

Third Circuit Court

Case: *Oliva-Ramos v. A.G.*, 694 F.3d 259 (3d Cir. 2012)

Date: September 13, 2012 (Amended Oct. 18, 2012 & Nov. 6, 2012)

Panel: McKee, Rendell, Ambro

Opinion: McKee

Tags: Immigration, removal proceedings, 4th Amendment, exclusionary rule, suppression, egregious violation, widespread abuse, ICE, home raids

Third Circuit Holding re. “Egregious Violations” Test: “evidence will be the result of an egregious violation within the meaning of Lopez-Mendoza, if the record evidence established either (a) that a constitutional violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its unfairness—undermined the reliability of the evidence in dispute.” 277 (see below for factors to consider)

Question(s) Presented: “We must decide whether the BIA erred in refusing to apply the exclusionary rule in a removal proceeding under the circumstances in this case.” 261

- “A related question that we must address is whether the BIA abused its discretion in not reopening this case to allow Oliva-Ramos to supplement the administrative record with evidence of widespread and/or egregious conduct by Immigration and Customs Enforcement (“ICE”) officials.” 261

Holdings: “the BIA erred in categorically rejecting all of Oliva-Ramos's Fourth Amendment arguments on the ground that the exclusionary rule does not apply in deportation proceedings, and thereby erred in failing to evaluate, first, whether ICE agents violated Oliva-Ramos's Fourth Amendment rights, and, second, whether those violations were egregious or widespread.” 274

Rationale: The part of *Lopez-Mendoza* about “egregious and widespread” violations was not mere dicta; the Respondent had a right to pursue this claim.

Facts: (261) 2007 - Team of armed, uniformed ICE officers rang entrance buzzer at 4:30 am. / (262) Officers came to arrest Oliva-Ramos’s sister Maria. “As the officers approached the front door of the apartment, they waived [sic] an administrative warrant.” His sister Clara allowed them in because she thought that she had no choice and that the warrant was valid. Maria wasn’t there, but others were in the apartment. “As she entered, the officers lined up behind her and followed her inside. Once inside, they began waking the occupants and ordering them into the living room while another agent blocked the door so that no one could leave.” Officers did not identify themselves, supervised Oliva-Ramos getting dressed. / (263) Questioning occupants about Maria, blocking each entrance to LR. Officers told them they could not refuse to answer questions about their status. Lasted 45 mins. No privacy, eating, drinking, speaking up. Everyone but Clara placed in van; same pattern repeated over and over at different housing units. Taken to ICE detention. / (264) No food for 15 hours.

Procedural History:

- **IJ & Removal Hearing:** ICE officer testified to “hundreds of home raids” besides this one. (264)

- “Officer Belluardo confirmed that there was no warrant for Oliva-Ramos but only a deportation warrant for Maria. Belluardo testified that it is standard protocol to get everyone in the house to a central location so that the officers can identify the subject and anyone else in the house.” 264
- Gov’t presented Form I-213, affidavit from ICE custody, Guatemalan passport & ID card
- “Oliva-Ramos objected to that evidence and moved to preclude consideration of all of the Government’s evidence obtained during the raid of his apartment and his subsequent arrest. **He argued that the evidence had been obtained by exploiting violations of the Fourth Amendment that were both egregious and widespread, and thus the exclusionary rule should apply.** He also moved to terminate the proceedings, and requested an evidentiary hearing on his suppression motion.” 264
- **IJ:** denied motion to suppress, **concluding that under *Lopez-Mendoza* noncitizens can’t suppress evidence unless it’s egregious.** 265 Granted VD. 266
 - Said the warrantless entry was fine, because Clara gave permission
 - “The IJ did not, however, evaluate any of the evidence relevant to whether circumstances might have existed to invalidate the alleged ‘consent’ or to determine if the circumstances here implicated the exception to the nonapplication of the exclusionary rule in removal proceedings under *Lopez-Mendoza*.” 265
- **BIA Appeal: Cited to *Lopez-Mendoza* saying that the 4th Amendment didn’t usually apply in civil removal proceedings.** 266
 - Said the parts of *Lopez-Mendoza* about “widespread” and “egregious” violations were just “obiter dictum” and didn’t bind them, nor were there any binding BIA precedents. 266
 - If there was anything binding in BIA precedent, it was about due process, not about 4th Am. 267
 - **New documents procured via FOIA regarding ICE training and arrests:**
“The September memorandum changed the policy to permit up to fifty percent of each team’s arrest goal to be satisfied by counting “collateral arrests.” These are arrests of persons who were not themselves the targets of the FOT and had not missed removal hearings or departure deadlines, but were discovered during ICE operations. In the following fiscal year, when Oliva-Ramos was detained by a FOT that was after someone [*270] else, collateral arrests comprised forty percent of the total number of ICE arrests by FOTs. Collateral arrests accounted for nearly twenty-five percent of all FOTs arrests in fiscal year 2007. Oliva-Ramos argued that he was detained pursuant to this policy, and that the policy both encouraged and resulted in widespread violations of the Fourth Amendment.” 269-70

Respondent’s Arguments:

- “Oliva-Ramos argues that the BIA misapplied Fourth Amendment law when evaluating his various Fourth Amendment claims.” 274
- “He claimed that the ICE agents failed to obtain proper consent to enter the apartment, that they arrested him without a warrant and without probable cause, and that they seized him without reasonable suspicion.” 274
- “Relying on *Lopez-Mendoza*, Oliva-Ramos contends that Fourth Amendment law provides for the suppression of evidence obtained as a result of these violations because they were egregious and/or widespread.” 274

Appeals to Statute & Precedent: (see below for Regulations)

- ***Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984):** 4th Amendment does not usually apply to civil removal proceedings, except when there is good reason to believe that abuse by arresting officers is egregious and widespread.
- ***Adamson v. C.I.R.*, 745 F.2d 541, 545 (9th Cir. 1984):** standard for egregious violation of 4th Am
- ***Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006):** standard for egregious violations
- ***Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006):** egregious = threats, coercion, physical abuse
- ***Puc-Ruiz v. Holder*, 629 F.3d 771, 778 n.2 (8th Cir. 2010):** physical brutality; unreasonable show or use of force

Discussion:

- ***Lopez-Mendoza*:** 3d Circuit notes that “eight Justices agreed that the exclusionary rule should apply in deportation/removal proceedings involving egregious or widespread Fourth Amendment violations. Thus, where an alien can establish either of those two circumstances, the plurality opinion can only be read as affirming that [272] the remedy of suppression justifies the social cost.” 271-272
- “The BIA's analysis of *Lopez-Mendoza* views that opinion only as a plurality. In doing so, the BIA ignored the fact that almost all of the Justices on the Court agreed that the exclusionary rule should apply to some extent in removal hearings. As we explained above, eight of the nine Justices agreed with that proposition. Four would have limited the rule [\[*275\]](#) to instances of widespread or egregious violations of law by Government officials, and four others would apply the rule without that condition.” 274-75
- **Due Process Violations:** refusal of IJ to subpoena witnesses & records
 - “The requested witnesses and documents were essential to Oliva-Ramos's claim of egregious or widespread violations and alleged constitutional violations by the Government. ICE policy and practice manuals on search and seizure practices and its practices with respect to consent and entry of dwellings could have shed light on the contested nature of Clara Oliva's consent, as well as whether Oliva-Ramos was improperly seized.” 273
 - “Since the Government forced Oliva Ramos to litigate his FOIA request, it should have been clear to the IJ that, even though Oliva-Ramos had exercised diligence, he was not able to effectively present his case and that he was not attempting to delay or obfuscate the proceedings.” 273
 - “He was finally able to obtain the documentary evidence only after members of a clinical program at the Cardozo School of Law initiated FOIA litigation.” 273
- **Third Circuit Standard for Egregious and Widespread Violations:**
 - “We have not had occasion to consider when conduct by ICE officials (or anyone acting in a similar role) would constitute the kind of egregious violations that could trigger the protections endemic in the exclusionary rule and justify applying the rule in the civil arena. We now take this opportunity to more precisely define the standard that should be used in determining whether

unlawful conduct by governmental [\[*276\]](#) officers rises to the level of an "egregious" violation of the [Fourth Amendment](#)." 275-76

- E.g. – *Rochin v. CA*, 342 U.S. 165 (1952) – seized suspect and had his stomach pumped (became “shocks the conscience” standard under 14th Amendment)

COMMENTARY:

- **There is a higher standard for 4th Amendment violations in immigration settings because of *Lopez-Mendoza***—“The jurisprudence that has developed for "ordinary" [Fourth Amendment](#) violations—where the test is "reasonableness"—is critical to determining whether [Fourth Amendment](#) violations occurred in the first instance. **However, a violation must be more than "unreasonable" for it to satisfy the higher threshold of an "egregious" [Fourth Amendment](#) violation under *Lopez-Mendoza*.**”
- **This means that different Circuit Courts have different standards for “egregious”—**
 - **NINTH CIRCUIT:** “The Court of Appeals for the **Ninth Circuit** has adopted a test resembling the qualified immunity inquiry into whether a constitutional violation was the result of bad faith. [Orhorhaghe](#), 38 F.3d at 493. After establishing that a [Fourth Amendment](#) violation has occurred, the **Ninth Circuit** considers "whether the agents committed the violations deliberately or by conduct a reasonable officer should have known would violate the Constitution." *Id.* The test was developed in [Adamson v. C.I.R.](#), 745 F.2d 541, 545 (9th Cir. 1984), [\[*277\]](#) after analyzing the Janis decision, [428 U.S. 433](#), 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976), that the Supreme Court relied on for the weighing of interests analysis in [Lopez-Mendoza](#). The [Adamson](#) court determined from "language in *Lopez-Mendoza* that **deterrence is not the only consideration**" underlying the exclusionary rule. [745 F.2d at 545](#). "[I]n addition to deterrence, the exclusionary rule serves the vital function of **preserving judicial integrity**." *Id.* The Ninth Circuit concluded that **if "police unreasonably violated the defendant's [fourth amendment](#) rights, the integrity of the courts would be implicated."** [Id. at 546](#).”
 - **SECOND CIRCUIT:** “In [Almeida-Amaral v. Gonzales](#), 461 F.3d 231 (2d Cir. 2006), the Court of Appeals for the Second Circuit also addressed this issue. . . . The Court of Appeals for the Second Circuit began its discussion by explicitly adopting the *Lopez-Mendoza* exception applying the exclusionary rule in civil removal proceedings. See [id. at 234](#) (“[W]e now apply it as the law of the circuit.”). It then held that **"exclusion of evidence is appropriate under the rule of *Lopez-Mendoza* if record evidence established either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute."** [Id. at 235](#). We accept the test adopted by the Second Circuit with slight modification.

- **THIRD CIRCUIT:**

- “First, and most importantly, courts and agencies must adopt a flexible case-by-case approach for [\[*279\]](#) evaluating egregiousness, based on a general set of background principles which fulfill the two-part *Lopez-Mendoza* test.” 278-79
- “Second, those evaluating the egregiousness of the violation should pay close attention to the “characteristics and severity of the offending conduct.”” 279
- **FIRST CIRCUIT:** threats, coercion, physical abuse *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006).
- **EIGHTH CIRCUIT:** physical brutality, unreasonably show or use of force *Puc-Ruiz*, 629 F.3d at 778-79
- Case-by-case basis, considering many factors

- **Widespread violations standard:**

- Not explicitly adopted by any court at this time
- “determining when widespread violations of the [Fourth Amendment](#) may serve as an independent rationale for applying the exclusionary rule in civil removal proceedings is simply a matter of first impression for us.” 279
- “Given the discussion in [Lopez-Mendoza](#), we think that most constitutional violations that are part of a pattern of widespread violations of [\[**57\]](#) the [Fourth Amendment](#) would also satisfy the test for an egregious violation, as discussed above.” 279
- Evidence of consistent patterns—ICE Memoranda, Fugitive Ops Statistics
- “Oliva-Ramos argues that ICE conceded that it has a policy of rounding up everyone in a home, without any particularized suspicion, in order to question all of the occupants about their immigration status.[26](#) The BIA's refusal to even consider that evidence was contrary to [Lopez-Mendoza](#). By turning a blind eye to that evidence, the BIA prevented [\[**62\]](#) Oliva-Ramos from potentially demonstrating that the circumstances of his seizure fit within the narrow exception left open in [Lopez-Mendoza](#).” 281

- **Voluntary Consent to Enter Home**—this should have been scrutinized by a totality of the circumstances inquiry—see **8 C.F.R. § 287.8(f)(2) (consent to enter)**

- “The Supreme Court has made clear that [HN30](#)  “[c]onsent must be given voluntarily.” [Stabile](#), 633 F.3d at 230 (citing [Bumper v. North Carolina](#), 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968)). Thus, the Court requires a careful examination of the totality of the circumstances surrounding how that consent was obtained. See [United States v. Drayton](#), 536 U.S. 194, 206-07, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002). The appropriate inquiry into the voluntariness of a purported consent would include, without [\[**67\]](#) limitation: “the age, education, and intelligence of the subject; whether the subject was advised of his or her constitutional rights; the length of the encounter; the repetition or duration of the questioning; and the use of physical punishment.” [United States v. Price](#), 558 F.3d 270, 278 (3d Cir.

[2009](#)). We have also "identified as relevant 'the setting in which the consent was obtained [and] the parties' verbal and non-verbal actions.'" *Id.* In addition, the number of officers and displays of force are important factors. See *United States v. Kim*, 27 F.3d 947, 954 (3d Cir. 1994). This kind of particularized scrutiny was not applied to the evidence here because it was assumed that the [Fourth Amendment](#) remedy of suppression did not apply." 283

- **Seizure-- [8 C.F.R. §§ 287.8\(b\)\(1\)](#) (seizure)**

- "We have made clear, however, that the "authority under [Section 1357\(a\)\(1\)](#) to interrogate a person believed to be an alien is limited by the restrictions of the [fourth amendment](#)." *Babula v. Immigration & Naturalization Service*, 665 F.2d 293, 295 (3d Cir. 1981) (citation omitted)." 283
- "In order to conduct a proper analysis under the [Fourth Amendment](#), the BIA should have considered among the non-exclusive list of relevant factors, the circumstances that the Supreme Court described in [Mendenhall](#). The *Mendenhall* Court explained that "[e]xamples 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." [Mendenhall](#), 446 U.S. at 554." 284

- **[8 C.F.R. § 287.8\(c\)\(2\)\(i\)](#) (warrantless arrest)**

- "We held in *Babula* that "under [section 1357\(a\)\(2\)](#) . . . 'arrest' means an arrest upon probable cause, and not simply a detention for purposes of interrogation." [665 F.2d at 298](#)." 285

- **[8 C.F.R. § 287.8\(c\)\(2\)\(vii\)](#) [\[**75\]](#) (coerced statements)**

- "Based on our discussion of the circumstances surrounding the potential improper seizure and coercion, we will remand for further consideration of [8 C.F.R. § 287.8\(c\)\(2\)\(vii\)](#) and any potential violation of the [Due Process Clause of the Fifth Amendment](#)." 286

- **[8 C.F.R. § 292.5\(b\)](#) (right to counsel)**

- Only after NTA (with formal removal proceedings)—don't need to tell noncitizen they need a lawyer before that