U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: SOTO GARCIA, ENRIQUE

A 087-534-842

Date of this notice: 5/7/2013

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam: Docket

File: A087 534 842 – Phoenix, AZ

Date: MAY - 7 2013

In re: ENRIQUE SOTO-GARCIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John D. Shaw, Esquire

ON BEHALF OF DHS: Reed H. Allen
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Termination

In a decision dated June 2, 2011, the Immigration Judge granted the respondent's motion to suppress evidence submitted by the Department of Homeland Security ("DHS") to establish the respondent's removability and did not sustain the charge of removability listed above. Instead, the Immigration Judge terminated proceedings and the DHS has appealed. The record of proceedings will be remanded.

The issue on appeal is whether evidence submitted by the DHS, specifically the Record of Deportable/Inadmissible Alien (Form I-213) (Exh. 3), and the statements made by the respondent to the DHS when he was detained, are inadmissible to establish that he is an alien and, therefore, subject to removal as charged. Although the Supreme Court has held that the Fourth Amendment exclusionary rule generally does not apply in deportation proceedings, where the main issues are identity and alienage, it has left open the possibility that the exclusionary rule might apply in cases involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (holding that the Fourth Amendment's exclusionary rule is generally not considered applicable in removal proceedings unless the constitutional violations are "egregious"); *see also Orhorhaghe v. INS*, 38 F.3d 488, 492-93 (9th Cir. 1994) (holding that even in administrative proceedings, where the exclusionary rule ordinarily does not apply, evidence must be excluded if obtained in deliberate violation of the Fourth Amendment or by conduct which a reasonable officer should know is unconstitutional).

In removal proceedings, an alien seeking to exclude evidence based on a violation of the Fourth Amendment bears the burden of establishing a *prima facie* case that the evidence should be suppressed. *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971). Only when an alien *has* come forward with adequate evidence in support of suppression will the burden shift to the DHS to

justify the manner in which it obtained the evidence. *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988).

The evidence submitted to support the DHS's allegation that the respondent is removable as an alien not admitted or paroled was primarily derived from a vehicular stop of a car in which the respondent was driving with three other men, including his brother who was driving, and which resulted in the respondent's arrest by U.S. Customs and Border Protection ("CBP") agents in October of 2009 (I.J. at 4; *see* Exh. 3). The respondent presented the testimony of the three other occupants of the car in which he was driving when stopped by border patrol agents at the Arizona-California border (I.J. at 4-6; Tr. at 21-64). All three of the passengers, who are Hispanic, testified to essentially the same set of facts: the respondent's car was waved through the checkpoint but then pulled over a few minutes later by CBP agents who indicated they were pulling the car over because they could smell undocumented aliens; the respondent was arrested after being searched and the three other occupants of the car resumed their trip to California (I.J. at 4-6; Tr. at 24-29, 32, 36-43, 46-52). The three witnesses also testified that they were not in a rental car or a Hyundai Sonata when they were stopped, and that they did not know "Sergio Garcia" or "Jesus Ochoa-Torres," facts which were listed on the Forms I-213 and the continuation sheet (Form I-831) (I.J. at 4-6; Tr. at 29-31, 40-41, 47, 52-53, 60; *see* Exh. 3).

Based on these witnesses' testimony, the Immigration Judge determined that the respondent had established a *prima facie* case for suppressing the evidence arising out of an illegal stop (I.J. at 7). As noted by the Immigration Judge, stopping a vehicle is justified when the officer is aware of articulable facts that "'reasonably warrant suspicion'" that a vehicle contains aliens who may be illegally in the United States (I.J. at 6 (citing and quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975))); *see also Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1445 (9th Cir. 1994). Stopping a car solely because the inhabitants are Hispanic is not a sufficient reason to suspect a person of being an illegal alien (I.J. at 7). *See United States v. Brignoni-Ponce*, *supra*, at 886-87; *Gonzalez-Rivera v. INS*, *supra*, at 1447-48. We find no clear error in the Immigration Judge's determination that the respondent's witnesses testified credibly and that, based on their testimony indicating that the car was stopped solely because CBP officers "smelled" undocumented aliens, the respondent has established a *prima facie* case of illegality. Therefore, the burden of proof shifts to the DHS to justify the manner in which it obtained the Forms I-213 and I-831. *See Matter of Barcenas*, *supra*.

The Immigration Judge found that the DHS was unable to justify the manner in which it obtained the Form I-213 and the continuation sheet, Form I-831, because the information contained therein, including that the CBP agents stopped a rented Hyundai Sonata driven by Sergio Garcia with an occupant named Jesus Ochoa-Torres, was incorrect; the Immigration Judge found this evidence unreliable in the face of the respondent's witness' credible testimony, and, therefore, inadmissible (I.J. at 7-8). *See id.* at 611. The DHS did not offer any other evidence besides the Forms I-213 and I-831 (I.J. at 8). The Immigration Judge rejected the DHS's argument that it was denied an opportunity to question the respondent at the suppression hearing (I.J. at 8). While the respondent did not testify, the DHS was free to call the respondent as its own witness and did not do so (I.J. at 8; *see* Tr. at 19-20). As the DHS did not present evidence to justify stopping and arresting the respondent, the Immigration Judge found the stop illegal and suppressed all evidence obtained from the stop (i.e., the Forms I-213 and I-831) (I.J. at 8).

The Immigration Judge also found that the DHS had failed to establish that the respondent was removable as charged through evidence obtained by independent means (I.J. at 8-11). *See Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978), *modified* by 586 F.2d 755 (9th Cir. 1978) (holding that a Fourth Amendment violation does not require exclusion of evidence independently obtained from agency administrative records); *Matter of Sandoval*, 17 I&N Dec. 70, 79 (BIA 1979). Although the DHS submitted the respondent's children's birth certificates showing the respondent's place of birth as Mexico, the Immigration Judge found this evidence could not be relied on since the evidence was obtained by exploiting the prior illegal search and seizure (I.J. at 9). Though the respondent submitted his children's birth certificates voluntarily, the Immigration Judge found that he did so in order to be released from an illegal detention resulting from the illegal stop; therefore, the DHS had not shown that intervening circumstances existed between the illegal stop and the bond proceedings such that the birth certificates were "attenuated" from the unconstitutional stop and arrest (I.J. at 9-10 (citing *United States v. Perez-Esparza*, 609 F.2d 1284, 1289 (9th Cir. 1979))). *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (stating that consideration of evidence obtained both directly and indirectly from conduct that violated the Fourth Amendment is barred by operation of the exclusionary rule).

The Immigration Judge also found the DHS's submission of a printout from the Mexican National Population Registry ("CURP") (Exh. 8A) inadmissible because it lacked authentication and could not be relied on as the sole evidence to establish the respondent's alienage, particularly where the only indication that the document referred to the respondent was his name (I.J. at 10-11). The Immigration Judge concluded that it is possible that several people could have the same name in a country as populous as Mexico (I.J. at 11). While the CURP would be probative in corroboration with other evidence, the Immigration Judge deemed it unreliable standing alone (I.J. at 11). The Immigration Judge declined to consider any additional evidence from the DHS submitted after the suppression hearing because it had made clear that the record would close after that hearing; the DHS had been put on notice that the burden of proof would shift to it if the respondent established *prima facie* evidence of a constitutional violation and the DHS did not meet its burden of rebutting the evidence (I.J. at 11; *see* Tr. at 18, 64-65). Therefore, the proceedings were terminated (I.J. at 12).

On appeal, the DHS asserts that the Immigration Judge erred in closing the evidentiary record immediately following the March 14, 2011, suppression hearing (DHS's Br. at 13). The DHS argues that it could not have foreseen that it would be required to demonstrate alienage and removability during a suppression hearing; since the Immigration Judge did not make the finding that the respondent had established *prima facie* evidence of an egregious Fourth Amendment violation until almost two months after the March 14, 2011, suppression hearing, the burden of disproving a Fourth Amendment violation or of providing other independent evidence to meet the burden of establishing the respondent's removability did not shift to the DHS until June 2, 2011, when the Immigration Judge issued his decision (DHS's Br. at 14). Therefore, the DHS asserts that it was unfair to close the hearing on March 14, 2011, without providing the DHS an additional opportunity to provide evidence after it had assessed the respondent's initial evidence alleging a Fourth Amendment violation (DHS's Br. at 16-17).

However, as noted by the Immigration Judge, once the respondent made a prima facie showing that a Fourth Amendment violation had occurred, the burden shifted to the DHS to rebut

the respondent's claim and establish the admissibility of evidence (I.J. at 11). The Immigration Judge made clear that upon hearing the evidence to support the motion to suppress, he would either grant and terminate proceedings or deny the motion and set the case for a merits hearing (Tr. at 6, 18, 64-65; I.J. at 11). The fact that some cases have multiple hearings on the issues of alienage, removability, and relief does not require that there be multiple hearings, as suggested by the DHS (DHS's Br. at 13; *see* Respondent's Br. at 7-9, 11-12). In this case, the Immigration Judge heard evidence on the issue of whether to suppress evidence which he made clear could result in termination of the proceedings if the respondent met his burden of proof. The DHS was given an opportunity to present its evidence in rebuttal and, therefore, we find no error in the Immigration Judge's decision.

The DHS also argues that the Immigration Judge erred in terminating proceedings because it presented clear and convincing independent evidence that the respondent is an alien (DHS's Br. at 17). According to the DHS, the Immigration Judge should have drawn a negative inference from the respondent's refusal to testify and erred in not considering the respondent's brother's testimony that the respondent was born in Mexico (DHS's Br. at 18-19; *see* Tr. at 62-63). In addition, the DHS asserts that other evidence it submitted also corroborated the respondent's alienage, including a USCIS Central Index System ("CIS") printout indicating that the respondent was issued a nonimmigrant visa in Mexico and that his country of birth and citizenship was Mexico (DHS's Br. at 20). A document obtained from the United States Department of State, Bureau of Consular Affairs, further substantiated this information (DHS's Br. at 20-21). Finally, the DHS submitted copies of the respondent's and his children's birth certificates all of which establish that the respondent was born in Mexico (DHS's Br. at 21-22).

As already noted, we do not find error in the Immigration Judge's refusal to consider additional evidence submitted subsequent to the March 14, 2011, suppression hearing. This included the USCIS Central Index System printout and the Department of State document.

We are not persuaded that the respondent's lack of testimony provides an independent basis for finding him removable. While the Immigration Judge may draw a negative inference from an alien's silence in deportation proceedings, he is not required to do so (*see* Respondent's Br. at 11 (citing *Matter of Guevara*, 20 I&N Dec. 328, 241 (BIA 1990)). As noted in *Matter of Guevara*, *supra*, at 242, an alien who remains silent after being confronted with evidence of alienage and his potential deportability may leave himself open to adverse inferences, which may lead to a finding of deportability. *See United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154-55 (1923); *United States v. Alderete-Deras*, 743 F.2d 645, 647 (9th Cir. 1984) (stating that in a deportation hearing there is no prohibition against drawing an adverse inference when a petitioner invokes his Fifth Amendment right against self-incrimination). The case at hand presents a different set of facts, where illegal evidence has been submitted and obtained through an illegal seizure of the respondent. The burden of proof no longer lies with the respondent and there was no requirement that he take the stand in order to testify about his alienage. At any rate, the respondent did not invoke his right against self-incrimination here, as in cases discussing whether to draw a negative inference from an alien's silence. *See id.* The Immigration Judge made clear that both the respondent and the DHS could present evidence at the March 14, 2011, hearing, and the DHS did not call the respondent to testify. In other words, the respondent did not refuse to testify so much as he was simply not questioned by either his attorney or opposing counsel.

However, we find it necessary to remand in order to clarify whether the respondent's brother's testimony was considered inasmuch as it appears to be evidence of alienage which is independent of the evidence found inadmissible because of the unlawful stop. *See Wong Sun v. INS*, *supra*, at 487-88 ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."); *see also United States v. Ceccolini*, 435 U.S. 268, 275 (1978) (holding that the testimony of a third party witness whose identity was discovered as a result of the Fourth Amendment violation may be admissible where the discovery of the witness is sufficiently attenuated from the taint of the constitutional violation). Accordingly, the following order will be entered.

ORDER: The record of proceedings is remanded for further proceedings consistent with this order.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
200 EAST MITCHELL DRIVE, SUITE 200
PHOENIX, ARIZONA 85012

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
SOTO-GARCIA, Enrique	)	**FILE NO.:** A087-534-842
Respondent	)	**DATE:** JUN - 2 2011

On Behalf of the Respondent:
John D. Shaw, Esq.
Law Office of Shaw & Gould
1536 W. Thomas Road
Phoenix, AZ 85015

On Behalf of the Government:
Reed Allen, Esq.
Assistant Chief Counsel
Department of Homeland Security
2035 North Central Avenue
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ORDER AND DECISION OF THE IMMIGRATION COURT

I. Procedural History

On October 28, 2009, the Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA"), charging the respondent as subject to removal from the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("the Act"), as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at any time or place other than as designated by the Attorney General. [Ex. 1] In support of this charge, DHS alleged that the respondent: (1) is not a citizen or national of the United States; (2) is a native and citizen of Mexico; (3) arrived in the United States at or near El Paso, Texas, on or about March 26, 2002; and (4) was not then admitted or paroled after inspection by an Immigration Officer. *Id.*

On March 30, 2010, the respondent filed a Motion to Suppress Evidence and Terminate the Proceedings. Specifically, the respondent petitioned the Court to suppress the Form I-213, Record of Deportable/Inadmissible Alien, and all statements made by the respondent to DHS because the "evidence was obtained as a result of egregious violations of the respondent's 4th Amendment rights." [Ex. 2A at 3] The respondent claims that "all evidence such as birth certificate or other evidence of alienage which DHS may seek to offer in this case is tainted as fruit of the poisonous

tree." *Id.* On May, 20, 2010, DHS filed its opposition to the respondent's motions to suppress and terminate proceedings, together with a submission of evidence, which included the Form I-213 and birth certificates for the respondent's two children. [Ex. 3] On July 22, 2010, the respondent submitted a response to the DHS opposition. [Ex. 4] On November 2, 2010, the Court ordered a full suppression hearing, set for March 14, 2011. [Ex. 6]

On February 14, 2011, DHS submitted a motion for extension of time to submit additional evidence in support of its brief, which the respondent opposed. [Ex. 7A] On February 28, 2011, the Court granted DHS' motion for extension of time. *Id.* After the suppression hearing, DHS submitted another motion to extend time, which was denied by the Court on April 12, 2011. On April 12, 2011, the respondent filed a memorandum in support of his position. On April 14, 2011, DHS filed its statement of position.

II. Statement of Law

DHS bears the burden of proving, by clear, convincing, and unequivocal evidence, that the respondent is removable as charged. *See Woodby v. INS*, 385 U.S. 276 (1966). As a part of its burden, the government "must prove 'alienage,' i. e., that the subject of the proceeding is an alien." *Iran v. INS*, 656 F.2d 469, 471 (9th Cir. 1981). The respondent argues that all evidence obtained during the alleged illegal stop by United States Customs and Border Protection ("CBP") should be suppressed because it was obtained in violation of his rights under the Fourth Amendment of the United States Constitution. The respondent also argues that the proceedings should be terminated because, if this evidence is excluded, the government cannot meet its burden of establishing removability as charged.

"The general rule in a *criminal* proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040-41 (1984) (emphasis added). "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). "[A]n initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.*; *see also Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."). "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police

cannot, as a matter of law, amount to a seizure of that person." *Mendenhall*, 446 U.S. at 555.

Once an individual has been "seized," the Court must determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. In determining whether the scope of the officer's actions were reasonable, we consider whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Terry*, 392 U.S. at 21. The "seizure must always be rooted in some substantial basis in addition to the subject's appearance or name." *Orhorhaghe*, 38 F.3d at 498. "[W]hen dealing with an unreasonable stop based solely on a person's race or ethnicity, the question of whether an agent's conduct constitutes a bad faith violation only arises once it has already been established that the stop was based solely on race." *Gonzalez-Rivera*, 22 F.3d at 1450 n.8.

Immigration proceedings are not bound by strict rules of evidence. *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983); *see also Trias-Hernandez v. INS*,528 F.2d 366, 369 (9th Cir. 1975) ("Hearsay is admissible in administrative proceedings, which need not strictly follow conventional evidence rules."); *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). In immigration proceedings, evidence must be probative and its admission must be "fundamentally fair" so as not to deprive the individual of due process of law. *See Baliza*, 709 F.2d at 1233; *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980). The Court "may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." 8 C.F.R. § 1240.7(a). This Fourth Amendment "exclusionary rule" does not generally apply in immigration proceedings. *See id.* at 1050-51; *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979). According to the Ninth Circuit, however, *egregious* Fourth Amendment violations do warrant the application of the exclusionary rule in immigration proceedings.[1] *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448 (9th Cir. 1994). "Under Ninth Circuit law, a bad faith constitutional violation occurs when 'evidence is obtained by deliberate violations of the fourth amendment, or by conduct a reasonable officer should have known is in violation of the Constitution.'" *Id.* at 1449 (quoting *Adamson v. CIR*, 745 F.2d 541, 545 (9th Cir. 1984)). "[A] fundamentally unfair Fourth Amendment violation is considered egregious regardless of the probative value of the evidence obtained." *Id.* at 1451.

Similarly, the Board of Immigration Appeals ("the Board") has held that:

> evidence resulting from a search and seizure in violation of fourth amendment rights is not for that reason alone excludable from civil deportation proceedings. Every fourth amendment violation will not of necessity result in a finding that the

1 In *Lopez-Mendoza*, the Supreme Court limited its holding to situations that do not involve "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Lopez-Mendoza*, 468 U.S. at 1050-51.

admission of resulting evidence is fundamentally unfair.

Matter of Toro, 17 I&N Dec. at 343 (internal citations omitted). "The use of admissions obtained from a respondent involuntarily to establish deportability is fundamentally unfair." *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980).

When a respondent claims that evidence was obtained in violation of due process, the burden is on the respondent to establish a prima facie case of illegality. An affidavit alone is not sufficient to meet this burden; therefore, the respondent's claims must also be supported by testimony. *Barcenas*, 19 I&N Dec. at 611-12. "Statements in a motion for suppression must be specific and detailed. They should not be general, conclusory, or based on conjecture. They must be based on personal knowledge. They must set forth a prima facie case. The articles to be suppressed must be enumerated." *Matter of Wong*, 13 I&N Dec. at 822. If the respondent establishes a prima facie case, DHS will be called upon to assume the burden of justifying the manner in which it obtained its evidence. *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975); *see also Matter of Wong*, 13 I&N Dec. 820 (BIA 1971); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971).

III. Analysis

The respondent claims that he was unlawfully stopped, detained, and placed in removal proceedings, constituting an egregious violation of his constitutional rights. As a result of the respondent's arrest, DHS obtained evidence regarding the respondent's alienage. According to the respondent, these items of evidence should be excluded as "fruit of the poisonous tree." *See generally Wong Sun v. United States*, 371 U.S. 471 (1963).

In support of his motion, the respondent offered the testimony of the other occupants in the car, Victor Renteria, Jesus Soto, and Victor Saavedra, at the suppression hearing on April 12, 2011. Their testimony will be summarized below.

A. Testimony

Victor Renteria testified first. He is a Hispanic male and a resident of Ventura, California. He is a friend of the respondent and Jesus Soto, and he is the brother-in-law of Victor Saavedra. Mr. Renteria had gone to Houston with his uncle and asked Mr. Soto for a ride back to California from Avondale, Arizona, because it was cheaper than taking the bus. He testified that he, Mr. Soto, Mr. Saavedra, and the respondent left in Mr. Soto's truck, a four-door white Toyota Tacoma, at around 8:00 p.m. near the end of October. Mr. Soto drove westbound on the Interstate 10 out of Phoenix, Arizona. He stated that nothing unusual happened as they drove through Arizona. At the Arizona-California border, the truck stopped at the inspection station in a normal fashion. The inspectors peered inside, and waved them through the checkpoint. He stated that no one in the vehicle acted unusual and that the truck merged back onto the highway in an ordinary manner. Four or five

minutes later, he noticed flashing lights behind them. Mr. Soto pulled over in a normal fashion by putting his signal on and merging onto the right side of the road. After the car pulled to the side of the road, two CBP agents approached the vehicle on the passenger side. Mr. Renteria was seated the back of the car, on the passenger side. As the officers approached, Mr. Renteria rolled down the car window and asked the agents why they stopped the vehicle. One of the agents responded, "I can smell when there are undocumented people in the car. That's what I get paid for." The agents then asked the men to step out of the car, patted the men down, searched the truck with canine assistance, and arrested the respondent. The remaining three men resumed their trip. Mr. Renteria testified that on that date, he was certain that they were never in a rental car, nor in a Hyundai Sonata, and that he did not know "Sergio Garcia" or "Jesus Ochoa-Torres."

Victor Saavedra testified next. He is a Hispanic male and a resident of Aurora, Colorado. Previous to living in Aurora, he lived in Avondale, Arizona, and prior to that, Ventura, California. He is a friend of the respondent and Jesus Soto, and he is the brother-in-law of Victor Renteria. Mr. Saavedra was headed to Ventura to pick up his then-fiancée, now wife, and move to Avondale. He asked Mr. Soto for assistance because Mr. Soto owned a white four-door Nissan Frontier with a hitch. Mr. Saavedra planned to haul a trailer from Ventura to Avondale with Mr. Soto's help. He, Mr. Soto, Mr. Renteria, and the respondent left from Avondale at around 8:30 p.m. on October 28 or 29. Mr. Soto drove westbound on the Interstate 10. Mr. Saavedra was seated in the back seat on the driver's side, behind Mr. Soto. He stated that nothing unusual happened as they drove through Arizona. At the Arizona-California border, their vehicle stopped at the inspection station, passed through without incident, and merged back onto the highway in an ordinary manner. Four or five minutes later, he noticed flashing lights behind them and Mr. Soto pulled over. As the CBP agents approached the vehicle, Mr. Renteria asked why the vehicle had been stopped. One of the agents responded, "I can smell it and I get paid to know when there are undocumented people in the car." The agents ordered the men to step out the car and empty their pockets, searched the truck several times with canine assistance, and arrested the respondent. The remaining men resumed their trip. He testified that on that date, he was certain that they were never in a rental car, nor in a Hyundai Sonata, and that he did not know "Sergio Garcia" or "Jesus Ochoa-Torres."

Jesus Soto was the final witness and testified on the stand with the aid of a Spanish interpreter. He is a Hispanic male and a resident of Phoenix, Arizona. He is the brother of the respondent and a friend of Victor Renteria and Victor Saavedra. Mr. Soto agreed to give Mr. Renteria a ride to Ventura, California, pick up Mr. Saavedra's fiancée in Ventura and help Mr. Saavedra haul a trailer from Ventura to Avondale. He owns a four-door 2002 Nissan Frontier, which he was driving on October 24, 2009. He testified that he, Mr. Renteria, Mr. Saavedra, and the respondent left from Phoenix, Arizona and headed westbound on the Interstate 10. He stated that nothing unusual happened as they drove through Arizona. At the Arizona-California border inspection station, he stopped in an ordinary manner and rolled down his window. After the inspectors waved the vehicle through, he rolled up his windows and merged onto the highway in a normal fashion. Four or five minutes later, Mr. Soto noticed there was a car behind him, so he

changed lanes to allow the car to pass. The car changed lanes as well, and put its lights on. Mr. Soto then pulled over to the right side of the road to stop, and rolled down the windows. The agents approached on the passenger side of the truck and instructed him to turn off his car, which he did. The first thing the agents asked was if there was anyone in the car that did not have documents. He testified that Mr. Renteria then had a conversation with the agent, which he did not understand because it was in English. He later learned from Mr. Renteria that the officer had told him that he could smell undocumented people in the car. The agents asked all of the men for their documents and to empty out their pockets. The respondent was arrested and the rest of the men resumed their trip. He testified that he has never been in a Hyundai Sonata. He also stated that on another occasion, he drove a rental car to California, but not in October 2009. He did not know "Sergio Garcia" or "Jesus Ochoa-Torres."

B. *Prima Facie* Case of Illegality

The respondent has set forth a *prima facie* case of illegality for the motion for suppression. At the evidentiary hearing, the respondent submitted three credible and consistent testimonial accounts of the stop by CBP. The only significant discrepancy was Mr. Renteria's testimony that the vehicle was a Toyota Tacoma. Nevertheless, Mr. Renteria testified that the vehicle was a white four-door pickup truck and conceded that he might not have recalled the exact make and model of Mr. Soto's car.

"Under Ninth Circuit law, all 'bad faith violation[s] of an individual's fourth amendment rights' are considered sufficiently egregious to 'require[] application of the exclusionary sanction in a civil . . . proceeding.'" *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994) (quoting *Adamson v. CIR*, 745 F.2d 541, 545 (9th Cir. 1984)). "Under Ninth Circuit law, a bad faith constitutional violation occurs when 'evidence is obtained by deliberate violations of the fourth amendment, or by conduct a reasonable officer should have known is in violation of the Constitution.'" *Id.* Whether a reasonable officer should have known his conduct violated the Constitution depends in part on whether the constitutional right was clearly established in that particular context at issue. *Id* at 1450 (holding that a reasonable officer should have known a stop based solely on a person's Hispanic appearance was unconstitutional because "the [stop] occurred long after the Supreme Court... made clear that the Constitution does not permit such stops.") The Fourth Amendment allows officers on roving patrol stop vehicles "only if they are aware of specific articulable facts together with rational inferences from these facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

At the same time, in determining whether a particular stop by the Border Patrol has met the reasonable suspicion test, it is crucial that "the 'articulable facts' forming the basis of a reasonable suspicion [be] 'measured against an objective reasonable man standard, not by the subjective impressions of a particular officer.'" *Nicacio v. INS*, 797 F.2d 700, 703 (9th Cir. 1986). As the

Nicacio court explained, all "'permissible deductions' ... or 'rational inferences' ... must ... flow from objective facts and be capable of rational explanation. While an officer may evaluate the facts supporting reasonable suspicion in light of his experience, experience may not be used to give the officers unbridled discretion in making a stop." *Id.* at 705. "In other words, an officer's experience may furnish the background against which the relevant facts are to be assessed, as long as the inferences he draws are objectively reasonable, but 'experience' does not in itself serve as an independent factor in the reasonable suspicion analysis." *United States v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. 2000).

The respondent claims that he was stopped because of his Hispanic appearance, which would constitute an egregious violation of the Fourth Amendment if true. [Ex. 2A at 5] The occupants in the vehicle consistently and credibly testified that when asked why he stopped the respondent's vehicle, the CBP agent responded it was because he could "smell undocumented people in the car." Considering that CBP agents were following the respondent in a vehicle, that both vehicles were moving, and that undocumented people do not have any easily identifiable scent, this cannot be considered an articulable fact nor a rational inference that formed the basis for reasonable suspicion. The agent's statement was undoubtedly inappropriate given the situation, and possibly a racist statement about undocumented people in general. The Ninth Circuit emphasized that "[a]s a nation we have acted decisively to remove all vestiges of racial discrimination from our lives [and that] [n]ot for a moment will we tolerate racist behavior." *Frazer v. United States,* 18 F.3d 778, 785 (9th Cir. 1994). Therefore, the Court finds that the testimonial evidence submitted by the respondent fully supports the respondent's affidavit submitted for suppression.

The Court finds that the respondent has established a *prima facie* case for suppressing the evidence arising out of an illegal stop. The burden therefore shifts to DHS to justify the manner in which it obtained its evidence. *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975); *see also Matter of Wong*, 13 I&N Dec. 820 (BIA 1971); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971).

C. DHS Burden to Justify Manner of Obtaining Evidence

Once the respondent establishes a *prima facie* case, DHS bears the burden of justifying the manner in which it obtained its evidence. *Matter of Barcenas,* 19 I&N Dec. at 611 (BIA 1988). At the closing of the record, the only document DHS submitted in support of its position was the Form I-831, a continuation page of the Form I-231. The Form I-831 contains CBP's written account of the stop.

The Court cannot rely on the Form I-831 because the information contained within was incorrect, making it inherently unreliable and thus not fundamentally fair. The sole test for admission of evidence in immigration court is whether the evidence is probative and its admission is fundamentally fair. *Trias-Hernandez v. INS,* 528 F.2d 366, 369 (9th Cir. 1975). The Form I-831 in this case appears to document a completely separate encounter. According to it, the CBP agents

stopped a rented "four-door tan 2009 Hyundai Sonata," which is a sedan, not a truck, driven by a "Sergio Garcia." The agents then detained all four occupants, including a "Jesus Ochoa-Torres." However, according to the consistent and credible testimony of the witnesses, neither of these men were present in the vehicle, and only one person, the respondent, was detained by CBP on the day in question. Therefore, as the Form I-831 obviously contains incorrect information, it is unreliable and not fundamentally fair, and is therefore inadmissible.

DHS has not provided any other evidence justifying the manner in which it obtained its evidence, including attempting to offer the testimony of the officers involved in the stop or the respondent. DHS argues it was denied an opportunity to call the respondent at the suppression hearing, but this is incorrect. At the March 14, 2011, hearing, the Court explained that the respondent could call his witnesses in any order and never denied DHS an opportunity to call the respondent as its own witness to rebut the *prima facie* case for suppression. In fact, the Court made it clear multiple times during the suppression hearing that all evidence should be presented at the hearing, and that the Court would subsequently issue a written decision suppressing the evidence and terminating the proceedings or sustaining the charge and proceeding to determine eligible forms of relief.

Therefore, DHS has failed to meet its burden to justify the manner in which it obtained its evidence, and all evidence that it obtained as a result of the illegal stop will be suppressed. Most obviously, this will include the Forms I-213 and I-831, completed immediately after the respondent was detained.

D. Independently Obtained Evidence of Alienage

The Court has found a Fourth Amendment violation in this case, and therefore will suppress all evidence obtained as a result of the arrest or as "fruit of the poisonous tree." The "fruit of the poisonous tree doctrine" prohibits the "introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the [Fourth Amendment violation], up to the point at which the connection with the [violation] becomes 'so attenuated as to dissipate the taint.' *Murray v. United States.*, 487 U.S. 533, 536-537 (quoting *Nardone v. United States,* 308 U.S. 338, 341 (1939)). *See also Wong Sun,* 371 U.S. 471, 484-485 (1963). Not all evidence is "fruit of the poisonous tree" simply because "it would not have come to light but for the illegal actions of the police." *Id.* at 488. "Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting Maguire, Evidence of Guilt, 221 (1959)). In evaluating whether derivative evidence has become attenuated as to dissipate the taint, the Court considers such factors as temporal proximity of the violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct. *See Brown v. Illinois*, 422 U.S. 590, 603-604 (1975). Finally,

the "purpose [of the exclusionary rule] is to deter-to compel respect for the constitutional guaranty in the only effectively available way-by removing the incentive to disregard it.'" *Elkins v. United States,*, 364 U.S. 206, 217 (1960).

If it is established that evidence was independently obtained, however, it may not be suppressed. "[R]egardless of how [an] arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation." *Lopez-Mendoza*, 468 U.S. at 1043. "[I]t is well established that '[t]he exclusionary rule has no application where the government learned of the evidence from an independent source.' ...Hence, once the respondent has been placed in deportation proceedings, any evidence which is independently obtained may be relied upon, regardless of the alleged illegal arrest." *Matter of Cervantes*, 21 I&N Dec. 351, 353 (BIA 1996).

Further, "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984); *see also Matter of Sandoval*, 17 I&N Dec. at 79 (noting that identity, *as distinguished from alienage*, is not suppressible as the "fruit of the poisonous tree"). "Once an alien's identity is learned, the Service can entirely avoid triggering the exclusionary rule in all cases where documents lawfully in the Service's possession evidence unlawful presence." *Id.* "Since the person and identity of the respondent are not themselves suppressible . . . the INS must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest." *Lopez-Mendoza*, 468 U.S. at 1043; *see also United States v. Orozco-Rico*, 589 F.2d 433, 435 (9th Cir. 1978) ("[T]here is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence. The file can be used so far as relevant.").

DHS has submitted the respondent's children's birth certificates as evidence of his Mexican alienage because they indicate the respondent's place of birth as Mexico. [*See* Ex. 3, Tab C] DHS conceded that it came into possession of the birth certificates when the respondent submitted them during bond proceedings and argues that they are independently obtained evidence. The Court finds that allowing such evidence in this removal proceeding would be permitting DHS to use evidence which it has "come at by exploitation of [its] illegality." *See Wong Sun*, 371 U.S. at 488. The Court evaluates this evidence according to the attenuation factors laid out in *Brown*. 422 U.S. at 603-604. Though the bond hearing happened on November 17, 2009, twenty-four days after the respondent was taken into custody, the Court finds that the respondent's detention itself was illegal, as a direct result of the illegal stop. Furthermore, the respondent lacked sufficient "free will" in submitting his children's birth certificates at the bond hearing. The Ninth Circuit has stated that

> free will in this Fourth Amendment exclusionary rule sense means something apart from 'voluntariness,' or the absence of coercion, in the Fifth Amendment sense. The

> "free will" of an inculpating defendant is to be considered in light of the twin policies deterrence and judicial integrity of the Fourth Amendment's exclusionary rule. It is not enough for Fourth Amendment attenuation that the statement be uncoerced; the defendant's "free will" must also be sufficient to render inapplicable the deterrence and judicial integrity purposes that justify excluding his statement.

U.S. v. Perez-Esparza, 609 F.2d 1284, 1289 (9th Cir. 1979).

In bond proceedings, proof of familial ties is a factor the court considers when determining whether to grant bond. *Matter of Shaw,* 17 I&N Dec. 177 (BIA 1979). Though the respondent submitted the certificates "voluntarily," the Court considers that he did so in order to be released from an illegal detention, and therefore the respondent's free will is not sufficient to "render inapplicable the deterrence and judicial integrity purposes that justify excluding" the birth certificates. *Perez-Esparza,* 609 F.2d at 1289. Because of this, DHS has not shown that intervening circumstances existed between the illegal stop of the respondent, his subsequent illegal detention and the bond proceeding. Further, DHS has not argued that the respondent's children's birth certificates would have been "inevitably discovered" through independent means. *See Nix v. Mancera-Londono,* 912 F.2d 373, 375 (9th Cir. 1990). Therefore, the Court finds that the birth certificates were not attenuated to the illegal stop and detention of the respondent.

Finally, the Court also notes that racial discrimination is a particularly flagrant kind of official misconduct. The respondent has established, in the absence of government justification, that the stop was race-based. As the Ninth Circuit stated, "[w]e have long regarded racial oppression as one of the most serious threats to our notion of fundamental fairness and consider reliance on the use of race or ethnicity as a shorthand for likely illegal conduct to be 'repugnant under any circumstances.'" *Gonzalez-Rivera,* 22 F.3d at 144. Due to the flagrantly illegal nature of stopping the respondent based on his and his fellow passengers' Hispanic appearances, the Court finds the respondent's children's birth certificates warrant exclusion to deter future transgressions. Accordingly, the Court will suppress the birth certificates as derivative evidence tainted by the egregious violation of the respondent's Fourth Amendment constitutional rights.

During the suppression hearing, DHS also submitted a document which appears to be a print-out from the Mexican National Population Registry ("CURP"). [*See* Ex. 8A] The document lists the respondent's name, and a "registration date" of October 1, 2000. The document indicates that a person with the respondent's name was born in Sinaloa. [*See id.*] The document states that the sole purpose of the CURP is "the response of the [Mexican government] to allow and speed up the exercise of citizen's rights derived from governmental procedures and services." [*See id.*] The respondent's attorney objected to the document because it was unauthenticated. The Court agrees. To be admissible in immigration proceedings, evidence must be probative and its admission must be "fundamentally fair" so as not to deprive the individual of due process of law. *See Baliza*, 709 F.2d at 1233; *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980). Though immigration proceedings are

not bound by strict rules of evidence, in the Ninth Circuit, official records and public documents from foreign governments may be authenticated either through the requirements of 8 C.F.R. § 1287.6 (2010), or through any recognized procedure, including the Federal Rules of Evidence. *Vatyan v. Mukasey*, 508 F.3d 1179, 1182-83 (9th Cir. 2007). The method of authentication that the party submitting the evidence utilizes may affect the weight of the evidence, and Immigration Judges "retain broad discretion to accept a document as authentic or not based on the particular factual showing presented." *Id.* at 1185.

The CURP document submitted by DHS has not been authenticated by any means, and accordingly, the Court finds that it is unreliable. Furthermore, it has been submitted as sole proof of the respondent's alienage, and does not corroborate with any other evidence in the record that the respondent is a citizen of Mexico. *Cf. United States v. Rebon-Delgado*, 467 F.2d 11, 13 (9th Cir. 1972) (finding that a Mexican police citation in the respondent's name "was properly admitted without formal authentication as a foreign document, not as proof of the facts it recited, but solely as an object in appellant's possession that tended to corroborate his admission that he had been in Mexico"). Lastly, it contains no information identifying the respondent as the subject of the document other than the name "Enrique Soto Garcia." In a country as populous as Mexico, and a region as populous as Sinaloa, it is entirely possible that there are multiple individuals by this name. The Court therefore finds that although this document would be probative in corroboration with other evidence, without authentication and standing alone, it would be fundamentally unfair to the respondent if it is considered proof of alienage.

Finally, DHS argues that it should be given an opportunity to submit additional evidence to both rebut the respondent's claims of an egregious Fourth Amendment violation and to establish alienage through independent means. The burden, however, shifted to DHS at the suppression hearing. Much like asylum hearings where the burdens of proof can shift multiple times during one hearing, DHS had the opportunity to rebut the respondent's claims and establish alienage during the hearing. In the Court's order granting the suppression hearing, the Court put DHS on notice that the burden would shift to it after the respondent established a *prima facie* case for suppression. [*See* Ex. 6 at 5] The Court also made it clear to DHS during the suppression hearing that the record was closed at the end of the hearing and it would not be able to submit additional evidence. Therefore, the Court will not consider any evidence submitted by DHS after the suppression hearing, including the respondent's birth certificate and other documents submitted with DHS' post-hearing statement of position.

III. Conclusion

The Court finds that there was an egregious Fourth Amendment violation in this case and that DHS failed to justify the manner in which the contested evidence was obtained. Accordingly, the contested pieces of evidence will be suppressed. The Court also finds that DHS has failed to prove respondent's alienage with evidence obtained through independent means. The Court thus finds that

allegations (1) and (2) are not sustained by clear, convincing, and unequivocal evidence, and therefore it cannot sustain the charge of removability under section 212(a)(6)(A)(i) of the Act. *See Woodby v. INS*, 385 U.S. 276 (1966).

Accordingly, the following orders shall be entered:

ORDERS: **IT IS ORDERED THAT** the respondent's motion to suppress is **GRANTED**.

IT IS FURTHER ORDERED THAT allegations (1) and (2) in the NTA are not sustained by clear, convincing, and unequivocal evidence.

IT IS FURTHER ORDERED THAT the charge of removability is not sustained pursuant to section 212(a)(6)(A)(i) of the Act.

IT IS FINALLY ORDERED THAT the respondent's motion to terminate proceedings is **GRANTED**.

JUN - 2 2011
Date

John W. Richardson
U.S. Immigration Judge

CERTIFICATE OF SERVICE
SERVICE BY: Mail (M) Personal Service (P)
TO: [X] DHS [ ] Alien [X] Alien's Attorney
Date: 6-2-11 By: _____ (Court Staff)