proper stop for interrogation, any of the following occurs:

- The individual admits that he or she is an alien, but fails to produce any of the required documents and is unable to give any details as to his or her status,[43] or
- The individual produces identification that appears to be fabricated and fails to produce any evidence that he or she has a right to be or remain in the U.S.,[44] or

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[37] Anticipating Major Changes To Federal Immigration Enforcement, A.G. Schneiderman Provides Local Governments With Legal Tools To Protect Immigrant Communities, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, Jan. 19, 2017, available at https://ag.ny.gov/press-release/anticipating-major-changes-federal-immigration-enforcement-ag-schneiderman-provides.

[38] Supplemental Memorandum To Guidance Concerning Local Authority Participation In Immigration Enforcement And Model Sanctuary Provisions, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, Mar. 12, 2017, available at https://ag.ny.gov/sites/default/files/guidance_and_supplement_final3.12.17.pdf.

[39] Guidance to Vermont Cities and Towns Regarding Immigration Enforcement, VERMONT ATTORNEY GENERAL'S OFFICE, Mar. 23, 2017, available at http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/H.492/W~Mark%20Hughes~Guidance%20to%20VT%20Cities%20and%20Towns%20Regarding%20Immigration%20Enforcement~3-23-2017.pdf.

[40] State Guidance for Law Enforcement in Connecticut, CONNECTICUT OFFICE OF THE GOVERNOR, Feb. 22, 2017, available at http://www.sde.ct.gov/sde/lib/sde/pdf/digest/2016_17/superintendent_immigration_guidance.pdf.

[41] *Arizona v. United States*, 567 U.S. 387, 407 (2012).

[42] *Maldonado v. Holder*, 763 F.3d 155, 172 (2nd Cir. 2014) (Lynch, J., dissenting).

[43] *United States v. Sanchez*, 635 F.2d 47, 62–63 (2nd Cir. 1980) ("We conclude that [defendant's] failure to produce any of the required documentation and his inability to give any details whatever as to his status justified [investigator's] placing him under arrest").

[44] *United States v. Hernandez-Rojas*, 470 F. Supp. 1212, 1220 (E.D.N.Y.), aff'd, 615 F.2d 1351 (2nd Cir. 1979).

- The individual admits that he or she entered the U.S. illegally,[45]or
- The individual possesses an expired visa, but is unable to produce any evidence demonstrating the validity of the visa.[46]

An immigration agent, at a minimum, has reasonable suspicion that an individual has violated immigration laws where the A-number on the individual's Social Security application belongs to another immigrant.[47]

Of course, to arrest the individual in any of the above circumstances, the agent must also have a reasonable belief that the individual "is likely to escape before a warrant can be obtained for his arrest."[48] In the Second Circuit, "the clear and undisputed deportability of an alien may provide a sufficient basis for an INS officer to believe that escape is likely before a warrant can be obtained."[49]

§ 3.9 Rights in the Home and Other Private Places

The Second Circuit acknowledges, however, that "[a] nighttime, warrantless raid of a person's home by government officials may, and frequently will, constitute an egregious violation of the Fourth Amendment."[50] Further, the violation arising from such a raid may be egregious "regardless of whether government agents physically threaten or harm residents" if the entry was done without consent and in the absence of exigent circumstances.[51] Evidence obtained independent of the egregious Fourth Amendment violation, however, is admissible.[52]

§ 3.11 Arrests Based on Race or Ethnic Appearance

According to the Second Circuit, there is no impermissible selection on the basis of race where a group of aliens targeted by immigration officials have assembled together willingly and other people "were excluded by no criteria other than [the aliens'] self-selection."[53] Likewise, there is no impermissible selection on the basis of race where aliens who responded to a statutorily authorized registration program were subsequently placed in deportation proceedings as a result of the information they provided.[54]

While an individual's apparent race or ethnicity, standing alone, does not justify a stop, an immigration officer can consider an individual's apparent race or ethnicity as a relevant factor.[55]

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[45] *United States v. Galindo-Hernandez*, 674 F. Supp. 979, 985 (E.D.N.Y. 1987) ("In this case it is clear that once [defendant] admitted he had entered the United States illegally, there was probable cause to effect his arrest").
[46] *United States v. Galindo-Hernandez*, 674 F. Supp. 979, 985 (E.D.N.Y. 1987) ([Defendant's] expired visa, coupled with his inability to produce any documentation in refutation thereof, provided sufficient grounds for his arrest").
[47] *Chi Yuan Chen v. Gonzales*, 224 Fed. Appx. 116, 118 (2nd Cir. 2007).
[48] *United States v. Galindo-Hernandez*, 674 F. Supp. 979, 985 (E.D.N.Y. 1987) (quoting 8 USC § 1357).
[49] *United States v. Galindo-Hernandez*, 674 F. Supp. 979, 985 (E.D.N.Y. 1987) (citing *Contreras v. U.S.*, 672 F.2d 307, 309 (2nd Cir. 1982)) (internal citations omitted).
[50] *Pretzantzin v. Holder*, 736 F.3d 641, 646 (2nd Cir. 2013).
[51] *Cotzojay v. Holder*, 725 F.3d 172, 183 (2nd Cir. 2013).
[52] See *Pretzantzin v. Holder*, 736 F.3d 641, 652 (2nd Cir. 2013) (holding that evidence of birth certificate and arrest records were inadmissible absent showing that government obtained that evidence independently of any Fourth Amendment violation).
[53] *Maldonado v. Holder*, 763 F.3d 155, 161 (2nd Cir. 2014).
[54] *Rajah v. Mukasey*, 544 F.3d 427, 441 (2nd Cir. 2008).
[55] *United States v. Hernandez-Rojas*, 470 F. Supp. 1212, 1218–19 (E.D.N.Y.), aff'd, 615 F.2d 1351 (2nd Cir. 1979).

§ 3.15 Rights at the Border

Routine searches at the border, or at the functional equivalent of the border (such as an inland airport where an international flight first lands or at the confluence of two or more roads that extend from the border), have long been viewed as reasonable per se and need not be supported by probable cause or a warrant.[56] Different requirements that would otherwise apply under the Fourth Amendment govern vehicle stops at the international border or its functional equivalent because there the government's interest in preventing the entry of unwanted persons and effects is at its zenith.[57]

Miranda warnings need not be given to persons detained at the border and subject to a routine inquiry.[58]

§ 3.16 Rights at Border Equivalents

Routine searches at the border, or at the functional equivalent of the border (such as an inland airport where an international flight first lands or at the confluence of two or more roads that extend from the border), have long been viewed as reasonable per se and need not be supported by probable cause or a warrant.[59] Different requirements that would otherwise apply under the Fourth Amendment govern vehicle stops at the international border or its functional equivalent because there the government's interest in preventing the entry of unwanted persons and effects is at its zenith.[60]

In the Second Circuit, fixed checkpoints are held to a lower standard than roving patrols, and agents at fixed checkpoints may stop individuals even in the absence of reasonable suspicion.[61]

§ 3.19 "Stop and Identify" Statutes

New York City police officers may not arrest a person for trespass in a New York City Housing Authority building solely on the basis of the person's refusal to identify the resident who has given the person permission to be in the building, even if the officers know that the person they are questioning is not a resident.[62]

[56] *U.S. v. Singh*, 415 F.3d 288, 293–94 (2nd Cir. 2005).
[57] *U.S. v. Wilson*, 699 F.3d 235, 242 (2nd Cir. 2012).
[58] *U.S. v. Silva*, 715 F.2d 43, 46 (2nd Cir. 1983).
[59] *U.S. v. Singh*, 415 F.3d 288, 293–94 (2nd Cir. 2005).
[60] *U.S. v. Wilson*, 699 F.3d 235, 242 (2nd Cir. 2012).
[61] *Pietrzak v. Mukasey*, 260 F. App'x 337, 339 (2nd Cir. 2008).
[62] *Davis v. City of New York*, 902 F. Supp. 2d 405, 427 (S.D.N.Y. 2012).

MOTION TO SUPPRESS MANUAL UPDATES: THIRD CIRCUIT

§ 2.4 Was the Seizure an Arrest

The distinction between a "seizure" and an "arrest" can be a hazy one. A starting point is to remember that generally, all seizures require probable cause unless they fall within the exception of a *Terry* stop.[1] A *Terry* stop is based on reasonable suspicion, and is a brief stop for investigation or to issue a citation, while an arrest is traditionally prolonged and custodial in nature, requiring probable cause. An investigative stop that becomes "sufficiently like an arrest" will require probable cause.[2] Police may not "seek to verify their suspicions by means that approach the conditions of arrest."[3] Whether or not the stop is called an "arrest" by the officers is not determinative.[4]

If a stop or questioning amounts to a complete arrest, ICE or CBP must have had reason to believe that the person was not just an immigrant but also an undocumented immigrant at the time the arrest is made.[5] Courts in the Third Circuit have interpreted "reason to believe" as requiring that the arresting officer have probable cause to arrest the immigrant.[6] Specifically, "an immigration officer must have *both* probable cause to believe that an alien is in violation of an immigration law or regulation *and* probable cause to believe that the alien will likely flee the area before a warrant can be obtained."[7]

"[T]he probable cause determination turns on 'whether, at the moment the arrest was made … the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."[8] Although the Ninth Circuit has held that probable cause may exist where a lawful permanent resident fails to carry their green card on their person,[9] one district court in the Third Circuit found that the failure to carry a green card did not establish probable cause as a matter of law.[10]

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[1] See *Dunaway v. New York*, 442 U.S. 200, 209 (1979) (*Terry* is a "narrow" and "special category" of seizures that departs from traditional Fourth Amendment analysis); *Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (overview of case law).
[2] *Hayes v. Florida*, 470 U.S. 811 (1985) (warrantless, forcible removal of suspect from his home to police station, even for brief investigative purpose and fingerprinting, exceeded *Terry*).
[3] *Florida v. Royer*, 460 U.S. 491, 499 (1983).
[4] *Dunaway*, 442 U.S. at 212 (suspect arrested without probable cause when taken from neighbor's home to police car, then police station placed in interrogation room, never told he was "free to go" and would have been restrained if he attempted to); *Kaupp*, 538 U.S. at 631 (arrest where 17-year-old awakened in bed at 3 a.m. by three officers, told "we need to go and talk," handcuffed, taken without shoes and only wearing underwear in January, placed in patrol car, driven to crime scene then to sheriff's office, into interrogation room and questioned).
[5] 8 USC § 1357(a)(2).
[6] *Davila v. United States*, No. 2:13-CV-00070, 2017 WL 1162912 (W.D. Pa. March 28, 2017) (citing *Babula v. INS*, 665 F.2d 293, 298 (3rd Cir. 1981)).
[7] *Id.* (emphasis in original); see also *Babula*, 665 F.2d at 297 ("Eight U.S.C. s 1357(a)(2) provides that any INS agent may, without a warrant, 'arrest any alien in the United States, if he has reason to believe that the alien (is) in violation of any (law) or regulation (regarding the admission, exclusion, or expulsion of aliens) and is likely to escape before a warrant can be obtained'").
[8] *Davila*, 2017 WL 1162912, at *12 (second and third alterations in original) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).
[9] *Martinez v. Nygaard*, 831 F.2d 822, 828 (9th Cir. 1987).
[10] *Davila*, 2017 WL 1162912, at *12.

Rather, the inquiry is fact-intensive, and the court held that further factual development was necessary before it could answer the probable cause question.[11]

§ 2.7 Was the Fourth Amendment Violation Egregious

In *Lopez-Mendoza*, the Supreme Court held that as a general principle, the exclusionary rule does not bar the admission in civil deportation proceedings of evidence obtained as a result of an unlawful seizure.[12] The Court, however, expressly left open the question whether exclusion of evidence might be appropriate if the evidence was obtained by "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[13]

The circuit courts have differing interpretations of what amounts to an egregious violation.[14] 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; other circuits have remanded for further fact finding.[15] In *Oliva-Ramos v. Attorney General*, 694 F.3d 259 (3rd Cir. 2012), the Third Circuit stated that "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." In determining whether a violation is egregious a variety of factors are considered, including but not limited to: whether the seizure itself was so gross or unreasonable in addition to being without a plausible legal ground (e.g., when the initial illegal stop is particularly lengthy, there is an unnecessary and menacing show or use of force, etc.), whether improper seizures, illegal entry of homes, or arrests occurred under threats, coercion or physical abuse, the extent to which the agents resorted to unreasonable shows of force, and whether any seizures or arrests were based on race or perceived ethnicity.[16] "These 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. Rather, the familiar totality of the circumstances

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[11] *Id.* ("[T]he Court concludes that factual issues prevent it from holding as a matter of law that [the agent] had probable cause under 8 U.S.C. § 1357(a)(2) to believe Davila was unlawfully present in the United States in violation of an immigration law or regulation").
[12] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1053 (1984).
[13] *Id.* at 1050-51. However, none of the circuit courts applying this have found that it is a two pronged requirement of transgressions of fundamental fairness *and* undermining the probative value of the evidence. Rather, courts have primarily looked to the question of fairness and the egregiousness of the officers' behavior, matching the criminal exclusionary principle that the probative value of evidence is irrelevant to the exclusionary principle, and that a "search prosecuted in violation of the Constitution is not made lawful by what it brings to light." *Byars v. United States*, 273 U.S. 28, 29-30 (1927). For example, in *Almeida-Amaral*, the Second Circuit cited *Gonzales-Rivera* to emphasize that a fundamentally unfair violation of the Fourth Amendment is considered egregious despite the probative value of the evidence obtained.
[14] *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2nd Cir. 2006) (egregiousness means a Fourth Amendment violation with some aggravating factor, such as a particularly lengthy seizure or a show or use of force; or if it was grossly improper, such as being racially based); *Cotzojay v. Holder*, 725 F.3d 172 (2nd Cir. 2013) (nighttime warrantless home raid was egregious; remanded for government to try to prove consent); *Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010) (examples of egregious Fourth Amendment violations would be: unreasonable show or use of force, seizure based on race or appearance, or invasion of private property without any reasonable suspicion); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 n.5 (1994) (exclusion of evidence is appropriate remedy for bad faith or deliberate constitutional violations, or conduct a reasonable officer should have known was unconstitutional); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994).
[15] *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 n.5 (1994); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994).
[16] *Oliva-Ramos* at 279.

must guide the inquiry and determine its outcome."[17] Few cases have applied *Oliva-Ramos*, but in an unpublished decision the Third Circuit found that the alleged failure to warn an immigrant that he had the right to an attorney and that his statements may be used against him prior to an interview with ICE did not amount to an egregious violation.[18] The court further held that "[a]bsent any indication that Form I–213 contained incorrect information or was obtained by coercion or duress, it is 'inherently trustworthy' and admissible to prove alienage."[19]

§ 3.8 The Warrant Requirement in Immigration Arrests and Searches

The INA requires immigration officials to obtain a criminal or administrative arrest warrant prior to making an arrest. The Act, however, makes certain exceptions to the warrant requirement, such as when an immigrant is caught in the act of trying to physically enter the U.S. without inspection.[20] An immigration officer may also circumvent the warrant requirement where he or she has "reason to believe"—which courts uniformly recognize as the equivalent of "probable cause"—that a violation of the immigration law has occurred, *but only if* he or she also believes the suspect is likely to escape before a warrant can be obtained.[21] The most commonly used exception by ICE and CBP officials who make arrests away from the border is the "likelihood of escape" exception.

Some circuits have not strictly applied the second prong of the test and have deferred to law enforcement judgment regarding likelihood of escape.[22] However, at least one district court in the Third Circuit has held that "[t]he likelihood of escape limitation is 'seriously applied.'"[23] In *Davila v. United States*, the court declined to hold as a matter of law that an immigration officer had probable cause to believe that the plaintiff was likely to escape before a warrant could be obtained.[24] While the plaintiff was in her car, a factor which courts have previously found weighs in favor of a likelihood of escape, the court noted that she was grocery shopping, had lived in the United States for a long time, had entered legally, and had been willing to assist the officers in offering interpretation services.[25] But in another recent case, *Lawal v. McDonald*, the Third Circuit found that officers had a reasonable basis for concluding that suspects might flee where the officers were conducting a workplace sweep involving a large number of suspected aliens.[26]

§ 3.9 Rights in the Home and Other Private Places

Under the laws of the United States, we have the most protection against questioning and searches in private places—especially in homes. The definition of a private home is broad, and includes all places where people live, such as migrant farm worker housing.[27] No police or immigration officer can enter a private house to search unless he or she has either the consent of the occupants (permission), exigent

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[17] *Id.*
[18] *Moralez-Palillero v. Attorney General of the United States*, 628 F. App'x 91, 92–93 (3rd Cir. 2016) (mem. op.)
[19] *Id.*
[20] INA § 287(a)(1)–(5); 8 USC § 1357(a)(1)–(5).
[21] INA § 287(a)(2); 8 USC § 1357(a)(2).
[22] See, e.g., *Contreras v. United States*, 672 F.2d 307, 308 (2nd Cir. 1982) ("Because of the difficulty of making an on-the-spot determination as to the likelihood of escape without any opportunity to verify information provided or to conduct a full-scale interview, 'an (INS) officer's determination will not be upset if there is any reasonable basis for it'" (quoting *Marquez v. Kiley*, 436 F.Supp. 100, 108 (S.D.N.Y.1977))).
[23] *Davila v. United States*, No. 2:13-CV-00070, 2017 WL 1162912, *14 (W.D. Pa. March 28, 2017) (citing *Babula v. INS*, 665 F.2d 293, 298 (3rd Cir. 1981)).
[24] *Id.* at *16.
[25] *Id.* at *15–16.
[26] 546 F. App'x 107, 112 (3rd Cir. 2014).
[27] *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985).

circumstances, or a warrant. "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."[28] A warrant must be signed and issued by a judge or magistrate who has determined that the law enforcement agency requesting the warrant shows "probable cause" that a specific person in the home has broken the law.[29] "[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."[30] In *United States v. Tiewloh*, the Third Circuit found that ICE agents' entry into a home was permissible because the officers had reason to believe that the person listed in the arrest warrant was at his mother's home.[31] The Third Circuit has recently clarified that "reason to believe" in this context means probable cause: "law enforcement armed with only an arrest warrant may not force entry into a home based on anything less than probable cause to believe an arrestee resides at and is then present within the residence."[32]

§ 3.11 Arrests Based on Race or Ethnic Appearance

The courts agree that the use of race or ethnic appearance alone as a factor is not a basis for justifying a stop or arrest.[33] In *Gonzalez-Rivera v. INS*, the U.S. Court of Appeals for the Ninth Circuit held that a Border Patrol stop of a car based only on the Hispanic appearance of its occupants was an "egregious" violation of the Fourth Amendment to the Constitution.[34] The court found that the use of race or ethnicity, even in conjunction with other factors, may not be not sufficient to form a reasonable suspicion.[35] To establish reasonable suspicion, law enforcement agents use a "totality of the circumstances" test and may take into account 1) the characteristics of the area, 2) the proximity to a U.S. border, 3) erratic or evasive driving, and 4) previous experience with alien traffic in the area.[36] After examining the "totality of the circumstances," the agent must have an objectively "particularized basis" for the stop.[37] In many cases, this means that ICE can provide thin justifications to meet this standard, pointing to factors beyond race or skin color. One Third Circuit case addressed whether an arresting officer's call to ICE was impermissibly based on race. In *Aguilar-Hernandez v. Attorney General of the U.S.*, the officer arrested an immigrant for driving under the influence and subsequently called ICE to notify them of the arrest.[38] Aguilar argued that the officer called ICE solely on the basis of race and sought to suppress his later statements to ICE agents.[39] The court rejected this argument, holding that even if the phone call did implicate the Fourth Amendment, Aguilar's speculation regarding the officer's motive in calling ICE was insufficient to establish an egregious violation.[40]

§ 3.13 Workplace Raids

ICE cannot force an employer to consent to entry to a private area. But if ICE does get the owner's valid permission to enter the property to question workers, or they get a valid judicial search warrant, then the

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[28] *Payton v. N.Y.*, 445 U.S. 573, 586 (1980).
[29] 18 USC § 2236.
[30] *Id.*
[31] 319 F. App'x 178, 180 (3rd Cir. 2009) (mem. op.)
[32] *United States v. Vasquez-Algarin*, 821 F.3d 467, 480 (3rd Cir. 2016).
[33] See *United States v. Swindle*, 407 F.3d 562 (2nd Cir. 2005) (summarizing federal cases rejecting use of race or ethnic appearance alone to justify stops and arrests.)
[34] *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994).
[35] *Id*.
[36] *United States v. Brignoni-Prince*, 422 U.S. 873, 885 (1975); see also *U.S. v. Sokolow*, 490 U.S. 1 (1989) (holding that individual factors that may appear innocent in isolation may constitute suspicious behavior in the aggregate).
[37] *United States v. Arvizu*, 534 U.S. 266 (2002).
[38] 544 F. App'x 67, 68 (3rd Cir. 2013).
[39] *Id.* at 69.
[40] *Id.*

agents may question workers without individual suspicion that each person is undocumented, as long as each person being questioned feels free to leave and not to answer the question.[41] Without individualized suspicion, employees within non-public areas remain protected by the Fourth Amendment as though they were on the street: if ICE does not have at least the "reasonable suspicion" for a *Terry* stop, individuals are free to ignore agents' questions and to leave.[42]

One Third Circuit case has addressed the rights of workers being questioned by ICE agents at their place of work.[43] In that case, ICE agents had received a tip that a certain workplace employed undocumented immigrants.[44] After an investigation, where officers discovered that at least one past employee at the factory had been undocumented, the officers went to the workplace "to look for aliens in violation of their immigration status."[45] The officers questioned several of the employees onsite and used the evidence obtained—mainly statements by the individuals—as evidence of their deportability.[46] The workers challenged their seizures, arguing that the officers lacked any individualized suspicion.[47] The court found that because the officers had a reliable informant tip that the employer hired undocumented immigrants, had confirmed that at least one removable person had previously worked there, and because the manager in charge spoke English with difficulty, the officers had the requisite amount of suspicion to question employees.[48] The workers also challenged the legality of the workplace search, arguing that the officers did not properly obtain consent from the factory's owners.[49] However, the court held that the workers lacked standing to challenge the search of the factory.[50]

§ 3.15 Rights at the Border

The authority of immigration officials to search persons and effects at a border is almost unlimited. An immigration official at the border can stop and question anyone seeking entry, without any "reasonable suspicion" or "probable cause" that a person trying to enter the U.S. is undocumented. "A person seeking entry into the United States does *not* have a right to remain silent."[51] "An alien at the border … must convince a border inspector of his or her admissibility to the country by affirmative evidence."[52] "[W]hether an individual is questioned in a primary inspection line or removed from the line for secondary inspection has no bearing on the inapplicability of normal *Miranda* rules under such circumstances."[53] "In either event, the alien still must meet his information production burden, and the border inspector is accordingly entitled to ask questions and require answers."[54] Indeed, even though a

[41] See *INS v. Delgado*, 466 U.S. 221 (1984).
[42] See *INS v. Delgado*, 466 U.S. 210, 215-218 (1984) (workers not seized if they remain in workplace during immigration sweep out of "voluntary obligations to their employers); *Martinez v. Nygaard*, 831 F.2d 822, 826 (9th Cir. 1987) (under *Delgado*, "no seizure occurs so long as INS agent conduct does not give workers reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer.")
[43] *Babula v. Immigration & Naturalization Serv.*, 665 F.2d 293 (3rd Cir. 1981).
[44] *Id.* at 294.
[45] *Id.*
[46] *Id.* at 295.
[47] *Id.* at 296.
[48] *Id.* at 296–97.
[49] *Id.* at 297.
[50] *Id.*
[51] *United States v. Kiam*, 432 F.3d 524, 529 (3rd Cir. 2006) (emphasis in original).
[52] *Id.*
[53] *United States v. St. Vallier*, 404 F. App'x 651, 656 (3rd Cir. 2010).
[54] *Kiam*, 432 F.3d at 529–30.

criminal offense "may be inextricably tied to a person's admissibility, [] customs officers are not required to provide *Miranda* warnings prior to asking questions that might bear upon this illegal conduct."[55]

[55] *St. Vallier*, 404 F. App'x at 656.

MOTION TO SUPPRESS MANUAL UPDATES: FOURTH CIRCUIT

§ 2.6 Searches and Search Warrants

The Fourth Amendment governs immigration-related searches just as it governs any other search by other law enforcement or other government actors. Thus, an immigration officer must have a warrant, probable cause or valid—meaning not coerced—consent to search an individual, his home, a private worksite area, or an automobile.[1]

The Fourth Amendment requires that all searches be based on "probable cause" and that the person or thing to be searched must be described specifically in a warrant. *All* searches require a search warrant, with a few exceptions. One of the major exceptions to the warrant requirement is searches with the consent of the person.[2] However, it must be voluntary consent, not obtained by duress or coercion, and some courts may require explicit statement or action to demonstrate consent.[3]

§ 2.7 Was the Fourth Amendment Violation Egregious

In *Lopez-Mendoza*, the Supreme Court held that as a general principle, the exclusionary rule does not bar the admission in civil deportation proceedings of evidence obtained as a result of an unlawful seizure.[4] The Court, however, expressly left open the question whether exclusion of evidence might be appropriate if the evidence were obtained by "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[5]

Unfortunately, there is more case law defining what an egregious violation is not. For example, the Fourth Circuit found in *Yanez-Marquez v. Lynch* that execution of a warrant during the nighttime, outside the stated time limitations on the warrant, was a Fourth Amendment violation but was not sufficiently egregious to warrant suppression.[6] The court found ICE agents' use of guns drawn and pointed at the residents "unquestionably was measured and by no means excessive (in the constitutional sense or

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[1] See *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 270-273 (1973) (automobile search at least 20 miles from border without any of the three violated Fourth Amendment); *Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994) (consent to home search given after official's false assertion that they did not need a warrant was coerced, "egregious" violation of Fourth Amendment); *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F.Supp. 432 (N.D. Cal. 1989) (fenced-in area around commercial nursery was protected curtilage and greenhouses were not "open fields;" search without warrant or consent was unlawful) (applying *United States v. Dunn*, 480 U.S. 294 (1987)); *Bond v. United States*, 529 U.S. 334 (2000) (Border Patrol agent's exploratory squeezing of a bag in overhead compartment of bus at permanent checkpoint near border, without warrant or consent, was unreasonable search).

[2] *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

[3] See *Orhorhaghe*, 38 F.3d at 493. See also *United States v. Jones*, 356 F.3d 529, 534 (4th Cir. 2004), where "[c]onsent may be supplied by non-verbal conduct." This was a drug case in which the defendant was found not to have objected (and thereby to have consented) to the use of keys found in a duffle bag to open a locked box therein. Consent to search the duffle bag had already been given, and the locked box contained incriminating evidence.

[4] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1053 (1984).

[5] *Id.* at 1050-51. However, none of the circuit courts applying this have found that it is a two-pronged requirement of transgressions of fundamental fairness *and* undermining the probative value of the evidence. Rather, courts have primarily looked to the question of fairness and the egregiousness of the officers' behavior, matching the criminal exclusionary principle that the probative value of evidence is irrelevant to the exclusionary principle, and that a "search prosecuted in violation of the Constitution is not made lawful by what it brings to light." *Byars v. United States*, 273 U.S. 28, 29-30 (1927). For example, in *Almeida-Amaral*, the Second Circuit cited *Gonzales-Rivera* to emphasize that a fundamentally unfair violation of the Fourth Amendment is considered egregious despite the probative value of the evidence obtained.

[6] *Yanez-Marquez v. Lynch*, 789 F.3d 484, 472 (4th Cir. 2015).

otherwise)."[7] In *Navarro-Chalan v. Ashcroft*, the Ninth Circuit held that there was no egregious violation where the immigrant disclosed his name and identity before the arrest.[8] Thus, where the immigrant provides information voluntarily before he or she is arrested, the courts will not suppress the information provided.[9]

The Ninth Circuit has also consistently held that existing evidence of identity cannot be suppressed *even if* there is an egregious violation.[10] In *Hoonsilapa v. INS*, the Ninth Circuit declined to extend the exclusionary rule in a removal proceeding where an illegal arrest led to discovery of the immigrant's identity, which resulted in a search of pre-existing INS files.[11] The court reasoned that such a sanction was not appropriate, since the identity evidence was from a visa petition which was voluntarily submitted. The court concluded that "the mere fact that Fourth Amendment illegality directs attention to a particular suspect does not require exclusion of evidence subsequently unearthed from independent sources."[12]

§ 2.9 Evidence Obtained in Violation of Due Process

Removal proceedings must conform to "traditional standards of fairness encompassed in due process."[13] Even if there is no egregious violation of the Fourth Amendment, individuals are entitled to procedural due process under the Fifth Amendment in a removal proceeding.[14] Procedural due process prohibits the government from using statements that are made involuntarily to support deportation.[15] When the surrounding circumstances of an interrogation are fundamentally unfair, the statement may be excluded under the Fifth Amendment.[16] But a statement will not be suppressed in a removal proceeding based merely on the failure to warn of the person's privilege against self-incrimination.[17] The immigrant bears the burden of proof to show that the immigration authorities unlawfully obtained evidence before the government will be required to justify the manner in which the statement was obtained.[18]

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[7] *Id.*
[8] *Navarro-Chalan v. Ashcroft*, 359 F.3d 19 (9th Cir. 2004).
[9] In a similar vein, in an unpublished decision *Olmedo-Monroy v. INS* the Ninth Circuit held that although the official agent's conduct fell below the proper standard, it was not egregious misconduct under the Fourth Amendment. *Olmedo-Monroy v. INS*, 917 F.2d 1307, slip op. 1990 U.S. App. LEXIS 19679 (9th Cir. 1990). The IJ accepted as true that the Border Patrol agents did not stop the petitioner solely because of his Hispanic appearance, but for other reasons. In another unpublished decision, the Ninth Circuit held that it is not an egregious violation of the Fourth Amendment when an immigration agent was given consent to obtain passports from petitioners' home and then seized documents from a closed suitcase. *Apostol v. INS*, 936 F.2d 576, slip op. 1991 U.S. App. LEXIS 13648 (9th Cir. 1991).
[10] See, e.g., *United States v. Del Toro Gudino*, 376 F.3d 997 (9th Cir. 2004); *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994); *United States v. Garcia-Beltran*, 443 F.3d 1126 (9th Cir. 2006) (fingerprints).
[11] *Hoonsilapa v. INS*, 575 F.2d 735 (9th Cir. 1978).
[12] *Id.* (citing *United States v. Cella*, 568 F.2d 1266, 1285-1286 (9th Cir. 1977)). See also *Mineo v. U.S. INS*, 19 F.3d 11 (4th Cir. 1994) (unpublished) (upholding BIA's denial of motion to suppress and affirmation of IJ's finding that "application for extension of stay and the INS's Nonimmigrant Information System printout were independent evidence which proved [defendant's] deportability").
[13] *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1277 (9th Cir. 1979).
[14] *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Navia-Duran v. INS*, 568 F. 2d 803, 808 (1st Cir. 1977); *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980).
[15] *Navia-Duran*, 568 F.2d at 811.
[16] See *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).
[17] *United States v. Alderete-Deras*, 743 F.2d 645, 648 (9th Cir. 1984) (holding that IJ's failure to provide Miranda warnings did not preclude admission of the alien's statement in deportation proceeding since there was no coercion or improper behavior).
[18] *Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975).

The Supreme Court held in the seminal case of *Miranda v. Arizona* that the failure to inform a person of their rights renders any statements made during a custodial interrogation inadmissible in a criminal trial.[19] However, the courts have not extended its application to the removal context.[20] Miranda warnings do not have the same significance in removal hearings primarily because the characterization of removal hearings as a civil proceedings.[21] For example, in a deportation hearing, once the fact that the respondent is an immigrant is established, the burden is upon him or her to prove time, place, and manner of entry, which if not sustained, results in an automatic presumption of unlawful presence.[22] In addition, the main purpose of the Miranda warnings, "to permit the suspect to make an intelligent decision as to whether to answer the government agent's questions," would not be served because of the immigrant's burden of proof, the potential adverse inference from silence, and the admissibility of statements despite lack of counsel at the preliminary interrogation.[23]

Statements that are illegally obtained, however, can be suppressed. The "threshold requirement" for purging the taint of an illegally obtained confession is the confession's voluntariness under the Fifth Amendment.[24] To determine the voluntariness of a statement, courts consider the totality of the circumstances.[25] But the test for voluntariness differs from the criminal context where voluntariness depends on whether the accused received adequate Miranda warnings. In the civil immigration proceedings, an immigrant's statement made after an illegal search is not involuntary under the Fifth Amendment *unless* the record evidences that "the alien's statement was induced by coercion, duress, or improper action" by the immigration officer.[26]

§ 3.6 Current Authority of Local Police to Make Immigration Stops

Local and state law enforcement agents do not have authority to stop or arrest someone solely on the basis of their immigration status.[27] However, they do have authority to enforce criminal laws.[28] Under the Supreme Court's decision in *Arizona v. United States*, police may investigate immigration status following a stop, so long as is does not unreasonably prolong the stop.[29] *In U.S. v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011), following a routine traffic stop for speeding and possible driver impairment, the officer called ICE to verify the validity of a permanent resident ID provided by a backseat occupant of the vehicle in response to a request for identification. ICE confirmed that the alien registration number on the ID did not match the name given. The court held that although the call to ICE was unrelated to the justification for the stop, "the totality of the circumstances" demonstrated that the officer "diligently pursue[d] the investigation of the justification for the stop," although the court also stated that

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[19] *Miranda v. Arizona*, 384 U.S. 436 (1996).
[20] See, e.g., *Bustos-Torres v. INS*, 898 F.2d 1053, 1056-57 (5th Cir. 1990) (failure to provide Miranda warnings results in exclusion of any admissions by non-citizen in criminal trial but not from the removal proceeding); *Strantzalis v. INS*, 465 F.2d 1016, 1018 (3rd Cir. 1972).
[21] *US v. Solano-Godines*, 120 F.3d 957, 960 (9th Cir. 1997).
[22] *Chavez-Raya v. INS*, 519 F.2d 397, 401 (7th Cir. 1975).
[23] *Id*. at 402; see also *Lavoie v. INS*, 418 F.2d 732, 734 (9th Cir. 1969); *Nason v. INS*, 370 F.2d 865, 867-68 (2nd Cir. 1967); *Ah Chiu Pang v. INS*, 368 F.2d 637, 639 (3rd Cir. 1966).
[24] *Delfin v. INS*, 83 F.3d 426 (9th Cir. 1996) (citing *Brown v. Illinois*, 422 U.S. 590, 604 (1975)).
[25] *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). See also *United States v. Buckner*, 473 F.3d 551, 554 (4th Cir. 2007), holding that whether consent is "knowing and voluntary" depends on the totality of the circumstances. In this case, a wife's consent to the search of a computer was held to extend to the husband's password protected files because the wife had apparent authority to consent to the search based on the overall facts and circumstances.
[26] *Delfin v. INS*, 83 F.3d 426 (9th Cir. 1996) (citing *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1278 (9th Cir. 1979)).
[27] *Arizona v. United States*, 567 U.S. ____, 132 S.Ct. 2492 (2012).
[28] The authority of local officers to make arrests for federal crimes is generally an issue of state law. See *United States v. Di Re*, 332 U.S. 581, 589 (1948).
[29] *Arizona v. U.S.*, 567 U.S. ___(2012); see also *Muehler v. Mena*, 544 U.S. 93, 101 (2005); *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

"[e]xtending the stop to verify the validity of the ID without reasonable suspicion might well have rendered the stop unreasonable if the stop had been longer or if some other aspect of the officer's conduct had demonstrated definitive abandonment of the prosecution of the traffic stop."

MOTION TO SUPPRESS MANUAL UPDATES: FIFTH CIRCUIT

§ 2.1 Overview

The general rule is that an immigration judge presiding over removal proceedings (formerly called deportation proceedings) cannot use the exclusionary rule to suppress evidence alleged to be obtained in violation of the Fourth Amendment. But there are circumstances under which the exclusionary rule will still apply. In *Lopez Mendoza*, the Supreme Court announced possible exceptions where the exclusionary rule may apply in removal proceedings, including where there is a policy of widespread abuse, or an egregious violation of the Fourth Amendment or other liberties that "might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." The Fifth Circuit has not recognized the "widespread abuse" or "egregious violation" exceptions to the general rule that the exclusionary rule does not apply to statements or evidence of identity, nationality, and immigration status, including an alien's INS or DHS file ("A-file"). This was held to be the case even where the alien was found to have been stopped illegally.[1]

§ 2.3 Identifying a Seizure in the Immigration Context

Traffic stops near the United States-Mexico border require the arresting officers or agents to have reasonable suspicion of illegal activity.[2] The fact that a driver is on an interstate highway that happens to be a "major corridor for illegal alien-smuggling" alone is not enough to justify a stop, and the court discounted the evidentiary value of a driver with two hands on the wheel who slowed down when he saw immigration agents, was a man driving in a car registered to a woman, with a passenger who would not look at the agents' car and where conversation between the driver and passenger stopped when the agents were observing them. The court thus specifically held that the agents lacked reasonable suspicion of illegal activity when they stopped the motorist; nevertheless the motorist's consequent admission that he was a Mexican citizen unlawfully present in the U.S. was still not suppressible.[3]

§ 2.6 Searches and Search Warrants

The Fifth Circuit defers to the BIA's findings as to whether the movant voluntarily consented to the warrantless search alleged to violate the Fourth Amendment.[4]

§ 2.7 Was the Fourth Amendment Violation Egregious

Even after *Lopez-Mendoza*,[5] the Fifth Circuit has consistently refrained from overturning a district court's denial of motions to suppress.[6] The Fifth Circuit also defers to the BIA's own determination of whether an agent's conduct was egregious.[7]

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[1] *United States v. Roque-Villaneuva*, 175 F.3d 345, 346 (5th Cir. 1999) (affirming the continued vitality of *United States v. Pineda-Chinchilla*, 712 F.2d 942 (5th Cir. 1983), even after *Lopez v. Mendoza*).
[2] *United States v. Hernandez-Mandujano*, 721 F.3d 345, 348 (5th Cir. 2013) (*per curiam*) (applying the *Brignoni-Ponce* factors, see *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975)).
[3] *Hernandez-Mandujano*, 721 F.3d at 348–50.
[4] *Rios-Arias v. Sessions*, – F. App'x —, No. 15-60712, 2017 WL 1279233, at *1 (5th Cir. Apr. 6, 2017) (*per curiam*).
[5] *INS v. Lopez–Mendoza*, 468 U.S. 1032, 1050–51 (1984).
[6] See *United States v. Pineda-Chinchilla*, 712 F.2d 942, 943–44 (5th Cir. 1983) (*per curiam*); *Roque-Villaneuva*, 175 F.3d at 346 (5th Cir. 1999); *United States v. Hernandez-Mandujano*, 721 F.3d 345 (5th Cir. 2013); *United States v. Duble-Ramos*, 619 F. App'x 329 (5th Cir. 2015); *United States v. Montes-Nunez*, 644 F. App'x 350 (5th

§ 2.9 Evidence Obtained in Violation of Due Process

In a case alleging *Miranda* violations, the Fifth Circuit held that statements concerning nationality and immigration status made while detained but prior to receiving *Miranda* warnings did not require suppression, because the statements were not necessary to establish the elements of the offense of conviction, and were therefore not prejudicial.[8]

§ 2.11 Due Process Rights Secured by Regulations

The Fifth Circuit has categorically refused to extend the suppression remedy to violations of the Code of Federal Regulations.[9]

§ 5.3 The Master Calendar Hearing

Failure to raise suppression at the suppression hearing, or statements of counsel purporting to waive the argument, prevent raising it on appeal.[10]

Cir. 2016) (*per curiam*); *United States v. Rodriguez*, – F. App'x —, No. 16-50021, 2016 WL 7480251 (5th Cir. Dec. 29, 2016) (*per curiam*).

[7] *Rios-Arias v. Sessions*, 2017 WL 1279233, at *1.

[8] *Duble-Ramos*, 619 F. App'x at 329–30.

[9] *Rios-Arias v. Sessions*, 2017 WL 1279233, at *1, citing *Ali v. Gonzales*, 440 F.3d 678, 682 (5th Cir. 2006).

[10] *Montes-Nunez*, 644 F. App'x at 350 (counsel waived the argument by stating that the defendant "was not seeking to suppress his A file"), citing *United States v. Musquiz*, 45 F.3d 927, 931 (5th Circ. 1995).

MOTION TO SUPPRESS MANUAL UPDATES: SIXTH CIRCUIT

§ 2.14 Interrogations and Agency Conduct during Stops and Arrests

8 CFR § 287.8 provides standards for enforcement activities regarding use of force, interrogation and detention not amounting to arrest and conduct during arrests. Many of these elements also mirror the requirements of the Fourth and Fifth Amendments. For example § 287.8(c)(2)(vii) prohibits the use of threats, coercion or physical abuse by an immigration officer to induce a person to make a statement. Such conduct would render statements involuntary and violate the Fifth Amendment.[1] Some courts are reluctant to provide a remedy for regulatory violations without a strong showing of prejudice or agency misconduct. In one case the Sixth Circuit refused to apply remedies under § 287.8(c)(2)(vii) unless specific facts were alleged regarding the use of "threats, coercion or physical abuse."[2] Because the defendant's affidavit only stated that the officers were "aggressive" and not that he was threatened, coerced, or physically abused, the court held that the motion to suppress was properly denied on this ground.

§ 3.8 The Warrant Requirement in Immigration Arrests and Searches

If a stop or questioning amounts to a complete arrest, ICE or CBP must have had reason to believe that the person was not just an immigrant but also an undocumented immigrant at the time the arrest is made.[3] Courts in the Third Circuit have interpreted "reason to believe" as requiring that the arresting officer have probable cause to arrest the immigrant.[4] Specifically, "an immigration officer must have *both* probable cause to believe that an alien is in violation of an immigration law or regulation *and* probable cause to believe that the alien will likely flee the area before a warrant can be obtained."[5] Recently a District Court in the Sixth Circuit similarly held that, during a traffic stop, ICE officers may not make a warrantless arrest for suspected immigration violations if they have no reason to believe that the defendant is likely to escape. Where the defendant was stopped close to his home in his car, answered the officers' questions without incident, had no known criminal history, and had a fiancé with whom he lived and a stable job, the court concluded he did not pose a risk of escaping before a warrant could be obtained.[6] In this case the court was also highly influenced by circumstances that indicated that the agents had ample opportunity to obtain a warrant relating to suspected dealing in drugs and firearms, but chose not to and instead staked out the suspect in a deliberate attempt to generate a situation that would enable them to arrest him during a warrantless traffic stop. Further, the court noted that the government had introduced no evidence at all that the defendant posed a risk of escape.

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[1] *Bong Youn Choy v. Barber*, 279 F.2d 642, 646-47 (9th Cir. 1960).
[2] *Nolasco-Gaspar v. Holder*, 581 Fed.Appx. 546, 547 (6th Cir. 2014).
[3] 8 USC § 1357(a)(2).
[4] *Davila v. United States*, No. 2:13-CV-00070, 2017 WL 1162912 (W.D. Pa. March 28, 2017) (citing *Babula v. INS*, 665 F.2d 293, 298 (3d Cir. 1981)).
[5] *Id.* (emphasis in original); see also *Babula*, 665 F.2d at 297 ("Eight U.S.C. s 1357(a)(2) provides that any INS agent may, without a warrant, 'arrest any alien in the United States, if he has reason to believe that the alien (is) in violation of any (law) or regulation (regarding the admission, exclusion, or expulsion of aliens) and is likely to escape before a warrant can be obtained'").
[6] *United States v. Pacheco-Alvarez*, 227 F.Supp. 3d 863, 889-90 (S.D. Ohio, 2016).

MOTION TO SUPPRESS MANUAL UPDATES: SEVENTH CIRCUIT

§ 2.1 Overview of the Chapter

The Fourth Amendment protects "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] The protection afforded by the Fourth Amendment against unreasonable searches and seizures "governs not only the seizure of tangible items, but extends as well to the recording of oral statements."[2] The Fourth Amendment applies to all persons in the United States, including immigrants, whether the immigrants are undocumented or not.[3] Only at international borders and their functional equivalents are the protections of the Fourth Amendment reduced.[4] The highest degree of protection is afforded to "the sanctity of the home."[5]

The general rule is that an immigration judge presiding over removal proceedings (formerly called *deportation* proceedings) cannot use the exclusionary rule to suppress evidence alleged to be obtained in violation of the Fourth Amendment.[6] But there are circumstances under which the exclusionary rule will still apply. In *Lopez Mendoza*, the Supreme Court announced possible exceptions where the exclusionary rule may apply in removal proceedings, including where there is a policy of **widespread abuse**, or an **egregious violation** of the Fourth Amendment or other liberties that "might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[7] If information was gathered by illegal methods, such as a forced entry by ICE or the Customs and Border Patrol Agency (CBP) into a person's house or a forcibly obtained statement, a motion to suppress may keep the evidence out of the removal proceedings. To prevail, the motion to suppress must demonstrate an "egregious" violation or "widespread" abuse. A sample motion covering these concepts is included at **Appendix F**.

To determine whether there is an egregious violation, one must conduct a two-step analysis. The first step is to establish whether there was an unreasonable search or seizure in violation of the Fourth Amendment.[8] The second step is to determine whether there was an egregious violation. In the Seventh Circuit, an egregious violation occurs when it "transgress[es] notions of fundamental fairness and undermine[s] the probative value of the evidence obtained."[9] To meet the "egregiousness" standard, the

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[1] U.S. Const. amend. IV. The Fourth amendment also includes the provision that warrants must be based on probable cause and judicially authorized. The full text reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
[2] *Katz v. United States*, 389 U.S. 347, 353 (1967).
[3] *United States v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975) (applying the Fourth Amendment to undocumented immigrants arrested based on their apparent Mexican ancestry).
[4] *Almeida-Sanchez v. United States*, 413 U.S. 266, 273-75 (1973); see also *United States v. Yang*, 286 F.3d 940, 944 (7th Cir. 2002).
[5] *Payton v. New York*, 445 U.S. 573, 589 (1980); see also *Wanger v. Bonner*, 621 F.2d 675, 682 (5th Cir. 1980) ("An individual's privacy interests are nowhere more clearly defined or rigorously protected than in the home, the core of Fourth Amendment rights").
[6] See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding the exclusionary rule inapplicable to "technical violations" of the Fourth Amendment in deportation proceeding).
[7] *Id*. at 1050–51; see also *Gutierrez-Berdin v. Holder*, 618 F.3d 647, 652 (7th Cir. 2010) (citing *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002)).
[8] *Martinez-Camargo v. INS*, 282 F.3d 487, 493 (7th Cir. 2002) (stating that the question of egregiousness need not be reached when the officer's actions did not offend the Constitution in any respect).
[9] *Id.*; see also *Sehgal v. Lynch*, 813 F. 3d 1025 (7th Cir. 2016) (same).

violation must amount to something more than excessive force in making an arrest or seizure, or "very minor physical abuse coupled with aggressive questioning."[10]

§ 2.2 Questioning and Types of "Stops" of Immigrants

No updates, but *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976) and *Illinois Migrant Council v. Pilliod*, 53 F. Supp. 1011 (N.D. Ill. 1982) generally provide additional Seventh Circuit support for the text in this section.

§ 2.3 Identifying a Seizure in the Immigration Context

A. "Casual" Questioning: Not a Seizure

An ICE agent can ask a person questions about her immigration status if he has *"articulable facts to justify a suspicion" that she is an "alien"* (not a citizen of the U.S.) For this type of questioning, the agent does *not* have to suspect that the person is *undocumented*, just that he or she is not a U.S. citizen.[11] The courts require very little suspicion because this is such a small interference with one's liberty, not even amounting to a seizure of the person.[12] However, in this type of questioning, the person can choose not to answer any questions and *must be allowed to walk away.*[13]

B. Temporary Detention: A "Seizure" but Not an "Arrest"

Federal courts have found that a seizure occurred where: police officers make a traffic stop;[14] Border Patrol agent made a petitioner wait inside his vehicle until his immigration status was verified by the agent's colleagues;[15] when an immigration officer prevented a petitioner from leaving an area of the workplace;[16] law enforcement officer ordered a person to stop;[17] a petitioner was physically restrained by an immigration officer who grabbed her by the arm and held her for thirty seconds; the use of language or tone of voice indicating that compliance with the officer's request might be compelled;[18] and immigration agents surrounded and secured the premises during area control operations.[19]

Some of the factors that courts apply to determine whether a seizure has occurred include: whether the encounter took place in public; whether the suspect consented to speak to the police; whether the officers

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[10] *Gutierrez-Berdin* 618 F.3d 647, 652 (citing *Evans v. Poskon*, 603 F.3d 362, 364 (7th Cir. 2010)).
[11] See *Illinois Migrant Council v. Pilliod*, 540 F.2d at 1070 ("[A] street stop is justifiable here only when the INS agent has a 'reasonable suspicion based on specific articulable facts that such person is an alien (unlawfully) in the (United States)'") (quoting *United States v. Brignoni-Ponce*, 422 U.S. at 884).
[12] *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 129 (2nd Cir. 2008) (noting that immigration laws permit immigration officials to ask questions without a warrant of any person believed to be an alien as to his right to be or to remain in the United States); see also *Illinois Migrant Council v. Pilliod*, 531 F. Supp. at 1016 (noting that "when a person voluntarily cooperates with INS, is in no meaningful way detained, and retains his freedom to walk away, then no 'seizure' occurs, and the fourth amendment cannot be violated" (quotations omitted)).
[13] 8 CFR § 287.8(b).
[14] *Brendlin v. California*, 551 U.S. 249 (2007).
[15] *Benitez-Mendez v. INS*, 760 F.2d 907, 909 (9th Cir. 1983).
[16] *INS v. Delgado*, 466 U.S. 210, 218–21 (1984) (noting that mere questioning did not constitute a seizure when it occurred inside the factory, but the result would be different when it occurred at the exits); *Martinez v. Nygaard*, 831 F. 2d 822 (9th Cir. 1987).
[17] *Almeida-Amaral XXX, United States v. Alarcon-Gonzalez*, 73 F.3d 289 (10th Cir. 1996).
[18] See *Orhorhaghe*; 38 F.2d at 496; see also *Martinez v. Nygaard*, 831 F.2d 822, 826 (9th Cir. 1987); *Benitez-Mendez*, 707 F.2d at 1108.
[19] *Illinois Migrant Counsel v. Pilliod*, 531 F. Supp. at 1018–19 ("It is clear that this policy [of stationing agents at all exits during area control operations] results in 'seizures' for purposes of the fourth amendment").

told the suspect that he was not under arrest and free to leave; whether the suspect was moved to another area; the number of officers present; and whether they displayed weapons or physical force.[20]

§ 2.4 Was the Seizure an Arrest

If a stop or questioning amounts to a complete arrest, ICE or CBP must have had reason to believe that the person was not just an immigrant but also an undocumented immigrant at the time the arrest is made.[21] Courts in the Seventh Circuit have interpreted "reason to believe" as requiring that the arresting officer have probable cause to arrest the immigrant.[22] Specifically, an immigration officer must have *both* probable cause to believe that an alien is in violation of an immigration law or regulation *and* probable cause to believe that the alien will likely flee the area before a warrant can be obtained.[23]

"Probable cause exists when, at the time of the arrest, the arresting officer possesses 'knowledge from reasonably trustworthy information that is sufficient to warrant a prudent person in believing that a suspect has committed, or is committing a crime.'"[24] Whether a police officer acted on probable cause "is determined 'based on the common-sense interpretations of reasonable police officers as to the totality of the circumstances at the time of arrest.'"[25] Although the Ninth Circuit has held that probable cause may exist where a lawful permanent resident fails to carry their green card on their person,[26] the Seventh Circuit has not ruled on this issue. At least one district court in the Third Circuit, however, found that the failure to carry a green card did not establish probable cause as a matter of law; rather, the inquiry is fact intensive.[27]

§ 2.6 Searches and Search Warrants

Most searches that ICE and CBP conduct are done without a warrant, but with the consent of the person. Generally, consent to a search is determined by the totality of the circumstances.[28] Relevant factors include: "(1) the person's age, intelligence, and education, (2) whether he was advised of his constitutional rights, (3) how long he was detained before he gave his consent, (4) whether his consent was immediate, or was prompted by repeated requests by the authorities, (5) whether any physical coercion was used, and (6) whether the individual was in police custody when he gave his consent."[29]

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[20] See *United States v. Figueroa-Espana*, 511 F.3d 696, 702 (7th Cir. 2007) (listing factors relevant to whether a seizure occurred).
[21] 8 USC § 1357(a)(2).
[22] *Mayorov v. United States*, 84 F. Supp.3d 678, 690 (N.D. Ill. 2015) (citing *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir. 1975)); see also *Moreno v. Napolitano*, 213 F. Supp.3d 999, 1007 (N.D. Ill. 2016) ("the phase [sic] 'reason to believe' in § 1357(a)(2) requires the equivalent of probable cause, see *Cantu*, 519 F.2d at 496, which in turn requires a particularized inquiry").
[23] See generally *Moreno v. Napolitano*, 213 F. Supp.3d 999 (N.D. Ill. 2016) (holding that ICE officials must have "reason to believe" that the suspect is a removable alien *and* is likely to escape before a warrant can be obtained for his arrest).
[24] *United States v. Villegas*, 495 F.3d 761, 770 (7th Cir. 2007) (citing *United States v. Breit*, 429 F.3d 725, 728 (7th Cir. 2005)).
[25] *Id.*
[26] *Martinez v. Nygaard*, 831 F.2d 822, 828 (9th Cir. 1987) (holding that "[a]n individual's admission that she is an alien, coupled with her failure to produce her green card, provides probable cause for an arrest").
[27] *Davila v. United States*, 2017 WL 1162912, at *12 (W.D. Pa. 2017) ("[T]he Court concludes that factual issues prevent it from holding as a matter of law that Agent Tetrault had probable cause under 8 USC § 1357(a)(2) to believe Davila was unlawfully present in the United States in violation of an immigration law or regulation").
[28] *United States v. Figueroa*, 2008 WL 4822530 at *4 (E.D. Wis. Nov. 4, 2008) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).
[29] *United States v. Raibley*, 243 F.3d 1069, 1075–76 (7th Cir. 2001).

Many immigrants are not aware that they can say "no" to a search request. It is not legal for ICE or CBP to threaten a person in order to get them to give consent. That includes a threat to refer a person's family to immigration authorities.[30] However, it is generally legal for law enforcement agents to lie to people, and they will regularly do so, especially to get information or a confession.[31]

§ 2.7 Was the Fourth Amendment Violation Egregious

The exclusionary rule generally does not apply to removal proceedings.[32] It may, however, apply where Fourth Amendment violations are egregious or widespread.[33] In determining whether a violation is egregious, courts consider a variety of factors, including but not limited to:

> whether the seizure itself was so gross or unreasonable in addition to being without a plausible legal ground, (e.g., when the initial illegal stop is particularly lengthy, there is an unnecessary and menacing show or use of force, etc.), whether improper seizures, illegal entry of homes, or arrests occurred under threats, coercion or physical abuse, the extent to which the agents reported to unreasonable shows of force, and finally, whether any seizures or arrests were based on race or perceived ethnicity.[34]

Although the Seventh Circuit has not outright applied the *Oliva-Ramos* factors to date, it has at least favorably cited such factors as relevant to the egregiousness inquiry in a recent published opinion.[35] Generally, the Seventh Circuit requires a high burden when applying the egregiousness standard, holding, for example, that neither vague allegations of fraud[36] nor "very minor physical abuse coupled with aggressive questioning"[37] are the "egregious behavior contemplated by *Lopez-Mendoza*."[38] The government may, however, offend due process if it knows of an immigrant's weaknesses (i.e., poor English skills) and seeks to exploit them.[39]

§ 2.9 Evidence Obtained in Violation of Due Process

Removal proceedings must conform to "traditional standards of fairness encompassed in due process."[40] Even if there is no egregious violation of the Fourth Amendment, individuals are entitled to procedural due process under the Fifth Amendment in a removal proceeding.[41] Procedural due process prohibits the government from using statements that are made involuntarily to support deportation.[42] When the surrounding circumstances of an interrogation are fundamentally unfair, the statement may be excluded

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[30] See *Figueroa*, 2008 WL 4822530 at *4 (holding that a threat to refer the suspect's family to immigration authorities may be sufficient to vitiate the suspect's consent).
[31] *Frazier v. Cupp*, 394 U.S. 731 (1969).
[32] *INS v. Lopez–Mendoza*, 468 U.S. 1032, 1050–51 (1984).
[33] *Oliva-Ramos v. Attorney Gen. of U.S.*, 694 F.3d 259, 275 (3rd Cir. 2012).
[34] *Id.* at 279.
[35] See *Sehgal v. Lynch*, 813 F.3d 1025, 1031 (7th Cir. 2016) (citing *Oliva-Ramos* for factors relevant to the egregiousness inquiry).
[36] See *id.*
[37] *Gutierrez-Berdin*, 618 F.3d at 652.
[38] *Id.* at 653.
[39] See *Slavov v. Holder*, 501 Fed. App'x. 551, 555 (7th Cir. 2013); see also *United States v. Hollingsworth*, 27 F.3d 1196, 1203 (7th Cir. 1994) (*en banc*) (justifying government activity that does *not* "exploit[ ] the susceptibilities of a weak-minded person).
[40] *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1277 (9th Cir. 1979).
[41] *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Navia-Duran v. INS*, 568 F. 2d 803, 808 (1st Cir. 1977); *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980); *Aparicio-Brito v. Lynch*, 824 F.3d 674, 681 (7th Cir. 2016).
[42] *Navia-Duran*, 568 F.2d at 811.

under the Fifth Amendment.[43] But a statement will not be suppressed in a removal proceeding based merely on the failure to warn of the person's privilege against self-incrimination.[44] The immigrant bears the burden of proof to show that the immigration authorities unlawfully obtained evidence before the government will be required to justify the manner in which the statement was obtained.[45]

§ 3.8 The Warrant Requirement in Immigration Arrests and Searches

The INA requires immigration officials to obtain a criminal or administrative arrest warrant prior to making an arrest. The Act, however, makes certain exceptions to the warrant requirement, such as when an immigrant is caught in the act of trying to physically enter the U.S. without inspection.[46] An immigration officer may also circumvent the warrant requirement where he or she has "reason to believe"—which courts uniformly recognize as the equivalent of "probable cause"—that a violation of the immigration law has occurred, *but only if* he or she also believes the suspect is likely to escape before a warrant can be obtained.[47] The most commonly used exception by ICE and CBP officials who make arrests away from the border is the "likelihood of escape" exception.

In determining likelihood of escape, the Second Circuit has been willing to supply factors *post hoc* that could have been available to arresting officers, even if there is little evidence the officers were aware of those facts at the time.[48] Other courts, however, rely on the objective facts the officer had available at the time of the arrest.[49] This latter group includes the Seventh Circuit, which has held that the "likelihood of escape" is a statutory limitation that "is always seriously applied."[50] Recently, one district court in the Seventh Circuit rejected the government's argument that all potentially removable aliens are, by their very status, "likely to escape before a warrant can be obtained," or at the very least, all potentially removable aliens who have been placed into immigration custody are "likely to escape before a warrant can be obtained" upon their release.[51] Instead, a more "particularized inquiry" based on the individual circumstances is required prior to the arrest or detention.[52] Beyond overt attempts to flee or evade immigration agents,[53] relevant factors in deciding whether escape is likely include a person's mobility or

[43] See *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).
[44] *United States v. Alderete-Deras*, 743 F.2d 645, 648 (9th Cir. 1984) (holding that IJ's failure to provide Miranda warnings did not preclude admission of the alien's statement in deportation proceeding since there was no coercion or improper behavior); see also *Aparico-Brito*, 824 F.3d at 683 (noting that the examining officer is only required to notify the immigrant that any statement made may be used against him or her in a subsequent proceeding when the immigrant is placed into "formal proceedings," and "formal proceedings" do not begin *until* the government files a notice to appear in an immigration court).
[45] *Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975); see also *Sehgal v. Lynch*, 813 F.3d at 1030.
[46] INA § 287(a)(1)–(5); 8 USC § 1357(a)(1)–(5).
[47] INA § 287(a)(2); 8 USC § 1357(a)(2).
[48] See, e.g., *Contreras v. United States*, 672 F.2d 307, 308 (2nd Cir. 1982) (presumptively accepting agents' belief in likelihood of escape if there is "any reasonable basis for it") (quoting *Marquez v. Kiley*, 436 F. Supp. 100, 108 (S.D.N.Y. 1977)) (emphasis added).
[49] See *Cantu*, 519 F.2d 494, 497-498 (7th Cir. 1975); see also *Araujo v. United States*, 301 F. Supp. 2d 1095, 1101-02 (N.D. Cal. 2004); *United States v. Harrison*, 168 F.3d 483 (4th Cir. 1999) (unpublished) ("Hence, the critical question remains did the INS believe Harrison was likely to flee before a warrant could be obtained. In making such a determination, a court examines the objective facts within the knowledge of the INS Agents").
[50] *Cantu*, 519 F.2d at 496–497.
[51] *Moreno v. Napolitano*, 213 F. Supp.3d 999, 1006–1009 (N.D. Ill. 2016).
[52] *Id.* at 1007.
[53] See, e.g., *Matter of Cachiguango & Torres*, 16 I&N Dec. 205 (BIA 1977).

presence in a vehicle,[54] repeated past encounters with the immigrant with no intervening escape, ties to the neighborhood or family nearby, and previous deportations.[55]

The government may argue, in some cases successfully, that a person becomes likely to escape before a warrant can be obtained as soon as his or her unlawful presence in the United States has been clearly established by the officers.[56] This argument may not have as much success in the Seventh Circuit, however.[57] If establishing probable cause of immigration violations automatically provides probable cause that a person will escape before a warrant can be obtained, the two-part requirement of the warrantless arrest statute would be meaningless.[58] The Supreme Court's decision in *Arizona v. United States* bolsters this conclusion by holding that Arizona's warrantless arrest provision for suspected immigration violators—Section 6 of SB1070—was preempted, in part, because it would provide Arizona law enforcement officers with even greater arrest authority than federal immigration officials.[59]

§ 3.9 Rights in the Home and Other Private Places

The Seventh Circuit has a high standard for consent—the government has to prove by a preponderance of the evidence that their entrance into a private home without a warrant falls within the consent exception (i.e., consent was freely and voluntarily given).[60] To determine whether an immigrant voluntarily consented to a search, courts in the Seventh Circuit examine the totality of the circumstances.[61] To make this determination, courts consider factors such as: (1) the immigrant's age, intelligence, and education; (2) whether law enforcement advised the immigrant of his constitutional rights; (3) how long the defendant was detained prior to giving consent; (4) whether the consent was immediate, or prompted by repeated requests by law enforcement agents; (5) whether any physical coercion was used; and (6) whether the defendant was in custody.[62] No single factor is determinative.[63] Notably, the Seventh Circuit has not addressed whether an immigration officer may obtain consent to enter a home by inference.[64]

"Exigent circumstances" permit an entry into a home or a private section of the workplace without consent and without a warrant. An exigent circumstance is one where a reasonable officer believes that entry is necessary to render emergency assistance to an injured occupant or to protect an occupant from

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[54] See *Cantu*, 519 F.2d at 497-498.
[55] See *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432 (N.D. Calif. 1989); *Araujo v. United States*, 301 F. Supp. 2d 1095, 1101-02 (N.D. Cal. 2004); *United States v. Harrison*, 168 F.3d 483 (4th Cir. 1999) (unpublished); *Mountain High Knitting v. Reno*, 51 F.3d 216 (9th Cir. 1995); *Contreras v. United States*, 672 F.2d 307, 308 (2nd Cir. 1982).
[56] See, e.g., *Contreras v. United States*, 672 F.2d 307, 308 (2nd Cir. 1982).
[57] See *Moreno*, 213 F. Supp.3d at 1007–1008 (rejecting the government's categorical determination of likelihood to escape, instead requiring a more individualized determination prior to the arrest or detention).
[58] *Id*. at 1007 ("Nor can it be the case that, simply by being potentially removable, an alien must be deemed to be likely to evade detention by ICE. Such a reading would render the limitations on warrantless arrest created by 8 USC §§ 1226(a) and 1357(a)(2) meaningless").
[59] *Arizona v. United States*, 132 S.Ct. 2492 (2012).
[60] *United States v. Garcia*, 2014 WL 6757949, at *3 (N.D. Ill. Dec. 1, 2014) (citing *United States v. Zahursky*, 580 F.3d 515, 521 (7th Cir. 2009)).
[61] *Id*. at *5 (citing *United States v. Lewis*, 608 F.3d 996, 999 (7th Cir. 2010)).
[62] *Id*. (citing *United States v. Beltran*, 752 F.3d 671, 679 (7th Cir. 2014)).
[63] *United States v. Figueroa-Espana*, 511 F.3d 696, 704 (7th Cir. 2007).
[64] See, e.g., *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017 (9th Cir. 2008); *United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990); *United States v. Albrektsen*, 151 F.3d 951, 955 (9th Cir. 1998); *United States v. Garcia*, 997 F.2d 1273, 1281 (9th Cir. 1993) (finding that suspect's affirmative response and stepping back to clear the open doorway implied consent).

imminent injury.[65] A typical example of an exigent circumstance is when officers are in hot pursuit of an armed suspect. If officers are following a suspect who flees into his or another person's home, the agents may enter the home due to the exigent circumstances.

A warrant must be signed and issued by a judge or magistrate who has determined that the law enforcement agency requesting the warrant shows "probable cause" that a specific person in the home has broken the law.[66] A landlord *cannot* give police or immigration officers permission to enter the immigrant tenant's dwelling to perform a warrantless search (unless the landlord shares one living space with the tenant).[67]

§ 3.11 Arrests Based on Race or Ethnic Appearance

The courts agree that race or ethnic appearance alone has never been considered a sufficient basis to justify a stop or arrest.[68] For example, in *Illinois Migrant Council v. Pilliod*, the Seventh Circuit affirmed the district court's ruling that the stops and interrogations at issue violated the Fourth Amendment, because the individuals were singled out by INS agents solely due to their Mexican appearance or Spanish surnames.[69] In reaching this conclusion, the Seventh Circuit noted that the stops occurred in the absence of trustworthy tips, suspicious behavior, or any reasonable ground to believe that the persons were armed or dangerous.[70] The Seventh Circuit has not gone so far, however, as to address whether a stop predicated solely on race is "egregious" and warrants suppression in an immigration case.

§ 3.15 Rights at the Border

The authority of immigration officials to search persons and effects at a border is almost unlimited. An immigration official at the border can stop and question anyone seeking entry, without any "reasonable suspicion" or "probable cause" that a person trying to enter the U.S. is undocumented.[71] Officials can also search without a warrant any person seeking admission to the U.S., and anything in the person's possession.[72] For searches of persons, baggage, or mail "arriving" at the border or border equivalent, the government does not need to establish "reasonable suspicion" or a "good faith" belief that there is any illegal activity involved. These types of searches may include a person's components within a vehicle, such as the fuel tank.[73]

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[65] *Hawkins v. Mitchell*, 756 F.3d 983, 992 (7th Cir. 2014); *United States v. Jenkins*, 329 F.3d 579, 581 (7th Cir. 2003).
[66] 18 USC § 2236.
[67] See *Chapman v. United States*, 365 U.S. 610 (1961); *United States v. Chaidez*, 919 F.2d 1193, 1201 (7th Cir. 1990).
[68] See *United States v. Swindle*, 407 F.3d 562 (2nd Cir. 2005) (summarizing federal cases rejecting use of race or ethnic appearance alone to justify stops and arrests); *Illinois Migrant Council v. Pilliod*, 520 F.2d at 1070.
[69] 540 F.2d at 1070.
[70] *Id.*
[71] See *United States v. Yang*, 286 F.3d at 944 ("Routine searches without a warrant at this country's international borders are per se reasonable").
[72] INA § 287(c); 8 USC § 1357(c).
[73] *U.S. v. Flores-Montano*, 541 U.S. 149 (2004) (no privacy interest in fuel tank; disassembly of tank during border search did not require reasonable suspicion); *U.S. v. Hernandez*, 424 F.3d 1056 (9th Cir. 2005) (removal of door panels by Border Patrol that did not damage vehicle, undermine vehicle safety, or risk harm to motorist, was permissible); *U.S. v. Cortez-Rocha*, 394 F.3d 1115 (9th Cir. 2005) (permitting slashing of spare tire by Border Patrol without suspicion), cert denied, 126 S.Ct. 105; *U.S. v. Taghizadeh*, 41 F.3d 1263 (9th Cir. 1994) (customs officials need no suspicion to search incoming international packages).

"Routine" detentions and searches do not require reasonable suspicion because the government's interest in preventing the smuggling of illegal contraband and flight outweigh the minimal intrusion on the passenger.[74] For further discussion of what searches are routine or non-routine, see **§ 3.16** below.

§ 3.16 Rights at Border Equivalents

A. Airports

The special category of airport detentive stops and searches applies only to international terminals because domestic terminals are arguably not "functional equivalents of the border." The rationale is that an immigrant's rights near the border are greatly restricted, and the international terminal is the first place at which the stop, search and/or seizure of an air passenger crossing the border is feasible. Where a passenger flies between two domestic airports, the search should be analyzed under standard "interior," rather than "border," rules.[75] By treating the international terminal of airports as a "border," the same guidelines for searches at borders apply.

If a person has travelled past customs, but is still in the airport, a search may still be routine under certain circumstances.[76] A search that is *not* a routine border search may nevertheless be justified under the "extended border doctrine," which provides that "non-routine border searches that occur near the border are deemed constitutionally permissible if reasonable under the Fourth Amendment."[77] To determine whether an extended border search is reasonable, courts consider whether: "(1) there is a reasonable certainty that a border crossing has occurred; (2) there is reasonable certainty that no change in condition of the luggage has occurred since the border crossing; and (3) there is a reasonable suspicion that criminal activity has occurred."[78] This doctrine has been adopted by several circuits and recognized by others as a valid doctrine.[79]

In *Yang*, the defendant was routinely searched at customs but the x-ray of his luggage did not reveal any contraband. It was not until he had travelled to a different terminal that other circumstances caused customs agents to suspect he might be smuggling drugs into the country.[80] Given that the search did not occur until after the defendant left customs, the routineness of the search was in dispute, and the court therefore had to determine whether the extended border doctrine applied. There was no dispute that the defendant passed through customs, thereby crossing the border. Although the defendant was found in a different terminal, after a 30- to 45-minute period of being unwatched, the court still found that there was also a reasonable certainty that there was no change in condition of his luggage, because, among other things, he had to check his bags at the second terminal leaving the luggage out of his control for a

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[74] *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985); see also *U.S. v. Ramsey*, 431 U.S. 606 (1977).
[75] See *United States v. Place*, 462 U.S. 696 (1983) (under non-border analysis, 90-minute detention of luggage at airport was beyond police's authority to briefly detain luggage reasonably suspected of containing narcotics).
[76] *United States v. Ramos*, 645 F.2d 318, 319–321 (5th Cir. 1981) (finding that a search of an airline passenger who had traveled past customs less than a half hour prior but was still in the airport was a routine search because the passenger had not yet been assimilated into the "mainstream of domestic activities as to shield him from appropriate border examinations and searches"); *United States v. Ogbuehi*, 18 F.3d 807, 813 (9th Cir. 1994) (holding that a search conducted minutes after a defendant had crossed the border and was less than sixty feet from the border was a routine border search); *United States v. Wardlaw*, 576 F.2d 932, 935 (1st Cir. 1978) (finding that when a suspect has merely passed through a luggage inspection but not yet left the site of the border a secondary inspection is still a routine border search).
[77] *Yang*, 286 F.3d at 945.
[78] *Id.*
[79] See *id.* (surveying circuits that have adopted or recognized the "extended border search doctrine").
[80] See *id.* at 942, 945 (explaining that the defendant successfully passed through customs undetected until his cousin was caught and questioned by customs officials).

significant portion of the time that elapsed since he had crossed the border.[81] The final factor—reasonable suspicion of criminal activity—is analogous to a *Terry* stop, meaning the court had to consider the objective factors, such as the defendant's evasion of authorities at the terminal, the discovery of a significant amount of drugs on his travelling companion, and his travel itinerary from Laos, a drug source nation, to St. Paul, Minnesota, a known opium destination. The court concluded that such factors demonstrated reasonable suspicion that criminal activity was occurring, and therefore the search was reasonable under the extended border search doctrine.[82]

[81] See *id.* at 947–948.
[82] See *id.* at 948–949.

MOTION TO SUPPRESS MANUAL UPDATES: EIGHT CIRCUIT

§ 2.1 Overview of the Chapter

THE APPLICATION OF EXCLUSIONARY RULE/FOURTH AMENDMENT VIOLATIONS IN THE EIGHT CIRCUIT

I. The Exclusionary Rule is Generally Unavailable in Removal Proceedings

The Fourth Amendment, which protects individuals against unreasonable searches and seizures, applies to undocumented individuals and citizens alike. See *U.S. v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010). The Supreme Court developed the exclusionary rule to curtail violations of the Fourth Amendment. See *Weeks v. U.S.*, 232 U.S. 383 (1914). However, a Fourth Amendment violation does not necessarily mean that the exclusionary rule applies. See *Herring v. U.S.*, 555 U.S. 135, 139 (2009).

a. In order for the exclusionary rule to apply, the violation of the Fourth Amendment must be "sufficiently egregious to 'transgress notions of fundamental fairness'"

The exclusionary rule is generally not available in removal proceedings as "the likely costs of excluding probative evidence outweigh the likely social benefits." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-42 (1984). In order to utilize the exclusionary rule to the Fourth Amendment, an alien must first demonstrate a *prima facie* case indicating evidence can be excluded. *Lopez-Fernandez v. Holder*, 735 F.3d 1043, 1047 (8th Cir. 2013), citing to *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). To use the exclusionary rule in the civil context of removal proceedings, the alien must demonstrate that the violation of the Fourth Amendment was egregious. *Martinez Carcamo v. Holder*, 713 F.3d, 916, 922 (8th Cir. 2013), see also *Puc-Ruiz*, 629 F.3d 771, 778 (8th Cir. 2010).

In the Eight Circuit, the court has held that the "probative value of the evidence was undisputed" and the Fourth Amendment violations that were raised were not "sufficiently egregious to 'transgress notions of fundamental fairness.'" *Puc-Ruiz*, 629 F.3d at 778. In *Puc-Ruiz*, the court determined that in order for a violation to be egregious, the seizure needed to be sufficiently severe. *Id.* at 771. It held that there had not been an unreasonable use of force, that police officers had been provided information pertaining to a violation of a municipal ordinance, thus rendering their use of force reasonable, and that the only misconduct by the police was lack of probable cause at the time of the arrest, which did not rise to the level of an egregious Fourth Amendment violation. *Id.* at 779.

i. The totality of the circumstances must be reviewed to determine if a violation is an egregious Fourth Amendment violation

This circuit has determined it will utilize the same approach as the Third and Second Circuits in reviewing the totality of the circumstances to determine if a Fourth Amendment violation is an egregious violation. *Garcia-Torres v. Holder*, 660 F. 3d 333, 337 (8th Cir. 2011); see also *Martinez Carcamo*, 713 F.3d at 923 quoting *Puc-Ruiz*, 629 F.3d at 779; see also, *Lopez-Fernandez*, 735 F.3d at 1047. As in the Third Circuit, this Circuit does not consider a "one size fits all approach." *Oliva-Ramos*, 694 F.3d 259, 279 (3rd Cir. 2012). As such, this circuit has rejected the Ninth Circuit standard that a "bad faith" violation is an egregious violation. See *Garcia-Torres*, 660 F.3d at 337 (declining "to adopt the Ninth Circuit's standard … that an 'egregious violation' is nothing more than a 'bad faith' violation).[1]

[1] In *Garcia-Torres*, the court declined to consider cases raised by the alien such as *U.S. v. Flores-Sandoval*, 422 F.3d 711 (8th Cir. 2005) and *U.S. v. Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001), stating that such cases were not

In applying the totality of the circumstances approach, this Circuit has determined the following: a warrantless entry of business premises and arrest is a "mere garden variety error." Even if there was a search and seizure violation of the Fourth Amendment, such a violation was not an egregious violation and therefore, the exclusionary rule did not apply. See *Garcia-Torres*, 660 F.3d at 336-37; see also *Lopez-Fernandez*, 735 F.3d at 1047. Furthermore the Eight Circuit has indicated a search is not egregious because it "invades the privacy of a home." *Martinez Carcamo*, 713 F.3d at 923; see also *Lopez-Fernandez*, 735 F.3d at 1047. The Eight Circuit has found that a search based upon reasonable suspicion will not result in an egregious violation.

Lopez-Fernandez, 735 F.3d at 1047. In *Lopez-Fernandez*, it determined that a reasonable suspicion for the search existed. *Lopez-Fernandez*, 735 F.3d at 1047 (Forms I–213 submitted in the aliens' deportation proceedings state that a named informant contacted the State Highway Patrol regarding information of possible illegal aliens living at the aliens' address. The aliens did not contest the fact that there was a tip, and the record did not suggest that the tip was unreliable or that it would not support articulable suspicion). The Circuit has also stated "'Reasonable suspicion may be based on an informant's tip as long as it is sufficiently reliable.' "*U.S. v. Quarles*, 955 F.2d 498, 501 (8th Cir. 1992) (quoting *U.S. v. Thompson*, 906 F.2d 1292, 1295 (8th Cir. 1990).

When citing to *Martinez Carcamo*, this circuit determined it had not yet determined if an egregious Fourth Amendment violation would result in exclusion. See *Martinez Carcamo*, 713 F.3d at 922. The court reaffirmed that it reviews the totality of circumstances in order to determine if there has been an egregious Fourth Amendment violation and it stated it has not created a list of conduct that would be considered egregious. *Id.* at 923. Furthermore, it reiterated it has determined egregious violations of the Fourth Amendment to include: "an unreasonable show or use of force in arresting and detaining, a decision to arrest and detain based on race or appearance, or the invasion of private property and detention of individuals with no articulable suspicion whatsoever." *Chavez-Castillo v. Holder*, citing to *Lopez-Fernandez*, 735 F.3d at 1047, citing to *Puc-Ruiz*, 629 F.3d at 779 (emphasis omitted).

b. If an alien can make a showing that the Fourth Amendment violation was egregious, then the alien can have a hearing to suppress the evidence

If an alien is able to make a *prima facie* demonstration that the Fourth Amendment violation was egregious, then the alien may be entitled to an evidentiary suppression hearing. See *Lopez-Gabriel*, 653 F.3d 683, 686 (8th Cir. 2011) (holding that a hearing was not necessary because there were no indications the violations were egregious).

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relevant as they were criminal actions that punished the violations of law prohibiting illegal reentry after deportation and were not only cases pertaining to civil deportation actions. In *U.S. v. Flores-Sandoval*, the court determined a custodial detention without justification was contrary to the Fourth Amendment and the results of the alien's detention were to be suppressed. 422 F.3d 712. This case required that the immigration official believe a person be an alien before questioning him. *Id.* at 714. In *U.S. v. Guevara-Martinez*, the court similarly held fingerprint evidence is subject to the exclusionary rule. 262 F.3d, 755-57. However, in *U.S. v. Quintana*, the Eight Circuit determined probable cause to believe the alien was deportable was not acquired after the alien's illegal arrest and detention, as had occurred in *U.S. v. Flores-Sandoval* and *U.S. v. Guevara-Martinez*. The court determined the motion to suppress should be denied in this case because Customs and Border Patrol had "reason to believe" (probable cause) to make a warrantless administrative arrest for deportation proceedings. *U.S. v. Quintana*, 623 F.3d 1237, 1241-42 (8th Cir. 2010).

§ 2.2 Questions and Types of "Stops" of Immigrants

1. Casual/Consensual Questioning:

In *U.S. v. Flores-Sandoval*, the court determined a custodial detention without justification was contrary to the Fourth Amendment and the results of the individual's detention were to be suppressed.[2] This case required that the immigration official believe a person be an undocumented immigrant before questioning him.[3] The Eight Circuit has determined on various occasions that a "knock-and-talk procedure" is a consensual questioning.[4]

2. Seizure:

The government must show that officials believe the individual is an undocumented immigrant *before* questioning him.[5] Even without being suspicions of a particular individual, law enforcement officers can ask questions and can ask for identification. This is not a seizure if a reasonable person would believe that he or she could terminate the encounter.[6] However, a "consensual encounter becomes a seizure implicating the Fourth Amendment, when considering the totality of the circumstances, the questioning is 'so intimidating, threatening, or coercive that a reasonable person would not have believe himself to free to leave.'"[7]

3. Arrest:

Immigration officers may perform a warrantless immigration arrest if they have "reason to believe" that the person is present in the United States in violation of any law or regulation "regulating the admission, exclusion, expulsion, or removal of aliens" from the United States, and is "likely to escape before a warrant can be obtained for his arrest."[8] "Reason to believe" means probable cause.[9] An immigration officer may also arrest someone for a non-immigration-related felony if he is performing immigration-related duties at the time, or has reason to believe the person has or is committing a felony and there is a likelihood the person will escape before a warrant can be obtained.[10] A warrantless arrest does not need to only occur at the time an individual enters the country.[11]

§ 2.3 Identifying a Seizure in the Immigration Context

The government must show that officials believe an individual is an undocumented immigrant *before* questioning him.[12]

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[2] *U.S. v. Flores-Sandoval*, 422 F.3d 711, 712 (8th Cir. 2005).
[3] *Id.* at 714.
[4] *U.S. v. Villa-Gonzalez*, 623 F.3d 526, 532 (8th Cir. 2010).
[5] *Flores-Sandoval*, 422 F.3d at 714.
[6] *U.S. v. Angulo-Guerrero*, 328 F.3d 449, 451 (8th Cir. 2003).
[7] *United States v. Flores-Sandoval*, 474 F.3d 1142, 1145 (8th Cir. 2007), quoting *U.S. v. Hathcock*, 103 F.3d 715, 718 (8th Cir. 1997).
[8] 8 USC § 1357(a)(2); *United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010).
[9] *Quintana*, 623 F.3d at 1239 ("Because the Fourth Amendment applies to arrests of illegal aliens, the term "reason to believe" in § 1357(a)(2) means constitutionally required probable cause") (citing cases).
[10] 8 USC § 1357(a)(5)(B); 8 CFR 287.5(c)(4); *U.S. v. Gomez-De La Cruz*, 2011 WL 883692, 2011 LEXIS 25608 (D. Neb. 2011); *Taylor v. Fine*, 115 F.Supp. 68 (S.D. Cal. 1953).
[11] See *Quintana*, 623 F.3d at 1241.
[12] *Flores-Sandoval*, 422 F.3d at 714.

Temporary Detention: A "Seizure" but Not an "Arrest"

In *U.S. v. Villa-Gonzalez*, the Eight Circuit determined that the individuals in the case had been seized by local law enforcement officers. While the officers had not touched the individuals nor had they used language to indicate they needed to comply with the officers, the officers had restricted the movements of the individuals while visibly armed. One of the officer had told one of the individuals he believed the individuals were criminal actors. Additionally, one of the officers took one of the individual's identification cards and did not return it to him. Based on these interactions, the court determined that the individuals would not have found that they could end the police encounter and that as such, this encounter was a seizure. However, despite the seizure, the court determined that the evidence which was obtained would still be admissible if the discovery of the evidence was inevitable, attenuated from the constitutional violation, or if the discovery was supported by an independent source unrelated to the seizure.[13]

Reasonable Suspicion: More than a Hunch but Less than Probable Cause

The government must show that officials believe the individual is an undocumented immigrant *before* questioning him.[14]

Race and appearance

In *U.S. v. Cobo-Cobo*, the individual argued that "the race of an individual cannot be considered in determining whether an officer has or had reasonable suspicion in connection with a *Terry* stop, including for immigration investigation."[15] However, the Eight Circuit has recognized that factors such as language spoken by the individual or the apparent nationality of the individual "may be relevant factors in some instances" to support reasonable suspicion.[16]

In *Chavez Castillo v. Holder*, the court determined that the officer had probable cause to stop the individual for speeding and that the individual had not been stopped because of his race.[17] The court made a similar determination in *Lopez-Gabriel v. Holder* and found that the individual failed to present facts to demonstrate he had been stopped and arrested because of his race. Furthermore, the government presented evidence to indicate the individual had been stopped for driving with a heavily cracked windshield and arrested because he did not have identification.[18]

§ 2.4 Was the Seizure an Arrest

The Eight Circuit has interpreted "reason to believe" as requiring that the arresting officer have probable cause to arrest the immigrant.[19]

§ 2.5 The Warrant Requirement in Immigration Arrests

In *U.S. v. Quintana*, the Eight Circuit determined the individual's warrantless administrative arrest for deportation proceedings to be valid.[20] The individual was questioned as part of a valid traffic stop and

[13] *Villa-Gonzalez*, 623 F.3d at 534.
[14] *Flores-Sandoval*, 422 F.3d at 714.
[15] *U.S. v. Cobo-Cobo*, 2016 WL4473443, at *7 (N.D. Iowa Aug. 24, 2016).
[16] *Cobo-Cobo*, 2016 WL4473443, at *7 (citing to *U.S. v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994)).
[17] *Chavez-Castillo v. Holder*, 771 F.3d 1081, 1084 (8th Cir. 2014).
[18] *Lopez-Gabriel v. Holder*, 653 F.3d 683, 687-688 (8th Cir. 2011).
[19] See *Quintana*, 623 F.3d at 1239.
[20] *Id.* at 1241–42.

when the individual's background checks did not produce information that confirmed the name, entry, and immigration status provided to the local law enforcement official by the individual, the official had "reason to believe" (probable cause) that the individual was in the country without authorization. The officer furthermore had reason to believe the individual would escape before an arrest warrant could be receive and "therefore had probable cause to make a warrantless "administrative" arrest for deportation proceedings."[21] The court stated that a warrantless arrest does not only apply at the time an individual enters the country.[22]

§ 2.6 Searches and Search Warrants

The Eight Circuit has determined that a warrantless entry into an individuals' trailer was not an egregious violation of the Fourth Amendment.[23] The Circuit has also determined a warrantless entry of an individual's home without consent not to be an egregious violation of the Fourth Amendment, as officers knocked and gained entry and the entry took place in the morning when the individuals were awake.[24]

§ 2.7 Was the Fourth Amendment Violation Egregious

To use the exclusionary rule in the civil context of removal proceedings, an individual must demonstrate that the violation of the Fourth Amendment was egregious.[25] The Eight Circuit has not developed "an exhaustive list of conduct that could constitute an egregious constitutional violation."[26] This Circuit has determined it will utilize the same approach as the Third and Second Circuits and will review the totality of the circumstances to determine if a Fourth Amendment violation is an egregious violation.[27] As in the Third Circuit, this Circuit does not consider a "one size fits all approach."[28] As such, this circuit has rejected the Ninth Circuit's standard that a "bad faith" violation is an egregious violation.[29] It has determined in its jurisprudence that the "probative value of the evidence was undisputed" and the Fourth Amendment violations that were raised were not "sufficiently egregious to 'transgress notions of fundamental fairness.'"[30] It has stated that where an individual is subjected to a seizure for no reason at all, that by itself may constitute an egregious violation of the Fourth Amendment, but only if the seizure is sufficiently severe.[31]

For example, in *U.S. v. Quintana*, the Eight Circuit determined probable cause to believe the individual was deportable was not acquired until after the individual's illegal arrest and detention. However, the court determined the motion to suppress should be denied in this case because Customs and Border Patrol had "reason to believe" (probable cause) to make a warrantless administrative arrest for deportation proceedings.[32] The Eight Circuit has also found that a search based upon reasonable suspicion will not result in an egregious violation.[33] In *Lopez-Fernandez*, the court determined that a reasonable suspicion

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[21] *Id*.
[22] *Id.* at 1241.
[23] *Martinez Carcamo v. Holder*, 713 F.3d 916, 918, 922 (8th Cir. 2013).
[24] *Lopez-Fernandez v. Holder*, 735 F.3d 1043, 1047-1048 (8th Cir. 2013).
[25] *Martinez Carcamo*, 713 F.3d at 922; see also *Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010).
[26] *Puc-Ruiz*, 629 F.3d at 779.
[27] *Garcia-Torres v. Holder*, 660 F. 3d 333, 337 (8th Cir. 2011); see also *Martinez Carcamo*, 713 F.3d at 923 (quoting *Puc-Ruiz*, 629 F.3d at 779); see also *Lopez-Fernandez*, 735 F.3d at 1047.
[28] *Oliva-Ramos v. Attorney General of the U.S.*, 694 F.3d 259, 279 (3rd Cir. 2012).
[29] See *Garcia-Torres*, 660 F.3d at 337 (declining "to adopt the Ninth Circuit's standard … that an 'egregious violation' is nothing more than a 'bad faith' violation).
[30] *Puc-Ruiz*, 629 F.3d at 778.
[31] *Id.* at 771.
[32] *Quintana*, 623 F.3d at 1241–42.
[33] *Lopez-Fernandez*, 735 F.3d at 1047.

for the search existed because Forms I–213 submitted in the individuals' deportation proceedings stated that a named informant contacted the State Highway Patrol regarding information of possible undocumented individuals living at the individuals' address. The individuals did not contest the fact that there was a tip and the record did not suggest that the tip was unreliable or that it would not support articulable suspicion.[34] "'Reasonable suspicion may be based on an informant's tip as long as it is sufficiently reliable.'"[35] Furthermore, a warrantless entry of the individual' home without consent is not an egregious violation of the Fourth Amendment as the officers knocked and gained entry, and the entry took place in the morning when the individual were awake.[36] In *Puc-Ruiz*, the court determined that in order for a violation to be egregious, the seizure needed to be sufficiently severe.[37] It held that there had not been an unreasonable use of force, that police officers had been provided information pertaining to a violation of a municipal ordinance, thus rendering their use of force reasonable, and that the only misconduct by the police was lack of probable cause at the time of the arrest, which did not rise to the level of an egregious Fourth Amendment violation.[38]

Furthermore, in *Garcia-Torres*, the court declined to consider cases raised by the alien such as *U.S. v. Flores-Sandoval*, 422 F.3d 711 (8th Cir. 2005) and *U.S. v. Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001), stating that such cases were not relevant as they were criminal actions that punished the violations of law prohibiting illegal reentry after deportation and were not only cases pertaining to civil deportation actions.[39] The court found that a warrantless entry and arrest at a business when police officers entered a restaurant co-owned by an individual on a tip that a liquor ordinance was being violated was not egregious conduct that violated the Fourth Amendment.[40] As such, the information officers received as a result of the individual's arrest was admissible "to establish Petitioner's alienage and removability."[41]

In *Martinez Carcamo*, the court rejected the deliberateness argument regarding the officers' violations of the Fourth Amendment. The court determined this argument was essentially an argument such as the Ninth Circuit's bad faith argument, which this Circuit does not accept. In analyzing the officers' conduct, including not allowing one of the individual's to make a call and awaking another while he was sleeping, the court determined this conduct was not egregious despite the record alluding to Fourth Amendment violations.[42] Furthermore, it determined that a warrantless entry into the individuals' trailer was not an egregious violation of the Fourth Amendment.[43]

Finally, the Eight Circuit has also indicated that even an egregious violation by local officials may not lead to the exclusion of evidence in immigration proceedings.[44]

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[34] *Id.*
[35] *U.S. v. Quarles*, 955 F.2d 498, 501 (8th Cir. 1992) (quoting *U.S. v. Thompson*, 906 F.2d 1292, 1295 (8th Cir. 1990).
[36] *Lopez-Fernandez* at 1047–1048.
[37] *Puc-Ruiz*, 629 F.3d at 771.
[38] *Id.* at 779.
[39] *Garcia Torres*, 660 F.3d 333 at 336; see *U.S. v. Flores-Sandoval* 42 F.3d at 712 (the court determined a custodial detention without justification was contrary to the Fourth Amendment and the results of the individual's detention were to be suppressed); see also *U.S. v. Guevara-Martinez*, 262 F.3d 751, 755-57 (8th Cir. 2001) (the court similarly held fingerprint evidence is subject to the exclusionary rule. It determined that "[t]he absence of evidence that the fingerprinting resulted from routine booking, and the concomitant inference that an INS-related purpose motivated the fingerprinting" resulted in the application of the exclusionary rule).
[40] *Garcia-Torres*, 660 F.3d at 336–37.
[41] *Id.* at 337.
[42] *Martinez Carcamo*, 713 F.3d 916 at 923.
[43] *Id.* at 918, 922.
[44] *Lopez-Gabriel*, 653 F.3d at 686.

§ 2.9 Evidence Obtained in Violation of Due Process

The Fifth Amendment's right to due process requires removal proceedings be "fundamentally fair."[45] The Eight Circuit has determined despite an immigration judge and the Board of Immigration Appeals erring in their factual findings pertaining to the immigrants' testimonies, these factual errors would not have impacted the result of the immigration proceedings. Therefore the individuals' proceedings were fundamentally fair despite these errors.[46]

Statements in immigration proceedings will not be inadmissible simply because an individual has not received *Miranda* type warnings. To demonstrate that statements are involuntary, an individual "must show coercion, duress, or improper action."[47] For example, in *Puc-Ruiz*, the court determined the record did not show that the individual's statements were not given to the Immigration and Customs Enforcement (ICE) agents freely.[48] In *Lopez-Gabriel*, an individual was stopped by a police officer, taken to a police station, where ICE agents questioned him and then subsequently transferred him to an ICE office in a different state and questioned him further. He was not informed of his right to remain silent by the officer nor by the ICE agents. The individual felt that he was under arrest and had to answer the ICE agents' questions.[49] The court determined that the individual's statements to police and ICE agents were voluntary and thus not a due process violation, stating "Without more, prompt questioning of a handcuffed detainee by an armed and uniformed officer without Miranda warnings, and questioning by ICE agents after an arrest, are not sufficient to mandate a hearing or to justify suppression in an immigration proceeding."[50] In this case, the individual failed to demonstrate "'promises, prolonged interrogation, interference with his right to counsel, or other indicia of coercion or duress' " that would indicate that his statement were involuntary.[51] Furthermore, a represented individual does not need receive *Miranda* warnings before being questioned during his immigration proceedings.[52]

§ 2.12 Warrantless Arrests: Examination & Notifications under 8 CFR § 287.3

Prejudice is not presumed when there has not be compliance with 8 CFR § 287.3 (a) and (c), as these provisions are not constitutionally mandated. In *Puc-Ruiz*, the individual stated there was a violation of 8 CFR § 287.3 as the same ICE officer who interviewed him by telephone when he was arrested by the police interviewed when he was transferred to the detention facility. The individual argued that if a different agent had interviewed him, he would not have shared his national origin and citizenship. He argued that had he been informed his statements could be used against him, he would not have made his statements. He also argued that if he had been given a list of legal counsel, he would have understood the implications of his interview with the officer. In reviewing the individual's arguments, the court determined that the outcome of the individual's immigration proceedings would not have been different, even if the circumstances had been such as the individual argued they should have been. The court indicated that the individual had already shared his immigration status with the ICE agent during the

[45] *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004).
[46] *Martinez Carcamo*, 713 F.3d 916 at 924.
[47] *Puc-Ruiz*, 629 F.3d at 779.
[48] *Id*.
[49] *Lopez-Gabriel*, 653 F.3d at 684-685.
[50] *Lopez Gabriel*, 653 F.3d at 687 (relying upon *U.S. v. Drayton*, 536 U.S. 194, 205 (2002)).
[51] *Lopez-Gabriel*, 653 F.3d 687.
[52] *Valadez-Salas v. INS*, 721 F.2d 251, 252 (8th Cir. 1983) (The court concluded that it would not disregard the individual's testimony because the immigration judge had not informed him of his Fifth Amendment right to remain silent).

telephone interview, which took place when the individual was in police custody. Therefore the interview with ICE agent while detained in ICE's custody did not lead to any additional information.[53]

The warrantless arrest does not only apply at the time an individual enters the country.[54]

§ 3.6 Current Authority of Local Police to Make Immigration Stops

In *U.S. v. Ovando-Garzo*, the court determined that the local official's conduct during a traffic stop was proper and reasonably related to the traffic stop. The court determined that the officer did not unreasonably prolong the traffic stop and the officer's actions did not exceed the scope of his authority.[55]

§ 3.8 The Warrant Requirement in Immigration Arrests and Searches

In *U.S. v. Quintana*, the Eight Circuit determined the individual was questioned as part of a valid traffic stop and when the background checks on the individual did not produce information that confirmed the name, entry, and immigration status provided to the local law enforcement official, the official had "reason to believe" (probable cause) that the individual was in the country without authorization. The officer furthermore had reason to believe the individual would escape before an arrest warrant could be receive and "therefore had probable cause to make a warrantless "administrative" arrest for deportation proceedings."[56]

§ 3.9 Rights in the Home and Other Private Places

The Eight Circuit has indicated a search is not egregious only because it "invades the privacy of a home."[57]

§ 3.10 Rights in Public Places

A warrantless entry and arrest at a business when police officers entered the location on a tip that a liquor ordinance was being violated was not egregious conduct that violated the Fourth Amendment.[58] As such, the information officers received as a result of the individual's arrest was admissible "to establish Petitioner's alienage and removability."[59] In applying the totality of the circumstances approach, this Circuit has determined the following: a warrantless entry of business premises and arrest is a "mere garden variety error." Even if there was a search and seizure violation of the Fourth Amendment, such a violation was not an egregious violation and therefore, the exclusionary rule did not apply.[60]

§ 3.11 Arrests Based on Race or Ethnic Appearance

In *Chavez-Castillo*, the individual failed to demonstrate that he was arrested solely because of his race. The court determined that the record did not reflect this information and that evidence, such as the officer's statement, record of arrest, and Form I-213, indicated that the individual was arrested as a result of speeding.[61] The court made a similar determination in *Lopez-Gabriel* and determined that the

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[53] *Puc-Ruiz*, 629 F.3d at 780-781.
[54] See *Quintana*, 623 F.3d at 1241.
[55] *U.S. v. Ovando-Garzo*, 752 F.3d 1161, 1164 (8th Cir. 2014).
[56] *Quintana*, 623 F.3d at 1240-1241.
[57] *Martinez Carcamo*, 713 F.3d at 923; see also *Lopez-Fernandez*, 735 F.3d at 1047.
[58] *Garcia-Torres*, 660 F.3d at 336–337.
[59] *Id.* at 337.
[60] See *Garcia-Torres*, 660 F.3d at 336-37; see also *Lopez-Fernandez*, 735 F.3d at 1047.
[61] *Chavez-Castillo*, 771 F.3d at 1084.

individual failed to present facts to demonstrate he had been stopped and arrested because of his race. Furthermore, the government presented evidence to indicate the individual had been stopped for driving with a heavily cracked windshield and arrested because he did not have identification.[62] In *Martinez Carcamo*, the Eight Circuit determined that the individuals' subjective belief that they were arrested based on their race could not be supported by facts. The individuals' were thus unable to establish an egregious violation of their Fourth Amendment rights and their motion to suppress was not granted.[63]

The Eighth Circuit has recognized that factors such apparent nationality "may be relevant factors in some instances" to support reasonable suspicion.[64]

§ 3.14 Rights in Automobiles

Eight Circuit courts have held that reasonable suspicion is not needed to detain an individual in the context of a traffic stop[65] and individuals in a vehicle can be detained until "routine but somewhat time-consuming tasks related to the traffic violation" are completed.[66] When the officer has completed the traffic stop, including the tasks associated with the stop, "further detention … would be unreasonable unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify further detention."[67] To determine if a detention is reasonable, an objective review of the facts and examination of the totality of the circumstances is conducted.[68] For example, in *U.S. Ovando-Garzo*, the court determined the officer did not conduct an unreasonably prolong the traffic stop when the officer asked the occupants in the vehicle questions to achieve the function of moving the stopped vehicle and occupants from the road. The questions included where the occupants lived, were born, and either they were lawfully present in the United States. Collecting the identification of the individual, communication with Border Patrol, and detention of the individual until the Border Patrol agent took custody of the individual, did not exceed the scope of the officer's authority.[69]

In *U.S. v. Quintana*, the Eight Circuit determined that the individual was questioned during a valid traffic stop by local law enforcement and that Border Patrol was correctly contacted to verify the foreign driver's license produced by the individual. In this case, the individual was taken into custody as the agent established probable cause to make a warrantless administrative arrest for deportation proceedings. Probable cause to take the individual into custody was acquired during the traffic stop.[70] Furthermore, the court stated that the detention of the individual in a Border Patrol Station was not a violation as detention during immigration proceedings are part of the process of the proceedings and the Terry stop considerations raised in *Hiibel v. Sixth Judicial Distr. Court*, 542 U.S. 177, 185-86 (2004) do not "apply to detention following an administrative arrest based upon probable cause that an alien is deportable."[71]

§ 3.16 Rights at Border Equivalents

In *U.S. v. Udofot*, the court determined that the Minneapolis-St. Paul International Airport was the functional equivalent of a border. The border was being crossed by the individual's checked luggage that

[62] *Lopez-Gabriel*, 653 F.3d at 687-88.
[63] *Martinez Carcamo*, 713 F. 3d at 923.
[64] *U.S. v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994).
[65] *U.S. v. Bueno*, 443 F.3d 1017, 1025 (8th Cir. 2006).
[66] *U.S. v. Riley*, 684 F.3d 758, 764 (8th Cir. 2012).
[67] *U.S. v. Flores*, 474 F.3d 1100, 1103 (8th Cir. 2007)(internal quotation marks and citations omitted).
[68] *U.S. v. Suitt*, 569 F.3d 867, 871 (8th Cir. 2009).
[69] *U.S. v. Ovando-Garzo*, 752 F.3d at 1163–64.
[70] *Quintana*, 623 F.3d 1237 at 1241.
[71] *Id*. at 1242.

was being shipped abroad. As such, the court determined that a warrantless search was proper as this was the equivalent of a border.[72]

[72] *U.S. v. Udofot*, 711 F. 2d 831, 840 (8th Cir. 1983).

MOTION TO SUPPRESS MANUAL UPDATES: NINTH CIRCUIT

§ 2.3 Identifying a Seizure in the Immigration Context

The Ninth Circuit has recognized five factors that assist in determining whether a seizure has occurred, i.e., "whether a reasonable person would have felt 'at liberty to ignore the police presence and go about his business.'"[1] These factors are: "(1) the number of officers; (2) whether weapons were displayed; (3) whether the encounter occurred in a public or non-public setting; (4) whether the officer's … manner [implied] that compliance would be compelled; and (5) whether the officers advised the detainee of his right to terminate the encounter."[2]

In determining reasonable suspicion, Border Patrol agents may consider

> (1) characteristics of the area; (2) proximity to the border; (3) usual patterns of traffic and time of day; (4) previous alien or drug smuggling in the area; (5) behavior of the driver, including obvious attempts to evade officers; (6) appearance or behavior of passengers; (7) model and appearance of the vehicle; and, (8) officer experience.[3]

§ 2.4 Was the Seizure an Arrest

In general, when an officer engaged in a *Terry*-like stop, i.e., a brief detention made for "limited investigative purposes" based on reasonable suspicion, exceeds the permissible scope of a brief investigatory detention,[4] the stop becomes an arrest requiring probable cause.[5] There is "no bright line rule for determining when an investigatory stop crosses the line and becomes an arrest."[6] Courts use "a fact-specific inquiry guided by the general Fourth Amendment requirement of reasonableness" in light of the "totality of the circumstances" to determine whether a detention amounts to an arrest or an investigatory stop.[7] Courts consider the "intrusiveness of the methods used in light of whether these methods were reasonable given the specific circumstances."[8] "'[E]specially intrusive means'" are generally only allowed

> under special circumstances, such as '(1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; (2) where the police have information that the suspect is currently armed; (3) where the stop closely follows a violent

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[1] *United States v. Cooley*, No. CR 16-42-BLG-SPW, 2017 WL 499896, at *4 (D. Mont. Feb. 7, 2017) (quoting *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004)).
[2] *Id.*
[3] *United States v. Ortiz-Gualajara*, No. CR1601654TUCRMJR, 2017 WL 1906950, at *4 (D. Ariz. Apr. 14, 2017) (quoting *United States v. Berber–Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007)), report and recommendation adopted, No. CR1601654001TUCRMJR, 2017 WL 1862168 (D. Ariz. May 9, 2017); see also *United States v. Rivas*, No. CR1601460TUCJGZLCK, 2017 WL 1365108, at *4 (D. Ariz. Mar. 15, 2017), report and recommendation adopted, No. R1601460001TUCJGZLCK, 2017 WL 1347067 (D. Ariz. Apr. 12, 2017).
[4] "The scope of a permissible *Terry*-stop has been expanded to include 'asking the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.'" *Aquino v. Cty. of Monterey Sheriff's Dep't*, No. 5:14-CV-03387-EJD, 2016 WL 5946867, at *4 (N.D. Cal. Sept. 29, 2016) (quoting *United States v. Washington*, 387 F.3d 1060, 1067 (9th Cir. 2004)).
[5] *Aquino*, 2016 WL 5946867, at *5–6.
[6] *Id.* (quoting *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988)).
[7] *Id.*
[8] *Id.* (quoting *Green v. City & Cty. of San Francisco*, 751 F.3d 1039, 1047 (9th Cir. 2014)).

> crime; and (4) where the police have information that a crime [potentially involving] violence is about to occur.'"[9]

When only reasonable suspicion supports a detention, "drawing weapons and using handcuffs and other restraints will violate the Fourth Amendment.'"[10]

To determine "whether a person involved in a border-related detention is under arrest" Ninth Circuit courts consider "whether a reasonable innocent person believes that he or she is free to leave after questioning, or more specifically, under the totality of the circumstances, whether such a person would believe that he or she 'is being subjected to more than the temporary detention occasioned by border crossing formalities.'"[11]

§ 2.5 The Warrant Requirement in Immigration Arrests

The statutory "likelihood of escape" requirement for warrantless arrests "is 'seriously applied' in the Ninth Circuit."[12] The fact that "the alien's deportability is clear and undisputed" alone is not sufficient.[13] Factors such as long-term employment, roots in the community, family with legal immigration status, and pending immigration proceedings with attorney representation all weigh against a likelihood of escape.[14]

§ 2.6 Searches and Search Warrants

While consent to entry into a residence may be inferred "in certain limited circumstances," an individual's failure to object to the entry does not amount to consent.[15] The Ninth Circuit has inferred consent to enter a home "only under very limited circumstances," such as "where the officers have verbally requested permission to enter and the occupant's action suggests assent"[16] and "where prior collaborative interactions between the suspect and the officers make the inference of consent unequivocal."[17] To determine if consent was voluntarily given, courts consider whether officers or immigration agents "used force, drew their guns, or made any threats or promises to gain entry" as well as whether the person giving consent understood the language in which the request for entry was made.

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[9] *Id.* (quoting *Green*, 751 F.3d at 1047).
[10] *Id.* (quoting *Washington v. Lambert*, 98 F.3d 1181, 1187 (9th Cir. 1996)).
[11] *Czarnecki v. United States*, No. C15-0421JLR, 2016 WL 5395549, at *7 (W.D. Wash. Sept. 27, 2016) (quoting *United States v. Guzman-Padilla*, 573 F.3d 865, 883 (9th Cir. 2009).
[12] *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432, 449 (N.D. Cal. 1989) (quoting *United States v. Cantu*, 519 F.2d 494, 497 (9th Cir. 1975)).
[13] *Id.*
[14] *Id.*
[15] *United States v. Larosa*, No. 316CR00075TMBKFM, 2017 WL 660772, at *5 (D. Alaska Feb. 8, 2017), report and recommendation adopted, No. 3:16-CR-00075-TMB, 2017 WL 600079 (D. Alaska Feb. 14, 2017); see also *United States v. Albrektsen*, 151 F.3d 951, 955 (9th Cir. 1998) (suspect's moving aside to avoid physical contact with entering officers is insufficient to establish implied consent).
[16] *Id.*; see also, e.g., *United States v. Garcia*, 997 F.2d 1273, 1281 (9th Cir. 1993) (holding that the officers' request to talk, combined with the suspect's affirmative response and step back clearing way for officers' entry, implied consent to enter).
[17] *Id.*; see also, e.g., *United States v. Rosi*, 27 F.3d 409, 412 (9th Cir. 1994) (holding that a request by suspect who had been lawfully arrested outside the home to retrieve clothing from his home implied consent to officers' entry where the suspect gave a house key to the officers); *United States v. Gilbert*, 774 F.2d 962, 964 (9th Cir. 1985) (*per curiam*) (request that officers retrieve clothing from home amounts to consent).

§ 2.9 Evidence Obtained in Violation of Due Process

"[B]ecause immigration proceedings are civil in nature, questioning for purposes of those proceedings need not be preceded by *Miranda* warnings."[18]

§ 3.6 Current Authority of Local Police to Make Immigration Stops

While "[s]tate police officers are not authorized to enforce federal immigration law unless there is a written agreement between their office and the federal government authorizing them to do so," such an agreement is not required "'for a state official to cooperate with [federal authorities] in identifying, apprehending, and detaining any individual unlawfully present in the United States.'"[19]

§ 3.8 The Warrant Requirement in Immigration Arrests and Searches

"The statutory requirement that there be likelihood of escape before a warrantless arrest is made is 'seriously applied' in the Ninth Circuit."[20] The fact that "the alien's deportability is clear and undisputed" alone is not sufficient.[21] Factors such as long-term employment, roots in the community, family with legal immigration status, and pending immigration proceedings with attorney representation all weigh against a likelihood of escape.[22]

§ 3.9 Rights in the Home and Other Private Places

While consent to entry into a residence may be inferred "in certain limited circumstances," an individual's failure to object to the entry does not show consent.[23] The Ninth Circuit has inferred consent to enter a home "only under very limited circumstances," such as "where the officers have verbally requested permission to enter and the occupant's action suggests assent"[24] and "where prior collaborative interactions between the suspect and the officers make the inference of consent unequivocal."[25] To determine if consent was voluntarily given, courts consider whether officers or immigration agents "used force, drew their guns, or made any threats or promises to gain entry" as well as whether the person giving consent understood the language in which the request for entry was made.[26]

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[18] *Parra v. Lynch*, No. 13-71493, 2016 WL 6892523, at *1 (9th Cir. Nov. 23, 2016).
[19] *A.J. v. City of Bellingham*, No. C16-0620-JCC, 2016 WL 7118381, at *5 (W.D. Wash. Dec. 7, 2016) (quoting *United States v. Ovando-Garzo*, 752 F.3d 1161, 1164 (8th Cir. 2014)).
[20] *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432, 449 (N.D. Cal. 1989) (quoting *United States v. Cantu*, 519 F.2d 494, 497 (9th Cir. 1975)).
[21] *Id.*
[22] *Id.*
[23] *United States v. Larosa*, No. 316CR00075TMBKFM, 2017 WL 660772, at *5 (D. Alaska Feb. 8, 2017), report and recommendation adopted, No. 3:16-CR-00075-TMB, 2017 WL 600079 (D. Alaska Feb. 14, 2017); see also *United States v. Albrektsen*, 151 F.3d 951, 955 (9th Cir. 1998) (suspect's moving aside to avoid physical contact with entering officers is insufficient to establish implied consent).
[24] *Id.*; see also, e.g., *United States v. Garcia*, 997 F.2d 1273, 1281 (9th Cir. 1993) (holding that the officers' request to talk, combined with the suspect's affirmative response and step back clearing way for officers' entry, implied consent to enter).
[25] *Id.*; see also, e.g., *United States v. Rosi*, 27 F.3d 409, 412 (9th Cir. 1994) (holding that a request by suspect who had been lawfully arrested outside the home to retrieve clothing from his home implied consent to officers' entry where the suspect gave a house key to the officers); *United States v. Gilbert*, 774 F.2d 962, 964 (9th Cir. 1985) (*per curiam*) (request that officers retrieve clothing from home amounts to consent).
[26] *United States v. Ortiz-Calderon*, No. CR15-5133 BHS, 2015 WL 9217145, at *3 (W.D. Wash. Dec. 17, 2015) (finding where officers told defendant's wife that her husband was in the country illegally and that they needed to

"The presence of exigent circumstances … provides a narrow exception to the warrant requirement" for entry into a home.[27] "In claiming an exigency exception, police bear the 'heavy burden' to demonstrate an urgent need to justify warrantless searches based on specific and articulable facts."[28] District courts in the Ninth Circuit have found that exigent circumstances, such as a 911 report of a drunk, suicidal woman with a gun[29] or officers finding a stabbing victim with a trail of blood leading into a home[30] can justify warrantless entry into a home. However, a district court within the Ninth Circuit found that a drunken suspect's failure to cooperate with law enforcement investigating neighbors' reports that the suspect had crashed his car into their fence and threatened them did not amount to exigent circumstances excusing the warrant requirement.[31]

§ 3.15 Rights at the Border

"The Ninth Circuit has upheld border searches as reasonable except where the search involved the destruction of property, was conducted in a particularly offensive manner, or was highly intrusive."[32]

The authority to conduct searches of persons, places, or things arriving at a United States border or border equivalent without reasonable suspicion extends to cruise ship cabins.[33] A search of a cruise ship cabin does not violate the Fourth Amendment "unless the search was 'unreasonable' because of the particularly offensive manner in which it is carried out.'"[34]

"There is no precise time limit on when a border search must be completed."[35] "The Ninth Circuit has 'considered the question of whether a prolonged detention pursuant to a suspicionless border search might be unreasonable, without finding that it was.'"[36] A search of a cell phone conducted two hours after a defendant entered a port was reasonable.[37]

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speak with him, the wife apparently had no trouble understanding the officers, and the officers did not use force, draw their guns, or make any threats or promises to gain entry, the wife's consent was voluntarily given).

[27] *Andison v. Clark Cty.*, No. C14-5492 RBL, 2016 WL 150182, at *4 (W.D. Wash. Jan. 13, 2016).

[28] *Id.* (quoting *LaLonde v. County of Riverside*, 204 F.3d 947, 957 (9th Cir. 2000)).

[29] *Id.*

[30] See *United States v. McKee*, 157 F. Supp. 3d 879 (D. Nev. 2016).

[31] *McDowell v. Jefferson Cty.*, No. 4:15-CV-507-BLW, 2017 WL 241319, at *4 (D. Idaho Jan. 18, 2017) (holding that government had not shown that the amount of time it would have taken to secure a warrant "posed an 'immediate and serious' danger to the officers or other persons, [or] why the only option was an immediate arrest").

[32] *United States v. Mendez*, No. CR1600181001TUCJGZJR, 2017 WL 928460, at *4 (D. Ariz. Mar. 9, 2017); see also *United States v. Seljan*, 547 F.3d 993, 1002-03 (9th Cir. 2008) (*en banc*) ("Even when we have recognized the possibility that there might be a limit of the permissible scope or manner of a given [border] search … we have usually concluded that the limit had not been exceeded, consistent with the Supreme Court's conclusion that the government's authority to search at the border is broad and 'at its zenith'").

[33] *Bronstein v. U.S. Customs*, No. 15-CV-02399-JST, 2016 WL 4426900, at *1, 6 (N.D. Cal. Aug. 22, 2016) ("'there is no categorical exception to the border search doctrine that requires a higher showing of suspicion to search ship cabins") (quoting *United States v. Rachid*, No. C 12-00307 WHA, 2012 WL 4369314, at *3 (N.D. Cal. Sept. 24, 2012)).

[34] *Id.* (quoting *United States v. Flores-Montano*, 541 U.S. 149, 154 n.2 (2004)).

[35] *Mendez*, 2017 WL 928460, at *4; see also *United States v. Arnold*, 533 F.3d 1003, 1005 (9th Cir. 2008) (affirming suspicionless search of laptop and detention that lasted "several hours").

[36] *Id.* (quoting *Seljan*, 547 F.3d at 1002-03); see also *United States v. Gonzalez-Rincon*, 36 F.3d 859, 861, 863-64 (9th Cir. 1994) (upholding border search where the defendant was detained for several hours to monitor her bowel movements)).

[37] *Id.*

§ 4.3 The Changing Contours of Immigration Detainers

"Several courts have held that it is a violation of the Fourth Amendment for local jurisdictions to hold suspected or actual removable aliens subject to civil detainer requests because civil detainer requests are often not supported by an individualized determination of probable cause that a crime has been committed."[38]

The Northern District of California recently held that ICE agents may not issue a detainer based solely on the prisoner's race or foreign birth.[39]

[38] *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at *4 (N.D. Cal. Apr. 25, 2017); see also *Morales v. Chadbourne*, 793 F.3d 208, 215–17 (1st Cir. 2015); *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9–11 (D. Or. Apr. 11, 2014).

[39] *Mendia v. Garcia*, No. 10-CV-03910-MEJ, 2016 WL 2654327, at *11 (N.D. Cal. May 10, 2016) ("[U]sing Plaintiff's race or national origin as the only reasons to deprive Plaintiff of his liberty 'does not pass constitutional muster' under the Equal Protection Clause") (quoting *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 35 (D.R.I. 2014)).

MOTION TO SUPPRESS MANUAL UPDATES: TENTH CIRCUIT

§ 2.2 Questions and Types of "Stops" of Immigrants

An encounter with law enforcement officers is a seizure and non-consensual only where the person seized "'has an *objective reason* to believe he or she is not free to end the conversation with the officer and proceed on his or her way.'"[1] The individual's "subjective belief that she was not free to leave is not determinative. 'The correct test is whether a reasonable person in [the individual's] position would believe [she] was not free to leave.'"[2] Relevant factors in determining whether a reasonable person would feel free to leave include whether the officers surrounded the individual or otherwise restrained her from walking or driving away,[3] whether the officers were wearing uniforms or brandishing weapons,[4] whether officers promptly returned any property they have searched or examined,[5] the officer's persistence and tone of language,[6] and whether the officers inform the individual that she is free to leave.[7] Probing or potentially incriminating questions do not necessarily render an encounter coercive.[8] "Although 'accusatory, persistent, and intrusive questioning may turn an otherwise voluntary encounter into a coercive one,' this is true only if the officers 'convey the message that compliance is required.'"[9]

A traffic stop may turn into a consensual encounter once an officer has returned the driver's documentation "so long as 'a reasonable person under the circumstances would believe he was free to

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[1] *United States v. Torres-Guevara*, 147 F.3d 1261, 1265 (10th Cir. 1998) (quoting *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996)).
[2] *Id.* (quoting *Hernandez*, 93 F.3d at 1499).
[3] *Id.*; see also *United States v. Waksal*, 709 F.2d 653, 659 (11th Cir. 1983) (whether the police physically blocked the defendant's path is significant factor in determining whether seizure occurred); *United States v. Mburu*, No. 12-10212-01-JTM, 2013 WL 120171, at *3–4 (D. Kan. Jan. 9, 2013) (officer's car blocking defendant from pulling out of parking space supported finding that the encounter was non-consensual).
[4] Note, however that "[t]he mere presence of uniformed [immigration] agents [at an immigration checkpoint station] with sidearms and side handle batons [does] not render [] consent involuntary." *United States v. Briseno-Mendez*, No. 96-2218, 1998 WL 440279, at *10 (10th Cir. July 17, 1998).
[5] *Torres-Guevara*, 147 F.3d at 1265; see also *Hernandez*, 93 F.3d at 1499 (finding that "none of the usual factors indicating a person has been seized exist" where encounter occurred on a public sidewalk by a passenger loading zone, the officers were not uniformed and did not display their weapons, and the officers promptly returned the defendant's ticket and identification after examining them); compare *Waksal*, 709 F.2d at 660 (failure of police to return airline ticket and license to defendant was critical to determination that a seizure occurred).
[6] The Tenth Circuit has held that an officer's second request for identification following a refusal of the officer's first request using the word "need" did not render the undocumented immigrant's compliance involuntary. *United States v. Esparza-Mendoza*, 386 F.3d 953, 960 (10th Cir. 2004) ("The distinction on which [the defendant prosecuted for illegal re-entry] hopes to rely is that instead of asking for his identification, [the police officer] demanded it. Though the fact that the request was made in a declaratory rather than interrogatory sentence may be relevant to our overall consideration, it does not so alter the totality of the circumstances to the point that a reasonable person would have felt compelled to respond").
[7] *Torres-Guevara*, 147 F.3d at 1265. C.f. *United States v. Griffin*, 7 F.3d 1512, 1519 (10th Cir. 1993) (finding that a seizure occurred where the defendant was taken "to a small private office within a police-controlled area of the airport" and "was not told that she could refuse to answer the officer's questions or terminate the interview at any time and leave"). Note, however, an officer's failure to inform a defendant explicitly that he is free to go before requesting permission to search does not necessarily render the search involuntary. *United States v. Guerrero*, 472 F.3d 784, 789–90 (10th Cir. 2007).
[8] *Torres-Guevara*, 147 F.3d at 1265; see also *United States v. Glass*, 128 F.3d 1398, 1406–07 (10th Cir. 1997) (refusing to adopt a *per se* rule that "asking directly incriminating and focused questions" transforms a consensual encounter into a detention).
[9] *Torres-Guevara*, 147 F.3d at 1265 (quoting *Hernandez*, 93 F.3d at 1499).

leave or disregard the officer's request for information.'"[10] "Once such a consensual encounter begins, an officer is not required to inform a suspect that he does not have to answer the officer's questions or that he is free to leave at any time."[11]

§ 2.3 Identifying a Seizure in the Immigration Context

Identifying a Seizure

"A brief [law enforcement] encounter with an individual can be a detention under the Fourth Amendment if 'the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded.'"[12] To determine whether a seizure occurs, courts consider "all the circumstances surrounding the encounter" to determine whether "the police conduct would have communicated to a reasonable person that he or she was not free to decline the officer's requests or otherwise terminate the encounter."[13] For example, an immigration officer yelling "freeze" as other immigration officers approached to ask workers about their immigration status constituted a Fourth Amendment seizure of the workers.[14] And where an individual voluntarily stepped out of his home and initiated a conversation with ICE agents, "the encounter immediately became non-consensual" because the moment the individual exited his door he was surrounded by three uniformed and armed agents who ordered him to show his hands.[15] "This show of authority would have caused an individual to objectively believe that his freedom of movement was restricted."[16]

Basis of Suspicion

Characteristics of the Area in Which the Vehicle Is Encountered

The Tenth Circuit has "expressed skepticism" of the relevance of contentions that a place is a "'source and destination point for illegal aliens'" in analyzing "whether a state police officer had reasonable suspicion to stop a van suspected of transporting illegal aliens."[17] The Tenth Circuit stated that, "[t]o the extent that law enforcement officials seem primed to begin identifying 'known illegal alien communities' this type of evidence appears to be of minimal, if any, evidentiary value."

Proximity to the Border

While "proximity the border may be considered a factor in the reasonable suspicion calculus," the Tenth Circuit has noted that the significance of the proximity to the border declines the farther one travels from

[10] *United States v. Wallace*, 429 F.3d 969, 974–75 (10th Cir. 2005) (quoting *United States v. Elliott*, 107 F.3d 810, 814 (10th Cir. 1997)).
[11] *Id.*
[12] *United States v. Alarcon-Gonzalez*, 73 F.3d 289, 291 (10th Cir. 1996) (quoting *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 216 (1984)).
[13] *Id.*
[14] *Id.* at 292.
[15] *United States v. Rodriguez-Martinez*, No. 08-CR-00281-WYD, 2009 WL 9119964, at *5 (D. Colo. Feb. 20, 2009).
[16] *Id.*
[17] *United States v. Madroza-Acosta*, 221 Fed. Appx. 756 (10th Cir. 2007); *United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172, 1186-87 (D.N.M. 2010).

the border.[18] Tenth Circuit courts have "provided guidance that stops within fifty miles contribute to establishing reasonable suspicion."[19]

Behavior

The Tenth Circuit has "candidly acknowledged that a defendant's assertion that "'reactive behavior' can be described so broadly as to be meaningless … ha[s] some resonance,"' explaining that

> The behavior descriptions sometime appear contradictory from case to case. An officer's suspicion is aroused: when a subject looks at him carefully or refuses to look at him; when a subject drives exactly at the speed limit or drives too slowly; when a subject appears too nervous or too nonchalant. But we recognize the dynamic that well trained and experienced officers bring to the process, and hence, require that their suspicions be reasonable and articulable, not necessarily universal or profound.[20]

Types of reactions to the presence of border control the Tenth Circuit has recognized as suspicious include when individuals "exhibit 'surprised or scared' facial expressions, widen their eyes, look back to watch the Border Patrol vehicle go by, return to looking straight forward with both hands gripping the steering wheel, look a second time, and then stare straight forward again."[21] On the other hand, the Tenth Circuit has held that "driving ten miles per hour below the posted speed limit[,] … appear[ing] nervous, looking at [an] agent's car several times in the rear view mirror, … gripping the steering wheel tightly' while a Border Patrol agent 'follow[s] closely behind,' and then failing to acknowledge an agent's vehicle as it passes" did not give rise to reasonable suspicion.[22]

The Tenth Circuit is "wary" of claims that reasonable suspicion is supplied "by generic claims that a Defendant was nervous or exhibited nervous behavior after being confronted by law enforcement officials."[23] The Tenth Circuit has consistently held "that nervousness is 'of limited significance' in determining whether reasonable suspicion exists."[24] While, "extreme and persistent nervousness," receives "somewhat more weight,"[25] the Tenth Circuit has held that an individual's "'changing the topic

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[18] *Hernandez-Lopez*, 761 F. Supp. 2d at 1187 (quoting *United States v. Diaz-Juarez*, 299 F.3d 1138, 1142 (9th Cir. 2002)); see also *United States v. Mendez*, 181 Fed. Appx. 754, 757 (10th Cir. 2006).
[19] *Hernandez-Lopez*, 761 F. Supp. 2d at 1187; see also *Mendez*, 181 Fed. Appx. at 757 ("Obviously, the closer the stop occurs to the border, the more weight we accord to this factor.… A distance of fifty miles or less has routinely been held sufficiently close to the border to contribute to a finding of reasonable suspicion"); *United States v. Quintana-Garcia*, 343 F.3d 1266, 1272 (10th Cir. 2003) (finding support from a proximity of fifty to sixty miles from the border); *United States v. Barron-Cabrera*, 119 F.3d 1454, 1458 n. 4, 1460 (10th Cir. 1997) (finding support from a proximity of forty-five miles from the border); *United States v. Lopez-Martinez*, 25 F.3d 1481, 1485 (10th Cir. 1994) (finding support from a proximity of sixty miles from the border); *United States v. Venzor-Castillo*, 991 F.2d 634, 635, 639 (10th Cir. 1993) (holding an agent lacked reasonable suspicion to conduct a stop 235 miles from border).
[20] *Hernandez-Lopez*, 761 F. Supp. 2d at 1187 (quoting *United States v. Zambrano*, 76 Fed. Appx. 848 (10th Cir. 2003).
[21] *Hernandez-Lopez*, 761 F. Supp. 2d at 1188 (quoting *Barron-Cabrera*, 119 F.3d at 1457–58).
[22] *Id.* (quoting *Zambrano*, 76 Fed. Appx. at 851).
[23] *Id.* (quoting *Barron-Cabrera*, 119 F.3d at 1461).
[24] *Id.* (quoting *United States v. Simpson*, 609 F.3d 1140, 1147 (10th Cir. 2010)); see also *United States v. Santos*, 403 F.3d 1120, 1127 (10th Cir. 2005) ("[N]ervousness is a sufficiently common—indeed natural—reaction to confrontation with the police that unless it is unusually severe or persistent, or accompanied by other, more probative, grounds for reasonable suspicion, it is of limited significance in determining whether reasonable suspicion exists"); *United States v. Williams*, 271 F.3d 1262, 1268 (10th Cir. 2001); *United States v. Wald*, 216 F.3d 1222, 1227 (10th Cir. 2000).
[25] *Hernandez-Lopez*, 761 F. Supp. 2d at 1188 (quoting *United States v. West*, 219 F.3d 1171, 1179 (10th Cir. 2000)).

from his travel plans to the weather, swallowing hard, licking his lips, which were quivering, and nervously stroking the top edge of the head liner of the patrol car with his hand" did not establish reasonable suspicion.[26] The Tenth Circuit has recognized that "[f]or a motorist to become more nervous as the questioning becomes more prolonged and skeptical is not unnatural. Such behavior falls short of the 'extreme nervousness'" found to support reasonable suspicion in other cases.[27]

The Tenth Circuit has also held that "[c]areful, lawful driving gives little support to establishing reasonable suspicion."[28] A driver's "'gripping the wheel tightly and looking straight ahead at the road' does not establish reasonable suspicion."[29] Passengers sinking down in an attempt to hide "'is suspicious conduct not clearly susceptible to unsuspicious interpretations, unlike passengers merely avoiding eye contact, turning their heads away from a light, or shielding their eyes.'"[30] And "cautious driving of a rented moving truck, whose drivers are often inexperienced with the operation of large vehicles, cannot standing alone support a reasonable suspicion of illegal activity."[31]

§ 2.6 Searches and Search Warrants

To prove consent to a search, the government must "(1) 'proffer clear and positive testimony that consent was unequivocal and specific and freely and intelligently given' and (2) 'prove that this consent was given without implied or express duress or coercion.'"[32] Consent to a search "must be clear, but it need not be verbal. Consent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer."[33] A "non-verbal consent may validly follow a verbal refusal,"[34] but it must be clearly given.[35] "In determining whether consent was coerced," the Tenth Circuit considers factors including the number of officers present; whether an officer brandished a weapon; "use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's [property] … ; a request to accompany

[26] *Id.* (quoting *Santos*, 403 F.3d at 1127).
[27] *Id.*; compare *Williams*, 271 F.3d at 1268 ("extreme nervousness [that] did not dissipate throughout the entire stop") with *Santos*, 403 F.3d at 1128-29 (individual's "hand shook visibly when handing over his license and registration early in the stop, [but] appeared to relax … during the first part of his interview in [the Trooper's] car, only to become increasingly nervous as the interview increased in length and the officer questioned him more pointedly about his story").
[28] *Hernandez-Lopez*, 761 F. Supp. 2d at 1188-89; see also *United States v. Peters*, 10 F.3d at 1522 ("[W]e fail to see the nexus between careful driving and illegal conduct").
[29] *Hernandez-Lopez*, 761 F. Supp. 2d at 1189 (quoting *Peters*, 10 F.3d at 1522).
[30] *Id.* (quoting *United States v. Barbee*, 968 F.2d 1026, 1028 (10th Cir. 1992)).
[31] *Id.* (quoting *Peters*, 10 F.3d at 1522).
[32] *United States v. Hernandez*, 944 F. Supp. 847, 851 (D. Kan. 1996) (quoting *United States v. McRae*, 81 F.3d 1528, 1537 (10th Cir. 1996)).
[33] *United States v. Guerrero*, 472 F.3d 784, 789–90 (10th Cir. 2007); see also *United States v. Payan*, 905 F.2d 1376, 1379 (10th Cir. 1990) (defendant who opened trunk without objection or hesitation at request of Border Patrol agent consented to search of car trunk); *United States v. Benitez*, 899 F.2d 995, 998-99 (10th Cir. 1990) (consent given by defendant who "immediately exited the car and opened the trunk" at Border Patrol agent's request to look in the trunk).
[34] *Id.* at 790.
[35] *Hernandez*, 944 F. Supp. at 852 (finding that a search had not been consensual where the defendant opened his trunk for an officer to search only after five repeated requests from the officer, to which the defendant gave hesitant, equivocal, and questioning answers and indicated that he had difficulty understanding the officer's questions and where the final "request" was phrased such that it could reasonably understood as a command).

the officer to the station; [and] interaction in a nonpublic place or a small, enclosed place."[36] The government bears the burden of proving that consent to a search was voluntarily and freely given.[37]

§ 2.9 Evidence Obtained in Violation of Due Process

"[T]he absence of *Miranda* warnings does not render an otherwise voluntary statement … inadmissible in a deportation case."[38] *Miranda* is inapplicable to deportation proceedings "because an immigration hearing is civil in nature and [the respondent's] silence could be used against him."[39]

§ 2.10 Right to Remain Silent

An immigrant may decline to testify at an immigration hearing on the basis of the Fifth Amendment due to the potential for criminal prosecution for violation of immigration laws.[40] However, an immigrant, may, "unlike the criminal defendant, be required to answer non-incriminatory questions about his alien status."[41] An immigrant's "silence may be used as the basis for drawing certain adverse inferences at least with respect to non-incriminatory matters."[42]

§ 2.13 Consulting with a Consulate

A district court in the Tenth Circuit has recognized that if an immigrant can show prejudice due to a violation of the Vienna Convention, which guarantees the right to consult with an immigrant's consulate, i.e., "'some likelihood' that but for the Vienna Convention violation, the 'defense and conduct of the hearing would have been materially affected," the relevant "statements must be suppressed."[43]

§ 3.6 Current Authority of Local Police to Make Immigration Stops

The Tenth Circuit has held that a city police officer's arrest of an immigrant premised solely on an immigration violation violated the immigrant's "right to be free from an unlawful seizure" under the Fourth Amendment.[44]

However, the Tenth Circuit has held that "[a] state trooper has general investigatory authority to inquire into possible immigration violations."[45] The Tenth Circuit has also upheld a finding that a police officer could extend a stop after "the original reason for the stop had terminated … based on … a reasonable suspicion of undocumented immigration status" that had arisen during the course of the stop.[46]

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[36] *Id.*
[37] *United States v. Saavedra*, 961 F.2d 221 (10th Cir. 1992).
[38] *United States v. Montoya-Robles*, 935 F. Supp. 1196, 1201-02 (D. Utah 1996).
[39] *United States v. Valdez*, 917 F.2d 466, 469 (10th Cir. 1990).
[40] *United States v. Khan*, 324 F. Supp. 2d 1177, 1190 (D. Colo. 2004).
[41] *Id.*
[42] *Id.*
[43] *United States v. Martinez-Villalva*, 80 F. Supp. 2d 1152, 1156 (D. Colo. 1999) (quoting *United States v. Lombera-Camorlinga*, 170 F.3d 1241, 1243 (9th Cir.), reh'g granted, opinion withdrawn, 188 F.3d 1177 (9th Cir. 1999), and on reh'g *en banc*, 206 F.3d 882 (9th Cir. 2000)).
[44] *United States v. Argueta-Mejia*, 166 F. Supp. 3d 1216, 1225–26 (D. Colo. 2014) (noting that "cooperation under § 1357(g)(10) does not encompass a police officer arresting an individual, and then later contacting federal authorities"), aff'd sub nom. *United States v. Argueta-Mejia*, 615 F. App'x 485 (10th Cir. 2015).
[45] *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n. 3 (10th Cir. 1984); see also *United States v. Flores-Olmos*, 438 F. App'x 713, 716 (10th Cir. 2011) ("An officer does not need reasonable suspicion to inquire about immigration status").
[46] *United States v. Aispuro-Medina*, 256 Fed. Appx. 215, 219 (10th Cir. 2007).

§ 3.9 Rights in the Home and Other Private Places

"[S]earches and seizures inside a home without a warrant are presumptively unreasonable" under the Fourth Amendment.[47] "Absent consent or exigent circumstances," law enforcement may not enter a person's home, or even motel room, without a warrant.[48] "The government bears the burden of proving exigency."[49] Law enforcement officers "'may enter a home without a warrant where they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.'"[50] Where "'exigent circumstances' exist, the entry and search do not violate the Fourth Amendment so long as the manner and scope of the search is reasonable."[51]

§ 3.11 Arrests Based on Race or Ethnic Appearance

In general, "a person's race or ethnicity [is] not a proper factor in determining reasonable suspicion or probable cause."[52] "However, race may be a factor as to probable cause or reasonable suspicion if it matches a description of an offender or fits the facts relevant to a particular person, place, or circumstance of the offense."[53]

§ 3.13 Workplace Raids

An immigration officer yelling "freeze" as other immigration officers approach to ask workers about their immigration status constitutes a Fourth Amendment seizure of the workers because the workers would no longer feel free to leave.[54]

"[E]xcept in rare circumstances, a warrant [or consent of the owner] is as necessary to support a search of [non-public areas of] commercial premises as private premises."[55]

§ 3.14 Rights in Automobiles

Tenth Circuit courts have held that "[c]areful, lawful driving gives little support to establishing reasonable suspicion" that a driver is in the country illegally or engaged in unlawful activity.[56] A driver's "'gripping the wheel tightly and looking straight ahead at the road' does not establish reasonable suspicion."[57] Passengers sinking down in an attempt to hide "'is suspicious conduct not clearly susceptible to unsuspicious interpretations, unlike passengers merely avoiding eye contact, turning their heads away from a light, or shielding their eyes.'"[58] And "cautious driving of a rented moving truck, whose drivers are often inexperienced with the operation of large vehicles, cannot standing alone support a reasonable suspicion of illegal activity."[59]

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[47] *McCoy v. Miller*, 646 F. App'x 701, 703 (10th Cir. 2016) (quoting *United States v. Najar*, 451 F.3d 710, 713 (10th Cir. 2006)).
[48] *United States v. Parra*, 2 F.3d 1058, 1064 (10th Cir. 1993).
[49] *Id.*
[50] *McCoy*, 646 F. App'x at 703 (quoting *West v. Keef*, 479 F.3d 757, 759 (10th Cir. 2007)).
[51] *Id.*
[52] *United States v. Ruiz*, 961 F. Supp. 1524, 1532 (D. Utah 1997).
[53] *Id.*
[54] *United States v. Alarcon-Gonzalez*, 73 F.3d 289, 292 (10th Cir. 1996).
[55] *United States v. Leary*, 846 F.2d 592, 596 (10th Cir. 1988).
[56] *United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172, 1188-89 (D.N.M. 2010); see also *United States v. Peters*, 10 F.3d at 1522 ("[W]e fail to see the nexus between careful driving and illegal conduct").
[57] *Hernandez-Lopez*, 761 F. Supp. 2d at 1189 (quoting *Peters*, 10 F.3d at 1522).
[58] *Id.* (quoting *United States v. Barbee*, 968 F.2d 1026, 1028 (10th Cir. 1992)).
[59] *Id.* (quoting *Peters*, 10 F.3d at 1522).

In *United States v. Jaurez-Torres*, a Tenth Circuit district court held that border patrol agents did not have "reasonable suspicion" to justify stopping a mini-van 250 miles from the border where there was no evidence that the mini-van had recently crossed the border, the agents did not observe any occupants trying to hide and the agents justifications for stopping the vehicle, such as the failure of the occupants to glance at the agents' vehicle or to interact with one another and the presence of three adults "that did not comport with the 'archetypical' family unit," were suspect.[60]

A traffic stop may turn into a consensual encounter once an officer has returned the driver's documentation "so long as 'a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information.'"[61] "Once such a consensual encounter begins, an officer is not required to inform a suspect that he does not have to answer the officer's questions or that he is free to leave at any time."[62]

§ 3.15 Rights at the Border

"A 'border search' need not take place at the actual border but may be conducted at its functional equivalent."[63] To qualify as a taking place at a "functional equivalent of the border" a search must take place "'after a border crossing at the first practicable detention point.'"[64] The Tenth Circuit has held that a search falls within the border exception to the Fourth Amendment if

> (1) there is a reasonable certainty that the object of the search has just crossed the border, (2) the search takes place at the first practicable point after the border was crossed, and (3) there has been no time or opportunity for the object of the search to have changed materially since the time of the crossing.[65]

§ 3.16 Rights at Border Equivalents

At fixed border checkpoints, "border patrol agents may briefly detain and question a person without any individualized suspicion that the person is engaged in criminal activity."[66] At such checkpoints "agents may inquire into an individual's citizenship or immigration status and request documentation; may make a cursory visual inspection of the vehicle; and may briefly question an individual 'concerning such things as vehicle ownership, cargo, destination, and travel plans,' so long as such questions are 'reasonably related to the agent's duty to prevent the unauthorized entry of individuals into this country and to prevent the smuggling of contraband.'"[67] "The Fourth Amendment protects an individual's liberty interests at fixed checkpoints by limiting the scope of the stop."[68] "'A routine checkpoint stop must be brief and

[60] *United States v. Juarez-Torres*, 441 F. Supp. 2d 1108, 1110–15 (D.N.M. 2006).
[61] *United States v. Wallace*, 429 F.3d 969, 974–75 (10th Cir. 2005) (quoting *United States v. Elliott*, 107 F.3d 810, 814 (10th Cir. 1997)).
[62] *Id.*
[63] *United States v. Mayer*, 818 F.2d 725, 727–29 (10th Cir. 1987).
[64] *Id.* (quoting *United States v. Garcia*, 672 F.2d 1349, 1365 (11th Cir. 1982)).
[65] *Id.*
[66] *United States v. Briseno-Mendez*, 153 F.3d 728 (10th Cir. 1998).
[67] *Id.* (quoting *United States v. Rascon-Ortiz*, 994 F.2d 749, 752 (10th Cir. 1993)).
[68] *Id.*

unintrusive.'"[69] "Any detention beyond the scope of a routine checkpoint stop, however, must be based on reasonable suspicion, probable cause, or consent."[70]

"The distinction between 'routine' and 'nonroutine' turns to a large extent upon the degree of intrusiveness of the particular type of search."[71] For example, the Tenth Circuit has held that examination of a car's undercarriage was routine,[72] while drilling a small hole into a camper was a "non-routine" search that required reasonable suspicion.[73]

[69] *Id.* (quoting *United States v. Rascon-Ortiz*, 994 F.2d 749, 752 (10th Cir. 1993)).
[70] *Id.*; see also *United States v. Saavedra*, 961 F.2d 221 (10th Cir. 1992) ("The Border Patrol may ask the driver and passengers to explain suspicious circumstances, but may not search a private vehicle without consent or probable cause").
[71] *United States v. Uribe-Galindo*, 990 F.2d 522, 525–26 (10th Cir. 1993).
[72] *Id.*
[73] *United States v. Carreon*, 872 F.2d 1436, 1444 (10th Cir. 1989).

MOTION TO SUPPRESS MANUAL UPDATES: ELEVENTH CIRCUIT

§ 2.1 Overview of the Chapter

In the Eleventh Circuit, "evidence obtained illegally can be used in deportation proceedings, unless the violation was so 'egregious … that [it][ ] transgress[es] notions of fundamental fairness and undermine[s] the probative value of the evidence obtained.'"[1]

§ 2.2 Questions and Types of "Stops" of Immigrants

While "'[d]etention pursuant to a *Terry* stop, [i.e., a brief detention made for limited investigative purposes based on reasonable suspicion] must be temporary and last no longer than is necessary to effectuate the purpose of the stop,'" officers may further extend a *Terry* stop where "further reasonable suspicion, supported by articulable facts, emerges."[2] Brevity is an "important" but "highly context-sensitive" consideration.[3] For example, where officers had reason to believe that an individual they had detained had presented either a false or invalid identification, the officers were "justified in in prolonging the stop 'in order to determine if [the individual] had committed the crime of providing a false name to a police officer.'"[4]

§ 2.3 Identifying a Seizure in the Immigration Context

Immigration agents are "forbidden from detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens."[5] However, "a request for identification by the INS does not, by itself, amount to a detention protected by the Fourth Amendment '[u]nless the circumstances of the encounter [were] so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded.'"[6]

"Roving border patrols away from the border or its functional equivalents 'may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.'"[7] Reasonable suspicion may be supported by a combination of factors such as "'characteristics of the area, including its proximity to the border; the usual traffic patterns on the road; previous experience with alien smuggling … in the vicinity; the behavior of the driver, such as erratic driving; and characteristics of the vehicle, including the appearance of being heavily loaded.'"[8] "[T]he absence of a reason to believe the vehicle had come from the border … is not alone dispositive."[9] While the silence of a suspect when questioned does

[1] *Ghysels-Reals v. U.S. Atty. Gen.*, 418 F. App'x 894, 895 (11th Cir. 2011) (quoting *Immigration and Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984)).
[2] *United States v. Espinal*, No. 1:11-CR-00060-ODE, 2011 WL 7004195, at *9 (N.D. Ga. Aug. 29, 2011) (quoting *United States v. Mercer*, No. CR 06-02-M-DWM, 2007 WL 1342480, at *3 (D. Mont. May 4, 2007)), report and recommendation adopted, No. 1:11-CR-0060-4-ODE, 2012 WL 92451 (N.D. Ga. Jan. 10, 2012).
[3] *Id.*
[4] *Id.* (quoting *United States v. Stoltz*, Crim. No. 11-096 (RHK/LIB), 2011 WL 2533872, at *8 (D. Minn. June 3, 2011), adopted by 2011 WL 25339129, at *1 (D. Minn. June 27, 2011)).
[5] *United States v. Rodriguez-Franco*, 749 F.2d 1555, 1559 (11th Cir. 1985).
[6] *Id.* (quoting *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 216 (1984)).
[7] *United States v. Cruz-Hernandez*, 62 F.3d 1353, 1355 (11th Cir. 1995) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975)).
[8] *Id.* (quoting *United States v. Barnard*, 553 F.2d 389, 391 (5th Cir. 1977)).
[9] *Id.* (quoting *United States v. Pacheco*, 617 F.2d 84, 86 (5th Cir. 1980)).

not support reasonable suspicion, a suspect's attempt to walk away *may* be a valid factor supporting reasonable suspicion.[10]

When government agents approach an individual in an airport, "only 'exceptionally clear evidence of consent should overcome a presumption that a person requested to accompany an agent to an office no longer would feel free to leave.'"[11] The Eleventh Circuit has "assumed" "that this presumption of coercion is applicable to questioning about an individual's immigration status."[12]

§ 2.4 Was the Seizure an Arrest

"An ICE agent may [] arrest a suspected alien without a warrant only if he has (1) probable cause and (2) 'reason to believe that the person is likely to escape before a warrant can be obtained.'"[13] The fact that an individual was ultimately determined to be an undocumented immigrant does not retroactively justify an arrest where immigration agents lacked probable cause at the time of the arrest.[14] Nor is an arrest justified based solely on a person's race.[15]

§ 2.5 The Warrant Requirement in Immigration Arrests

In *Gonzales v. FedEx Ground Package Sys., Inc.*, the Southern District of Florida questioned immigration agents' failure to seek an arrest warrant for a suspected illegal immigrant prior to conducting a sting operation to arrest the suspect where they apparently had sufficient time to do so.[16]

§ 2.7 Was the Fourth Amendment Violation Egregious

The Eleventh Circuit has ruled that "evidence obtained illegally can be used in deportation proceedings, unless the violation was so 'egregious that it transgresses notions of fundamental fairness and undermines the probative value of the evidence obtained.'"[17]

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[10] *Gainor v. Douglas Cty.*, 59 F. Supp. 2d 1259, 1276-77 & n.19 (N.D. Ga. 1998) (citing *Lee v. Immigration and Naturalization Serv.*, 590 F.2d 497, 502 (3rd Cir. 1979)). But see *United States v. Marcelino*, 736 F. Supp. 2d 1343, 1349-51 (N.D. Ga. 2010) ("Where an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business.… Even assuming that Defendant here did pick up his pace after the agents addressed him the second time, I cannot say that his behavior constituted 'flight' so as to support a determination of reasonable suspicion. Rather, the facts indicate that the defendant and his companion continued to go about their business by continuing to walk in the same direction and manner as when the agents first observed them. To hold differently would render the concept of a voluntary or consensual stop meaningless because a person would never have the right to continue about their business without creating reasonable suspicion"); *Anthony v. Coffee Cty.*, No. CV 512-70, 2013 WL 12092531, at *6 (S.D. Ga. Oct. 29, 2013) ("Given the nature and duration of Plaintiff's continued movement as [the officer] confronted him, the Court finds [Plaintiff's] behavior more akin to going about his own business rather than attempting to flee. Therefore, given the totality circumstances, there was no reasonable suspicion justifying [the officer's] stopping [Plaintiff's] vehicle and demanding that he exit."), aff'd, 579 F. App'x 760 (11th Cir. 2014).

[11] *United States v. Alvarez-Sanchez*, 774 F.2d 1036, 1041 (11th Cir. 1985) (quoting *United States v. Berry*, 670 F.2d 583, 598 (5th Cir. 1982)).

[12] *Id.*

[13] *Gonzales v. FedEx Ground Package Sys., Inc*, No. 12-CV-80125, 2013 WL 12080223, at *13 (S.D. Fla. Aug. 1, 2013) (quoting 8 CFR § 287.8(b)(2)).

[14] *Id.* at *14.

[15] *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975)).

[16] *Id.*

[17] *Ghysels-Reals v. U.S. Atty. Gen.*, 418 F. App'x 894, 895 (11th Cir. 2011) (quoting *Immigration and Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984)).

§ 2.9 Evidence Obtained in Violation of Due Process

The Eleventh Circuit has held that an undocumented immigrant who was "locked in a room with five government employees and interrogated," but did not claim that he was "physically threatened, interrogated for an unusually long time, or denied any ordinary comfort during his interrogation" did not suffer an "egregious" violation of his Fifth Amendment rights that "would warrant suppression in an immigration case."[18]

§ 3.8 The Warrant Requirement in Immigration Arrests and Searches

In *Gonzales v. FedEx Ground Package Sys., Inc.*, the Southern District of Florida questioned immigration agents' failure to seek an arrest warrant for a suspected illegal immigrant prior to conducting a sting operation to arrest the suspect where they apparently had sufficient time to do so.[19]

§ 3.9 Rights in the Home and Other Private Places

"The Fourth Amendment establishes a right against non-consensual warrantless entry into one's home unless probable cause and exigent circumstances exist."[20] "Exigent circumstances may arise from a variety of situations, including when there is 'hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.'"[21]

Terry stops are generally not allowed in residences because "'*Terry's* twin rationales for a brief investigatory detention—the evasive nature of the activities police observe on the street and the limited nature of the intrusion—appear to be inapplicable to an encounter at a suspect's home.'"[22]

§ 3.11 Arrests Based on Race or Ethnic Appearance

Immigration agents may not base an arrest on race alone.[23]

§ 3.14 Rights in Automobiles

"Roving border patrols away from the border or its functional equivalents 'may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.'"[24] Reasonable suspicion may be supported by a combination of factors such as the "'characteristics of the area, including its proximity to the border; the usual traffic patterns on the road; previous experience with alien smuggling … in the vicinity; the behavior of the driver, such as erratic driving; and characteristics of the vehicle, including the appearance of being heavily loaded.'"[25] "[T]he absence of a reason to believe the

[18] *Rampasard v. U.S. Atty. Gen*., 147 F. App'x 90, 92 (11th Cir. 2005).
[19] *Id.*
[20] *Hill v. Orange Cty. Sheriff*, 666 F. App'x 836, 839 (11th Cir. 2016).
[21] *Id.* (quoting *Minnesota v. Olson*, 495 U.S. 91, 100 (1990)).
[22] *Harman v. Pollock*, 586 F.3d 1254, 1262 (10th Cir. 2009) (quoting *United States v. Washington*, 387 F.3d 1060, 1067 (9th Cir. 2004)).
[23] *Gonzales v. FedEx Ground Package Sys., Inc*, No. 12-CV-80125, 2013 WL 12080223, at *14 (S.D. Fla. Aug. 1, 2013).
[24] *United States v. Cruz-Hernandez*, 62 F.3d 1353, 1355 (11th Cir. 1995) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975)).
[25] *Id.* (quoting *United States v. Barnard*, 553 F.2d 389, 391 (5th Cir. 1977)).

vehicle had come from the border … is not alone dispositive."[26] While the silence of a suspect when questioned does not support reasonable suspicion, a suspect's attempt to walk away *may* be a valid factor supporting reasonable suspicion.[27]

§ 3.15 Rights at the Border

"It is well-established that routine searches at a United States international border do not require an objective justification, probable cause, or a search warrant."[28] "[T]he law provides that when Customs Officers first encounter an individual seeking entry into the United States the officer has discretion to stop the person and conduct a preliminary border search without fear of running afoul of the Constitution."[29] "Because an individual's expectation of privacy is at its lowermost at border entry points," officers "need not possess any level of suspicion" to "conduct routine questioning, examine the entrant's luggage, [or] conduct *Terry* patdowns and frisks."[30]

A search qualifies as one taking place at a "functional equivalent of the border" when

> (1) there is a reasonable certainty that the object of the search has just crossed the border, (2) the search takes place at the first practicable point after the border was crossed, and (3) there has been no time or opportunity for the object of the search to have changed materially since the time of the crossing.[31]

§ 3.16 Rights at Border Equivalents

"Border searches are considered non-routine, and require a reasonable suspicion, only when officers use 'highly intrusive' methods 'such as a strip search or an x-ray examination.'"[32] "A luggage search is considered a routine search."[33] So too was the cutting open of food packages.[34]

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[26] *Id.* (quoting *United States v. Pacheco*, 617 F.2d 84, 86 (5th Cir. 1980)).
[27] *Gainor v. Douglas Cty.*, 59 F. Supp. 2d 1259, 1276-77 & n.19 (N.D. Ga. 1998) (citing *Lee v. Immigration and Naturalization Serv.*, 590 F.2d 497, 502 (3rd Cir. 1979)). But see *United States v. Marcelino*, 736 F. Supp. 2d 1343, 1349-51 (N.D. Ga. 2010) ("Where an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business.… Even assuming that Defendant here did pick up his pace after the agents addressed him the second time, I cannot say that his behavior constituted 'flight' so as to support a determination of reasonable suspicion. Rather, the facts indicate that the defendant and his companion continued to go about their business by continuing to walk in the same direction and manner as when the agents first observed them. To hold differently would render the concept of a voluntary or consensual stop meaningless because a person would never have the right to continue about their business without creating reasonable suspicion"); *Anthony v. Coffee Cty.*, No. CV 512-70, 2013 WL 12092531, at *6 (S.D. Ga. Oct. 29, 2013) ("Given the nature and duration of Plaintiff's continued movement as [the officer] confronted him, the Court finds [Plaintiff's] behavior more akin to going about his own business rather than attempting to flee. Therefore, given the totality circumstances, there was no reasonable suspicion justifying [the officer's] stopping [Plaintiff's] vehicle and demanding that he exit."), aff'd, 579 F. App'x 760 (11th Cir. 2014).
[28] *United States v. Owusu*, No. 1:13-CR-0297-AT, 2013 WL 6843613, at *2 (N.D. Ga. Dec. 23, 2013).
[29] *Denson v. United States*, 574 F.3d 1318, 1340 (11th Cir. 2009).
[30] *Id.* (internal citations omitted).
[31] *United States v. Carter*, 760 F.2d 1568, 1576 (11th Cir. 1985).
[32] *Owusu*, 2013 WL 6843613, at *2 (quoting *United States v. Alfaro-Moncada*, 607 F.3d 720, 729 (11th Cir. 2010)).
[33] *Id.*; see also *United States v. Rice*, 635 F.2d 409, 410 (5th Cir. 1981) (stating that no articulable suspicion is required to conduct a search of luggage at the border).
[34] *Id.*