

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
621 SEVENTEENTH STREET, SUITE 300
DENVER, CO 80293

In The Matter Of:) **Date: October 21, 2010**
)
GUERRERO PARADA, Isabel)
A# 097 826 234)
)
GUERRERO PARADA, Citlali) **IN REMOVAL**
A# 094 979 940) **PROCEEDINGS**
)
SOTO-GUTIERREZ, Mario Alberto)
A# 094 979 939)
)
Respondents.)

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (“INA” or “the Act”), as amended, in that, an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Motion to Suppress
Motion to Terminate

ON BEHALF OF RESPONDENT:

Theodore Hess, Esq.
Hess & Schubert, LLP
804 Colorado Avenue, 2nd Floor
Glenwood Springs, CO 81601

ON BEHALF OF SERVICE:

Weldon Caldbeck, Assistant Chief Counsel
U.S. Department of Homeland Security
12445 East Caley Avenue
Centennial, CO 80111

WRITTEN DECISION

I. Procedural History

The three respondents, Ms. Isabel Guerrero-Parada, Ms. Citlali Guerrero-Parada and Mr. Mario Soto-Gutierrez, were issued notices to appear on March 24, 2009, charging them with being present in the United States without being admitted or paroled pursuant to INA §

212(a)(6)(A)(i). (Ex. 1, Notices to Appear ["NTAs"].) The respondents allege that they were subjected to an unlawful search and seizure by agents of the Department of Homeland Security ("DHS" or "Government") in violation of the Fourth and Fifth Amendments of the U.S. Constitution, and have moved to suppress all evidence and to terminate these removal proceedings. (Ex. 2, Resp'ts' Mot. to Suppress/Terminate ["Mot. to Suppress"], 03/26/10.) In particular, the respondents seek suppression of all statements, identification documents, all evidence in the Record of Deportable/Inadmissible Alien (Form I-213) including evidence of nationality and citizenship, and all derivative evidence resulting from the entry of the respondents' home on March 24, 2009. (*Id.*) DHS opposed the respondents' motion, and an evidentiary hearing was conducted on July 28, 2010 at the Denver Immigration Court ("Court") to take testimony from the parties. (Digital Audio Recording ["DAR"], 07/28/10.) At the conclusion of the hearing, both parties were given an opportunity to submit written closing arguments. (*Id.*)

II. Evidence

A. Documentary Evidence

The Court carefully considered the following documents submitted on behalf of the respondents and the Department of Homeland Security:

- Exhibit 1, Notices to Appear for all three respondents;
- Exhibit 2, Respondents' Motion to Suppress and Terminate;
- Exhibit 3, DHS Opposition to Motion to Suppress and Terminate, including Records of Deportable/Inadmissible Alien (I-213) for all three respondents;
- Exhibit 4, "Constitution on ICE: A Report on Immigration Home Raid Operations," Immigration Justice Clinic of the Benjamin N. Cardozo School of Law at Yeshiva University, 2009, submitted by the respondents;
- Exhibit 5, Illustrations of the residence at 25825 Highway 82 (for identification purposes only), submitted by the respondents, including:
 - Exhibit 5A, Illustration of the outside of the residence;
 - Exhibit 5B, Illustration of the first floor of the residence;
 - Exhibit 5C, Illustration of the second floor of the residence;
 - Exhibit 5D, Illustration of the third floor of the residence;
- Exhibit 6, Photographs of the residence at 25825 Highway 82, submitted by the Department of Homeland Security, including:
 - Exhibit 6A, Photograph of the residence from across Highway 82;
 - Exhibit 6B, Photograph of the front of the residence;
 - Exhibit 6C, Photograph of the front of the residence;
- Exhibit 7, Photographs of the front door and primary entrance to the residence, submitted by the respondents;
- Exhibit 8, Record of Deportable/Inadmissible Alien (I-213) for Bogarin Rodriguez Encarnacion, non-respondent resident of 25825 Highway 82;
- Exhibit 9, Photographs of the interior of the living area or common area, submitted by the respondents.

The Court has also considered the respondents' and DHS' closing arguments, submitted to the Court on September 9, 2010 and September 10, 2010, respectively. (Resp'ts' Closing Arguments, 09/09/10; DHS Closing Arguments, 09/10/10.)

B. Testimony of Respondent Citlali Guerrero Parada

The first witness was respondent Citlali Guerrero, a resident of 25825 Highway 82, located in Snowmass Village near Basalt, Colorado. (DAR, 07/28/10.) Ms. Guerrero testified that she was present in the house on the morning of March 24, 2009, when ICE agents entered her home and questioned her and the other residents. (*Id.*) She stated that at approximately 5:30 a.m., she awoke to a light in her face. (*Id.*) Ms. Guerrero indicated that her room was on the first floor, just off the living area. (*Id.*; *see also* Ex. 5B, Diagram of Residence.) She stated that the light was from a flashlight used by an officer, and when she began to get out of bed, the officer left the room and closed the door behind him. (DAR, 07/28/10.) She testified that he then proceeded to knock at her door, stating that there had been an accident and that he wanted to make sure everyone was safe. (*Id.*) Ms. Guerrero then stated that she did not know what to do; the officer continued knocking and Ms. Guerrero also heard a lot of noise outside her bedroom. (*Id.*) She stated that she looked out the window but did not see any accident. (*Id.*) Her husband and her son were also in the room, and she stated her son appeared scared. (*Id.*) When asked as to whether the front door to the home was open or closed, Ms. Guerrero testified that she was unsure if it was locked but it was "definitely closed." (*Id.*)

Ms. Guerrero testified that she finally opened her bedroom door and the officer came in and shined his flashlight around the room. (*Id.*) She stated that the officer told her and her husband to get their identification cards and meet in the living room. (*Id.*) She then stated that when she and her husband arrived in the living room, they found many officers and most of their housemates were there. (*Id.*) Ms. Guerrero recalled that she and the others were asked if any of them had the last name "Garcia" and then the officers began questioning them regarding their personal information, including their names, where they were from and whether they had permission to be in the U.S. (*Id.*) Ms. Guerrero clarified that she has never known anyone with the name "Garcia" to have lived in the house. (*Id.*) She stated that after a short time, they were taken to the immigration offices in Glenwood Springs. (*Id.*)

On cross-examination, Ms. Guerrero was questioned as to her certainty regarding the time when the ICE agents arrived. (*Id.*) She stated that though she did not have a clock, she knew it was around 5:30 a.m. because of the amount of time the officers were at the house prior to the time it began to get light out. (*Id.*) She testified that it was her custom to get up at 6:30 a.m. to get ready for work. (*Id.*) Ms. Guerrero was also questioned regarding her reaction to the officer who entered her room shining a flashlight on her, and she stated that she was not sure who he was until he left the room and identified himself as the police. (*Id.*) She reiterated that she was afraid after the officer left the room because she looked out the window and did not see any accident. (*Id.*) Regarding the questioning done while in the living room, Ms. Guerrero stated she was told by the officers: "we're going to ask you some questions and you have to tell us if it's true." (*Id.*)

C. Testimony of Sujey Guerrero Parada

Ms. Sujey Guerrero Parada testified that she is the sister of the respondent Citleli Guerrero Parada, and has resided at 25825 Highway 82 for approximately seven years. (*Id.*) She recalled the morning of March 24, 2009, when ICE agents came to her home. (*Id.*) She testified that she was sleeping in her room on the second floor with her husband (and respondent) Mario and their daughter Carla when she heard knocking at her bedroom door. (*Id.*; *see also* Ex. 5C.) She heard someone yelling that there had been an accident, and recalled being told they should come out of the bedroom. (DAR, 07/28/10.) She stated that she awoke her husband and that her daughter was scared. (*Id.*) She stated that she, too, was worried that the worst had happened, and even feared her sister could be dead, so she started knocking on the other bedroom doors, telling the others to come out. (*Id.*) She testified that the officers arrived at her house sometime between 5:00 and 6:00 a.m., and that it was dark outside and the officers had flashlights. (*Id.*) With regard to the front door, Ms. Guerrero stated that she did not know whether it was open or closed, but thought it was closed but not locked. (*Id.*) On cross-examination, she testified that none of the officers actually entered her bedroom, but that they came up the stairs knocking on all of the doors and screaming. (*Id.*)

D. Testimony of Niyeli Vilchez Pena

Ms. Niyeli Vilchez Pena testified that she has resided at 25825 Highway 82 for approximately two years. (*Id.*) She stated that she lived on the third floor, and that on most mornings, she would get up at approximately 6:30 a.m. and would catch the 7:14 bus to work. (*Id.*; *see also* Ex. 5D.) Ms. Vilchez testified that she recalled the morning of March 24, 2009, when she was asleep on the third floor of the home and was awoken by a voice saying there had been an accident. (*Id.*) She stated that she quickly got up to look to see what had happened, but was not fully dressed so was escorted by an officer back in to her room to change her clothing. (*Id.*) She further testified that she then went over to wake up her brother and told him that there had been an accident. (*Id.*) Ms. Vilchez then testified that she and her brother were told by the officer that they needed to go down to the living room. (*Id.*)

E. Testimony of Respondent Isabel Guerrero Parada

The respondent, Ms. Isabel Guerrero Parada, testified that she had been living at 25825 Highway 82 for over three years and recalled the events of March 24, 2009. (*Id.*) She stated that she worked in housekeeping at Aspen Square, and would leave for work on a 7:15 a.m. bus. (*Id.*) She stated that every morning before work, she had a routine of waking up at 5:00 a.m. to prepare for the day. (*Id.*) The respondent testified that when she awoke that morning, she looked at the clock, which said 5:00, and she decided to sleep a bit longer. (*Id.*) She was unsure how much longer she slept, but testified that shortly thereafter, she heard footsteps going up and down the stairs and loud knocking. (*Id.*) She stated that she believed it was sometime around 5:30 a.m. (*Id.*) She also stated she heard the individuals attempt to open the door, and heard them screaming that there had been an accident. (*Id.*) The respondent believed something had happened to someone in her house, and awoke her husband. (*Id.*) She stated that after opening her bedroom door in response to the knocking, a male officer told her they had to go down to the living room. (*Id.*)

On cross-examination, the respondent stated that though she was never physically mistreated by any of the agents, she felt “the biggest mistreatment was psychological.” (*Id.*) She stated that once in the living room, a tall officer asked most of the questions and an individual named Cesar served as an interpreter. (*Id.*) She stated that she was not told that she had a right to remain silent and felt intimidated and coerced by the presence and conduct of the officers. (*Id.*) She testified that neither she nor her husband sought out professional help as a result of the March 24 events. (*Id.*) However, the respondent stated that her husband had problems with sleeping as a result of his arrest. (*Id.*)

F. Testimony of Steve Turza

Mr. Steve Turza, an ICE Special Agent assigned to DHS Investigations testified for the Government. (*Id.*) He stated he had been working with the agency for 25 years and had been assigned to the Colorado Springs area for the last ten years. (*Id.*) With regards to the events leading up to March 24, 2009, Agent Turza testified that the agency received anonymous information in November 2008 about a reported theft of a television from the Aspen Square Hotel. (*Id.*) Additionally, he testified that the tip included information regarding a number of individuals residing at 25825 Highway 82. (*Id.*)

As a result of the tip, Agent Turza stated that his agency cross-checked the names with their database and found some of the individuals in the home had prior deportation orders. (*Id.*) He testified ICE agents began surveillance at some point in December and continued through January. (*Id.*) Later, the agent testified that he began to formulate a plan to conduct “Knock and Talks” with the residents of the home. (*Id.*) He stated that the “plan was simple: knock on the door and get consent to speak to the aliens.” (*Id.*) Agent Turza clarified that the “Knock and Talks” had occurred many times in the past, where ICE agents knocked on a door and properly identified themselves. Agent Turza clarified that agents were required to state “who you represent and why you are there.” (*Id.*) If the individual did not allow entry, Agent Turza stated that the agents must leave. (*Id.*)

With regards to the events occurring on March 24, 2009, Agent Turza testified that he and about eight to ten agents from ICE Deportations and Removal and ICE Investigations arranged to leave their office in Glenwood Springs around 5:00 a.m. (*Id.*) He stated they arrived at the residence approximately 30 minutes later but did not approach the residence until just prior to 6:00 a.m. (*Id.*) When asked whether he entered the home prior to 6:00 a.m., Agent Turza stated that they did not because “no one was responding to our initial knocks.” (*Id.*) When asked about whether there was a policy regarding “Knock and Talks” prior to 6:00 a.m., Agent Turza clarified that Detention and Removal Agents were not allowed to conduct “Knock and Talks” prior to that time, and he and the others honored that policy. (*Id.*) He further stated there were only two “good Spanish speakers” who were both with Deportation and Removal. (*Id.*)

Agent Turza testified that his officers split in to two teams: one team approached the downstairs unit or “sub-basement” and Agent Turza went to the main door of the home on the second floor with the second team. (*Id.*) He stated when he arrived at the front door, it was

propped wide open by a rock, and all the lights were on inside the common area.¹ (*Id.*) He testified that he knocked on the door frame and shouted who he was and why they were there. (*Id.*) He stated that he spent approximately five minutes at the front door until the other team came upstairs; when they arrived, he testified he was still standing in the doorway, yelling inside. (*Id.*)

Agent Turza conceded that he had no consent to enter the home. He stated that he made the decision to enter the home because nobody responded to his knocks or his yelling, and based on another recent incident where a Colorado family had been killed in a home as a result of carbon monoxide poisoning. (*Id.*) He then testified that upon entering the home, he knocked on the first door inside (*see* Ex. 5B) and a man answered. (DAR, 07/28/10.) Agent Turza testified that he told the man he had questions about his immigration status, and asked whether he would be willing to come out to the living room. (*Id.*) He also stated that he asked the man if he could go upstairs to knock on the other doors, and the man said yes. (*Id.*) He then said he and some other agents proceeded to knock on each door and all agreed to come to the common area. (*Id.*)

Agent Turza testified that, once gathered in the common area, he did the questioning. (*Id.*) He stated he advised the residents of their ability not to answer his questions. (*Id.*) Once alienage was determined as a result of these questions, he testified that they did a pat down search for weapons and contraband, and transported the individuals to the processing facility in Glenwood Springs. (*Id.*)

On cross-examination, Agent Turza reiterated that he entered the home without consent or a warrant. He believed it was unusual and suspicious that nobody responded to his knocks after he had been knocking for a “long time,” and he worried that “there could have been something wrong.” (*Id.*) He further explained to the Court that the agents chose to approach the house at 6:00 a.m. because they had noticed individuals leaving the address for work very early and wanted to be sure they were there before this occurred. (*Id.*) Agent Turza conceded that he never told the residents of the home that they had a right to remain silent. (*Id.*)

G. Testimony of Christopher Carter

Mr. Christopher Carter, an ICE Special Agent, testified as to his recollection of the events of March 24, 2009. (*Id.*) Agent Carter testified consistently with Agent Turza as to the events leading up to the day in question and further reiterated the agency’s “Knock and Talk” policy. (*Id.*)

With regards to the events occurring at 25825 Highway 82 on March 24, Agent Carter stated that he was in the team that was sent to the bottom unit, where he and Agent Vanessa Hips conducted a “Knock and Talk.” (*Id.*) He testified that the tenant answered the door in response to their knocks and let them in to his unit and provided them with identification. (*Id.*) Agent Carter testified that he and Agent Hips heard Agent Turza yelling, and within ten minutes of initiating the original “Knock and Talk,” they were upstairs with Agent Turza. (*Id.*) Agent Carter stated that when he and Agent Hips arrived upstairs, Agent Turza had already entered the

¹ “Common area” and “living room” were used interchangeably by Mr. Turza and the other witnesses throughout their testimony. However, it is the conclusion of the Court is that the room in question is a living room rather than a “common area.”

dwelling and was in the living room talking to four or five individuals on the couch. (*Id.*) He further testified that there were two other DHS agents with Agent Turza: "IA Cesar Garcia and another IA." (*Id.*) Agent Carter stated that he then took up perimeter security and remained present in the room while all of the interviews with the residents occurred. (*Id.*) He stated that he did not witness any threats, mistreatment or physical contact, except when the individuals were being escorted to their rooms, and only for officer safety. (*Id.*)

On cross-examination, Agent Carter was asked about the ICE policy governing the time Deportation and Removal Operations may conduct "Knock and Talks." (*Id.*) Agent Carter stated that the only time Deportation and Removal is allowed participate in "Knock and Talks" is when they are a part of a Fugitive Operations team, and that team must wait until 6:00 a.m. to conduct a "Knock and Talk." (*Id.*) However, he stated that there were no Fugitive Operations agents in the group on March 24, 2009. (*Id.*)

H. Testimony of Vanessa Hips

Ms. Vanessa Hips, an ICE Special Agent, testified that she was present at 25825 Highway 82 on March 24, 2009 and conducted a "Knock and Talk" with Agent Carter at the basement unit. (*Id.*) She testified that though she did not work for investigations at the time but rather was then working for Deportation and Removal, she was called on to assist with the "Knock and Talk." (*Id.*)

Agent Hips testified that when she and Agent Carter joined Agent Turza upstairs, they walked through the main entrance of the home to find Agent Turza speaking with several individuals. (*Id.*) She also testified that other residents were coming down the stairs. (*Id.*) Agent Hips stated that she remained in the living room area until she was needed to accompany the female residents to get appropriate clothing, as it was extremely cold in the room. (*Id.*)

During Agent Hips' testimony, there was a discussion as to whether the area continually referred to by the agents as a "common area" was a living room, a hallway or an entrance. (*Id.*) Agent Hips stated that the residents of the home kept their personal belongings in their bedrooms, and therefore she believed the space was most likely a "common area," though she did state that there was a couch and a refrigerator in the area. (*Id.*)

I. Testimony of Respondent Mario Soto-Gutierrez

The respondent Mario Soto-Gutierrez was called to testify briefly with respect to the living or common area at 25825 Highway 82. (*Id.*) Mr. Soto was shown photographs of what he identified as the living room of the residence. (*Id.*; see also Ex. 9, Resp't Photos of Interior.) He testified that though the photographs were taken after March 24, 2009, they fairly and accurately depicted the living room on that day. (DAR, 07/28/10.) The respondent testified that there were only two differences: (1) there was a new couch in the far corner that was purchased after March 24, 2009; and (2) the television set which appears in the middle of the room in the photograph was previously in the space where the new couch sat. (*Id.*)

III. Statements of Law

A. The Fourth Amendment, Generally

The Fourth Amendment guarantees that individuals will be secure against unreasonable searches and seizures “in their persons, houses, papers and effects.” U.S. CONST. amend. IV. Searches conducted without a warrant issued upon probable cause are *per se* unreasonable. *Katz v. United States*, 389 U.S. 347 (1967). The Supreme Court has delineated a few specific exceptions to this rule, including where a search or seizure is conducted pursuant to voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). However, consent must not be coerced “by explicit or implicit means, by implied threat or covert force.” *Id.* at 228.

On the occasion where the government has neither obtained a warrant nor consent to enter a home, entry into a home may be deemed reasonable where exigent circumstances are present. *Payton v. New York*, 445 U.S. 573, 590 (1980). Specifically, the Tenth Circuit Court of Appeals has held that exigent circumstances exist only if: “(1) the officers had an objectively reasonable basis to believe that there was an immediate need to enter to protect the safety of themselves or others, and (2) the conduct of the entry was reasonable.” *United States v. Walker*, 474 F.3d 1249, 1253 (10th Cir. 2007). Ultimately, if the evidence is obtained as a result of a search or seizure deemed unlawful, the evidence shall be excluded as fruit of a poisonous tree. *Wong Sun v. United States*, 371 U.S. 471 (1963).

The Supreme Court has held that a seizure occurs when, given all of the circumstance surrounding an incident, a reasonable person would believe he or she was not free to leave. *INS v. Delgado*, 466 U.S. 210, 215 (1984). When considering whether a seizure occurred, various factors may be considered. *Id.* The Tenth Circuit Court of Appeals has held it appropriate to consider “(1) whether the encounter occurred in a ‘confined or nonpublic space,’ (2) if ‘the officers confronting the subject were armed or uniformed,’ (3) the number of officers confronting the subject, (4) whether ‘the officers exhibited an intimidating or coercive demeanor,’ and (5) if the questions asked by the officer called for potentially incriminating answers.” *United States v. Esparza-Mendoza*, 386 F.3d 953, 959 (10th Cir. 2004) (quoting *United States v. Glass*, 128 F.3d 1398, 1405 (10th Cir.1997)).

B. Suppression of Evidence in Removal Proceedings

In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court found that the exclusionary rule is generally not applicable in removal proceedings. Even where an immigration officer lacks reasonable suspicion or probable cause to search or seize an individual, proof of a Fourth Amendment violation alone is not sufficient to require the suppression of evidence in Immigration Court proceedings. *Id.* at 1051. However, a plurality of the Court did agree that the exclusionary rule could apply in cases involving egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained. *Id.* at 1050-51. In such circumstances, the use of the tainted evidence violates the Fifth Amendment requirement of due process. *Id.* The BIA has also acknowledged that suppression of evidence in removal proceedings may be

appropriate where an egregious violation of the Fourth Amendment has occurred. *Matter of Cervantes*, 21 I&N Dec. 351 (BIA 1996).

A motion to suppress evidence in a removal proceeding must be made in writing and be sufficiently detailed and based on personal knowledge. *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). Statements in support of a motion to suppress should not be “general, conclusory or based on conjecture.” *Id.* The burden is on the respondent to establish a *prima facie* case in support of the claim that evidence was obtained in violation of the Fourth Amendment. *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971); *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975); *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). If the respondent meets their burden, the burden shifts to the government to justify the manner in which the evidence was obtained; a failure to justify the conduct results in suppression of the evidence at issue. *Tang*, 13 I&N Dec. at 692.

IV. Discussion

At the July 28 hearing, the Court solicited preliminary testimony to determine whether the respondents had met their initial burden to demonstrate a Fourth Amendment violation had occurred, and that the violation was egregious. (DAR, 07/28/10.) After hearing testimony from two of the respondents and two witnesses, the Court found that the respondents had made a *prima facie* for suppression.² See *Burgos*, 15 I&N Dec. at 279; *Barcenas*, 19 I&N Dec. at 612. Specifically, the respondents and the witnesses provided detailed and consistent accounts of the morning of March 24, 2009, including the time at which ICE agents entered the home, the urgency with which they were told to exit their rooms and meet in the living room, and the questions asked by the agents. (*Id.*) All of the witnesses testified credibly that they were awoken in the pre-dawn hours and that the agents were identifying themselves as “police” and yelling about an accident as they knocked on the various bedroom doors in the house. (*Id.*) The witnesses consistently stated that the agents alleged they were worried about the safety of the residents and told them to come down to the living room. (*Id.*) None of the witnesses recalled any instance where a knock was followed by the agent identifying him or herself as ICE or requesting consent to speak with the residents of the home. (*Id.*) After hearing testimony from the aforementioned witnesses, the Government stipulated that nobody in the home consented to the ICE agents’ initial entry through the front door. (*Id.*)

Moreover, a fact-specific inquiry in to the circumstances surrounding the raid indicates that a reasonable person in this situation would not have believed he or she was free to leave the

² In their closing arguments, DHS contends that Mario Soto-Gutierrez’s motion to suppress and terminate should be summarily dismissed because he did not testify in support of his motion. (DHS Closing Argument.) The Court disagrees. The documentary and testimonial evidence in support of Mr. Soto-Gutierrez’s motion, despite his lack of testimony, was sufficiently detailed and specific to find that each of respondents had met their burden to demonstrate a *prima facie* violation of their Fourth Amendment rights. Moreover, with respect to Mr. Soto Gutierrez, the Court reviewed his I-213 and heard testimony from Sujey Guerrero Parada, who testified to being in the bedroom with the respondent and their child on the morning of March 24, 2009. Notably, Mr. Soto-Gutierrez was offered as a witness (see Resp’t Witness List, 04/07/10), but prior to placing him on the stand, the government stipulated that there was no warrant or consent to enter the respondents’ residence. Therefore, DHS’s argument fails.

house. *See Delgado*, 466 U.S. at 215. The facts alleged by the respondents and respondents' witnesses reveal the residents of 25825 Highway 82 were in a vulnerable position when suddenly woken in the dark, pre-dawn hours by ICE agents already in their home, knocking loudly on their bedroom doors and demanding they come out. The Court finds this was definitively a "seizure."

After finding the respondents had met their burden, the Court next evaluated the testimony of the Government witnesses to determine whether the Fourth Amendment violation was justified. *Tang*, 13 I&N Dec. at 692. The Government produced three witnesses: Special Agent Steve Turza, Special Agent Christopher Carter and Special Agent Vanessa Hips.

The first witness, Agent Turza, testified that he was in charge of the operation, which was initiated after his office received a tip in early November 2008 regarding the presence of subjects suspected of being undocumented aliens, some of whom had prior removal orders. (DAR, 07/28/10; Ex. 3, DHS Opp'n.) Approximately **five months after receiving the tip**, the agents entered the home without a warrant. (DAR, 07/28/10.) Additionally, Agent Turza, the first agent to enter the home, testified that he entered the home after five minutes of knocking and yelling at the door, which he stated was propped wide open. (*Id.*) He conceded that he did not have consent to enter the premises. (*Id.*)

Though never articulated by the Government as an exception to the warrant requirement, Agent Turza alluded to concerns that led him to ultimately enter the residence. (*Id.*) Specifically, he stated that after there was no response to his five minutes of knocking and yelling, he became suspicious due to a recent carbon monoxide poisoning in the area. (*Id.*) He claimed to have justified his warrantless entry on this reasoning. (*Id.*) The Court does not agree that these are exigent circumstances, such that entry in to the respondents' home was justified. In the Tenth Circuit, to find exigent circumstances, a court must find an officer had an "objectively reasonable basis" to enter home without a warrant. *Walker*, 474 F.3d at 1253. Agent Turza testified that his basis for entering was concern due to an incident a few months prior where a family was killed due to carbon monoxide poisoning. (DAR, 07/28/09.) If the door was propped wide open, as the agent testified, than concern for carbon monoxide poisoning should have been significantly minimized, as it is commonly known that this type of poisoning occurs when there is an absence of oxygen in enclosed or semi-enclosed spaces. Therefore, the Court does not find there were exigent circumstances that would justify the agents' warrantless entry into the home.

Generally, the Court found the agents' testimony to be unreliable. First, Agent Turza's recollection of the morning was inconsistent with the testimony of the two other agents. (*Id.*) All three agents testified that approximately eight to ten agents – Investigations and Detention and Removal Agents – gathered at 25825 Highway 82 sometime between 5:30 and 6:00 a.m. (*Id.*) A significant inconsistency in the witnesses' testimony related to the entry. Agent Turza recalled that he waited for other agents, including Agents Carter and Hips, to affect entry into the home, approximately five minutes after he began knocking. (*Id.*) However, both Agent Carter and Agent Hips recalled reaching the propped open front door approximately ten minutes after both teams initially approached the home and finding Agent Turza already in the living room with several residents of the home seated on the couch. (*Id.*) The Court finds it unlikely that in only five to ten minutes, Agent Turza and two other agents could have approached various

bedrooms, knocked on the doors on all three floors of the home, identified themselves to the sleeping residents, explained why they were there, requested consent to enter the bedrooms and accompanied the residents down to the living room.

Moreover, Agent Turza's testimony conflicts with the testimony of the residents of the home, who all stated that the main entrance to the house was closed. (*Id.*) Given the time of year, as well as the consistency of the residents' testimony, the Court finds it unlikely that the front door to the home and primary access to the living room would have been left propped open over night.

Finally, the greatest inconsistency disturbing to the Court is the narrative on the I-213, which is contradictory to the testimony of the agents and the respondents. (*Id.*; Ex. 3, DHS Opp'n.) Specifically, the I-213 in all three cases indicates that the agents "approached these rooms/apartments, identified themselves as federal agents, asked for permission from all of subjects to enter their dwelling/apartments and question them regarding their citizenship and immigration status" (Ex. 3, DHS Opp'n.) The I-213s go on to state that the respondents "gave the agents verbal permission to enter their perspective rooms/apartments and agreed to answer our questions." (*Id.*) However, even the agents' testimony seems to indicate that the residents in the home were all brought down to the living room and questioned. (DAR, 07/28/09.) In fact, Agent Turza testified that none of the bedrooms were ever entered. (*Id.*) The Court did not hear any testimony which would indicate that, as mentioned in the I-213s, any of the agents sought permission to enter the bedrooms and question the residents about their immigration status in their respective rooms. This further calls into question the reliability of the I-213s.

In sum, the Court cannot find that DHS's violation of the respondents' Fourth Amendment rights was justified. While interpretations of "egregiousness" may vary, the decisions made by the ICE agents, particularly Special Agent Turza, who led the investigation, were beyond what a reasonable officer could or should have believed was lawful. The Ninth Circuit Court of Appeals recently found a violation of the Fourth Amendment to be egregious because "reasonable INS agents should have known that they were violating the Fourth Amendment" *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018-19 (9th Cir. 2008). While this case is not controlling in the Tenth Circuit, the Court agrees with the respondents' assertions that it is persuasive in making a determination as to whether a Constitutional violation is "egregious."

In the instant case, the agents acted unreasonably in failing to abide by their internal "Knock and Talk" policy, ostensibly established to reinforce constitutional requirements to be adhered to by ICE in conducting home raid operations. Specifically, the evidence in the record indicates that the agents failed to properly identify themselves and instead claimed to be "the police." (DAR, 07/28/10.) Additionally, the evidence shows that the first agents to enter the home and approach the various bedrooms failed to advise the residents as to the purpose of their visit. (*Id.*) More significantly, the agents violated the statute in conducting the raid. Pursuant to INA § 287(a)(2), ICE agents must have a reason to believe that the target of their investigation is in the United States without valid status *and* is likely to escape before a warrant can be obtained for his or her arrest. (Emphasis added.) Here, the agents did not present any evidence that would

indicate any of the residents of the home were flight risks. (DAR, 07/28/10.) More importantly, the agents were acting on a tip that was over five months old, an extended amount of time in which they could and should have obtained a warrant. (*Id.*)

In addition to the ICE agents' conducting a warrantless search and seizure, the credible testimony of four residents of 25825 Highway 82 indicated that the agents entered the home suddenly while all the residents were still sleeping and yelled about an accident on the highway. (DAR, 07/28/09.) While entry in to a home without a warrant, consent or exigent circumstances might not result in suppression of evidence in all removal cases, the Court finds that the agents' pre-dawn entry compiled with blatant misrepresentations to sleeping residents, conveying terrifying news of an accident is, in fact, egregious. In creating this ruse, the agents led the residents of the home to believe there was an actual concern for their safety, and ultimately lured every resident out of their respective bedrooms. (*Id.*) When all of the residents in the home were gathered in the living room, the agents asked for someone by the name of Garcia (unknown to the residents) and then began questioning the individuals about their alienage and immigration status. (*Id.*) The techniques used by the agents to acquire the information subsequently used against the aliens were coercive at best.

In their closing arguments, DHS argues that the respondents' motions should fail because, "assuming the conduct was egregious," the exclusionary rule should not apply as the actions of the ICE agents did not undermine the value of the evidence obtained during the search and seizure. (DHS Closing Argument.) The Court disagrees. When ICE agents enter a home without a warrant or consent, and subsequently create an environment of fear under false pretenses, the Court agrees with the respondents that the Constitutional violation definitively transgressed notions of fundamental fairness and undermined the probative nature of the evidence obtained. *See Lopez-Mendoza*, 468 U.S. at 1050-51.

V. Conclusion

The Court finds that the respondents and the respondents' witnesses testified credibly to the events of March 24, 2009. As such, the Court found the respondents had demonstrated an egregious violation of their Fourth Amendment rights, and thus met their initial burden. Furthermore, the Court finds that the testimony of the ICE agents was inconsistent, and unreliable. In consideration of the testimonial and documentary evidence submitted, the Court finds the Government failed to sustain its burden to justify the unlawful search and seizure. Therefore, the Court hereby suppresses the evidence acquired as a result of the illegal search and seizure, including all statements made during the search and thereafter, all identification documents, all evidence in the Records of Deportable/Inadmissible Alien, and all other evidence derived thereof.

The Government has not produced independent evidence outside of the I-213 to support the factual allegations in the NTA or to sustain the charge of removability. The Court recognizes that evidence from an independent source may be used once an alien has been placed in proceedings. *Cervantes-Torres*, 21 I&N Dec. at 353. However, the testimony taken at the July 28, 2010 hearing was for the limited purpose of determining whether an egregious Constitutional violation had occurred and whether the Government could justify their actions. As such, the

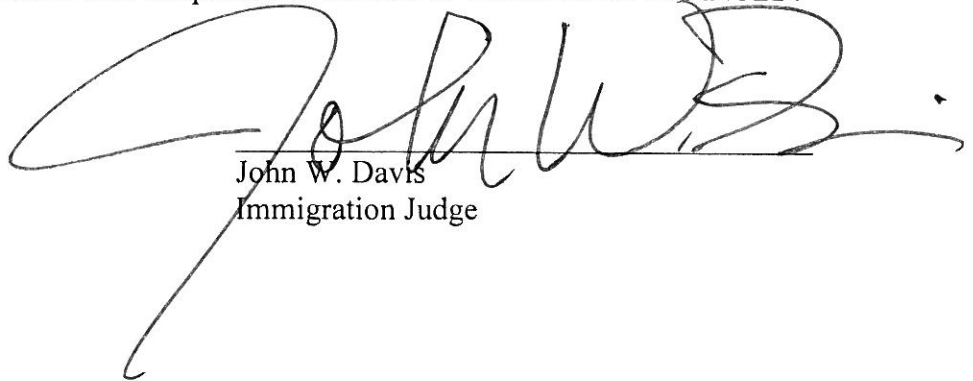
Court believes that any testimony regarding alienage at the suppression hearing is not independent evidence but is, like all of the other evidence obtained by DHS as a result of the home raid, "fruit of a poisonous tree." Therefore, DHS has failed to meet its burden of establishing the respondents' removability by clear and convincing evidence, INA § 240(c)(3)(A), and the removal proceedings must be terminated.

ORDERS

IT IS HEREBY ORDERED that Respondents' Motion to Suppress be GRANTED.

IT IS HEREBY FURTHER ORDERED that Respondents' Motion to Terminate be GRANTED.

October 21, 2010



John W. Davis
Immigration Judge