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Immigration Law- Exclusionary Rule- If the Exclusionary Rule Question is Reached, the Civil Nature of a Deportation Proceeding May Preclude Its Application

Diane M. Peress

CASENOTE

IMMIGRATION LAW—Exclusionary Rule—If the Exclusionary Rule Question Is Reached, the Civil Nature of a Deportation Proceeding May Preclude Its Application. *Cuevas-Ortega v. Immigration and Naturalization Service,* 588 F.2d 1274 (9th Cir. 1979).

In May, 1976, an Immigration and Naturalization Service ("INS") investigator and an inspector from the San Mateo District Attorney's office knocked on the apartment door of Josephina Del Toro-Mendoza.[1] The INS agent and the inspector were investigating possible immigration fraud in San Mateo County.[2] When Del Toro answered the door, the two men identified themselves. Del Toro spoke with them over the threshold.[3] At first, they asked questions about a Mexican family living in the same apartment complex. Then they asked if Del Toro herself was born in Mexico and if she was in the United States illegally. Del Toro answered "yes" to both questions and then permitted the investigators to enter her apartment.[4] She admitted that her husband and children were also illegal aliens.[5] The INS investigator then instructed Del Toro to come to the INS office with her husband and various identification documents.

Del Toro and her husband, Rafael Cuevas-Ortega, reported to the INS office. They admitted, after questioning, that Cuevas-Ortega had Del Toro and their children smuggled into the United States in September, 1974.[6] The admissions were "contemporaneously recorded on two I-213 forms."[7]

At the subsequent deportation hearing, when Del Toro and Cuevas-Ortega refused to testify,[8] the I-213 forms were introduced to show Del Toro's and Cuevas-Ortega's deportability. They were

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1. Cuevas-Ortega v. Immigration and Naturalization Service, 588 F.2d 1274, 1276 (9th Cir.1979).
2. The INS and the San Mateo County District Attorney's Office were investigating "possible fraudulent home birth registrations by resident aliens." *Id.* at 1275-76.
3. *Id.* at 1276.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* An I-213 Form is also known as a Record of a Deportable Alien.
8. *Id.* Petitioners did so on advice of counsel.

received in evidence, despite the petitioners' attorney's objections that the statements on the forms "were the 'fruits' of an illegal search and seizure at the initial apartment meeting."[9] The immigration judge found the petitioners deportable as illegal aliens and denied their request for voluntary departure.[10] The Board of Immigration Appeals (BIA) affirmed the finding of deportability and denial of voluntary departure.[11]

The Ninth Circuit Court of Appeals affirmed the BIA.[12] It held that no illegal search and seizure violative of the fourth amendment[13] had occurred during the initial questioning of Del Toro at her apartment, since "[s]he willingly spoke with the investigators both at her door and once they were inside."[14] The court further stated that "[t]here was no arrest, custody or curtailment of liberty"[15] and that the statements made by the petitioners at the INS office were voluntary and, therefore, not unlawfully obtained.[16] Having decided that no fourth amendment violation had occurred, the *Cuevas-Ortega* court rejected the petitioners' argument that the evidence used in the deportation proceedings was "fruit" of an illegal search and seizure.[17]

Finally, the court found that the immigration judge had not abused his discretion in denying the petitioners' request for volun-

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9. *Id.*

10. *Id.* The immigration judge also refused to allow further questioning of the INS investigator.

Petitioners had requested voluntary departure in the alternative. The immigration judge denied their request because Del Toro and the children had been smuggled into the United States and Cuevas-Ortega had an arrest record. *Id.*

If an illegal alien plans to reapply for admission to the United States after he has physically departed, it is important to apply for voluntary departure and to avoid deportation. Under section 1182(a)(17) of Title 8 of the United States Code, an alien who is arrested and deported is ineligible to receive a visa and is excluded from admission into the United States unless a special waiver is given by the Attorney General. 8 U.S.C. § 1182(a)(17) (1976).

11. 588 F.2d at 1275.

12. *Id.*

13. The fourth amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

14. 588 F.2d at 1277.

15. *Id.*

16. *Id.* at 1278.

17. *Id.*

tary departure because the petitioners did not meet their burden of proof.[18] To be eligible for voluntary departure, an alien must affirmatively establish his good moral character.[19] Cuevas-Ortega and Del Toro did not introduce anything to show such eligibility and consequently, the denial of their application was not arbitrary or capricious.[20]

Although the petitioners had raised an exclusionary rule argument in their appeal, the *Cuevas-Ortega* court declined to discuss the issue.[21] Yet the court's analysis could have gone further. It did in the original slip opinion.[22]

In May, 1978, the *Cuevas-Ortega* court held, in its slip opinion, that even if a fourth amendment violation had occurred, it would "decline to invoke the exclusionary rule . . . because the deportation proceeding was not one subject to its application."[23] The rationale of the court was that the exclusionary rule only applies to criminal proceedings and not to deportation proceedings which are civil in nature.[24] The court essentially concluded that "[s]ince neither criminal procedures nor sanctions are involved in deportation proceedings, the exclusionary rule is not here appropriate."[25] Eight months later, on January 2, 1979, the court amended its slip opinion, omitting the discussion of the exclusionary rule[26] and deciding

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. Cuevas-Ortega v. INS, No. 74-329, slip op. (9th Cir. May 3, 1978) [hereinafter cited as *Cuevas-Ortega*, slip op.].
23. *Id.* at 6.
24. *Id.* at 7.
25. *Id.*
26. Section IV of the May 3, 1978 slip opinion reads as follows:

> Petitioners contend that the evidence which established their deportability is excludable as the "fruit" of an illegal search and seizure. Even if we did not reject the contention that no fourth amendment violation occurred, we would decline to invoke the exclusionary rule in this case because the deportation proceeding was not one subject to its application.
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> The exclusionary rule is a judicially created remedy designed to safeguard fourth amendment rights through its deterrent effect on future unlawful police conduct. Stone v. Powell, 428 U.S. 465, 484 (1976); United States v. Janis, 428 U.S. 433, 443-47 (1976); United States v. Calandra, 414 U.S. 338, 347-48 (1974). It is not a personal constitutional right of an aggrieved party. Nor does the rule proscribe the use of illegal evidence in all proceedings or against all persons. Stone v. Powell, 428 U.S. at 486-89; United States v. Calandra, 414 U.S. at 348. The rationale for excluding evidence is strongest where the Government's unlawful conduct would result in the imposition of criminal

that the issue did not have to be reached.[27]

The use of the exclusionary rule in deportation proceedings is an issue that has been raised in many immigration appeals. The courts, however, are not in agreement on whether or how this issue should be decided. The decision of the Ninth Circuit, had it followed its slip opinion in *Cuevas-Ortega,* would have been in direct conflict with the recent holdings of the First Circuit, which has allowed the application of the exclusionary rule in deportation proceedings. The *Cuevas-Ortega* slip opinion presented a point of view which could have been a rational alternative to the First Circuit. This Casenote will discuss the "*Cuevas-Ortega* alternative" as advanced by the Ninth Circuit in its original slip opinion and contrast it with other circuits which have dealt with the exclusionary rule in deportation proceedings.[28]

The exclusionary rule is a judicially created remedy. It excludes evidence obtained through an unreasonable search and seizure by a federal or state government agent in violation of a defendant's

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sanctions, United States v. Calandra, 414 U.S. at 348, and the rule has thus traditionally applied only where criminal or quasi-criminal sanctions might be imposed. NLRB v. South Bay Daily Breeze, 415 F.2d 360, 364 (9th Cir. 1969), *cert. denied,* 397 U.S. 915 (1970). As observed in *Janis,* "the Court has never applied [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state." 433 [*sic*] U.S. at 447.

It is well established that deportation proceedings are civil, not criminal. Woodby v. INS, 385 U.S. 276, 285 (1966); Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952); Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977); LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976), *cert. denied,* 429 U.S. 1044 (1977); Trias-Hernandez v. INS, 528 F.2d 366, 368 (9th Cir. 1975); United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975). Since neither criminal procedures nor sanctions are involved in deportation proceedings, the exclusionary rule is not here appropriate. *See* NLRB v. South Bay Daily Breeze, 415 F.2d at 364.

Id. (footnotes omitted).

Section IV of the January 2, 1979 amended opinion reads as follows: Petitioners contend that the evidence which established their deportability is excludable as the "fruit" of an illegal search and seizure. Having rejected the contention that a fourth amendment violation occurred, we do not reach this exclusionary rule issue. 588 F.2d at 1278.

27. *Id.* On March 2, 1979 at 4:45 P.M. (EST), this writer conducted a telephone interview with the Honorable Judge Choy of the Ninth Circuit, at the U.S. District Court in Honolulu. He said that during the months between the slip opinion and the amended opinion, there was disagreement as to whether the exclusionary rule issue should have been reached in *Cuevas-Ortega.* The court finally concluded that the case could be decided without it.

See also Ninth Circuit Recedes From Holding on Exclusionary Rule, 56 Interpreter Releases (No. 3 Jan. 22, 1979) 24 (American Council for Nationalities Service).

28. The reader should therefore keep in mind that when the "*Cuevas-Ortega* alternative" is discussed, it will refer to the exclusionary rule discussion of the slip opinion and not the amended, final opinion.

fourth amendment rights.[29] The rule was designed to deter unlawful police conduct and is not considered "a personal constitutional right of an aggrieved party."[30]

In *Stone v. Powell*,[31] the Supreme Court reasoned that "despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in *all proceedings* or against all persons."[32] In *Stone*, the defendant, who had killed a liquor store manager's wife, was arrested for violating a vagrancy ordinance.[33] The policeman who searched him found a revolver in his possession which was later shown to be the weapon used in the homicide. The defendant was convicted of murder.[34] Defendant appealed, arguing that the testimony of the policeman who searched him and discovered the revolver should have been excluded because the vagrancy ordinance which had formed the basis for his arrest, was unconstitutional.[35] The Court noted that "[t]he primary justification for the exclusionary rule . . . is the deterence of police conduct that violates Fourth Amendment rights,"[36] and found that the public's interest in determining the truth at trial outweighed the goals to be accomplished by applying the exclusionary rule, especially where defendant had been given "full and fair consideration" of his illegal search and seizure claim at trial and on direct review.[37]

In an earlier case, *United States v. Calandra*,[38] the Court held that the rationale for invoking the exclusionary rule was "strongest where the Government's unlawful conduct would result in the imposition of a criminal sanction on the victim of the search."[39] In *Calandra*, the defendant argued that a federal agent had exceeded the scope of a search warrant for bookmaking records when he seized loansharking materials. Defendant tried to invoke the exclusionary

29. Mapp v. Ohio, 367 U.S. 643 (1961).
30. *See* Alderman v. United States, 394 U.S. 165, 174-75 (1969); *Cuevas-Ortega*, slip op. at 7.
31. 428 U.S. 465 (1976).
32. *Id.* at 486 (emphasis added).
33. *Id.* at 469.
34. *Id.* at 470.
35. *Id.*
36. *Id.* at 486.
37. *Id.* at 488-95.
38. 414 U.S. 338 (1974).
39. *Id.* at 348.

rule in the grand jury proceedings investigating the loansharking allegations. He also refused to answer grand jury questions, pleading his fifth amendment privilege against self-incrimination.[40] The Supreme Court, in utilizing its balancing approach, refused to apply the exclusionary rule to grand jury proceedings, noting that in this particular case the damage done to the grand jury process would be greater than any benefit derived by the defendant if it did apply the rule.[41]

The *Cuevas-Ortega* alternative relied on both *Powell* and *Calandra.*[42] It stressed that the exclusionary rule has traditionally been applied where "criminal or quasi-criminal sanctions" might be imposed.[43] In short, the exclusionary rule has no place in deportation proceedings.

The "fruit of he poisonous tree" doctrine is actually a corollary of the exclusionary rule. It dictates that evidence derived from information obtained by an illegal search and seizure is inadmissible.[44] Thus, while the exclusionary rule prevents direct use of evidence, the poisonous fruit doctrine prevents indirect use of evidence. In other words, unlawfully obtained evidence cannot be used indirectly to circumvent the exclusionary rule.[45]

In *Silverthorne Lumber Co. v. United States,*[46] the Court held that the evidence obtained indirectly from an unconstitutional search was tainted by that search and was therefore inadmissible.[47]

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40. *Id.* at 341. The court of appeals held that the defendant did have standing to invoke the exclusionary rule and allowed its application in Grand Jury proceedings.

41. *Id.* at 350-52. The Court also noted that there are statutory defenses for a grand jury witness who refuses to answer questions in the event he is held in contempt. *Id.* at 355 n.11.

42. *Cuevas-Ortega,* slip op. at 7.

43. *Id.* Quasi-criminal sanctions for the purposes of the exclusionary rule were defined in One 1958 Plymouth Sedan v. Penn., 380 U.S. 693 (1965). The case involved a state petition for the forfeiture of a car in which authorities had found 31 cases of liquor. *Id.* at 694. The defendant argued that the exclusionary rule applied since the search had been without a warrant. The state court ruled that a forfeiture proceeding was civil and that the exclusionary rule therefore did not apply. *Id.* at 694-95. The Supreme Court held that a forfeiture proceeding "is quasi-criminal in nature." *Id.* at 700. It defined a quasi-criminal proceeding as one where "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.*

44. Brown v. Illinois, 422 U.S. 590 (1975); Nardone v. United States, 308 U.S. 338 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

45. *See* note 44 *supra.*

46. 251 U.S. 385 (1920).

47. *Id.* at 390-92. In *Silverthorne,* while the company officers were arrested and detained in their homes, a marshal, without any authority, went to the corporate office and took books and records. The Government later wanted to use information that it derived from the

The doctrine was then extended to unlawful entries and unauthorized arrests in *Wong Sun v. United States.*[48]

Poisonous fruit evidence may still be admissible if the Government shows that the evidence could have been discovered through independent inquiry or would inevitably have been discovered without the tainted source.[49] It can also be received if the connection between the unconstitutional police conduct and the discovery of the challenged evidence becomes " 'so attenuated as to dissipate the taint.' "[50] There are also cases which hold that the evidence may be admissible if the Government demonstrates that no purpose of the exclusionary rule, such as deterring unlawful police conduct, would be served by the exclusion.[51]

In addition, a recent Supreme Court decision has narrowed the application of the poisonous fruit doctrine. In *United States v. Ceccolini,*[52] the Court held that the doctrine should be applied with "greater reluctance" in cases where the evidence derived from the illegally obtained information is live witness testimony.[53] The Court approved a broader use of the doctrine in cases which seek to suppress inanimate objects, such as documentary evidence, which have been derived from unlawful conduct.[54]

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corporate materials seized to indict the company and officers. The Court refused to allow the Government to use the information obtained by illegal search and seizure, even though it could have obtained the corporate documents lawfully. *Id.*

48. 371 U.S. 471 (1963). In *Wong Sun,* where an illegal search had taken place, the defendant was released after arraignment. He later returned voluntarily to make a statement. The Court held that while contemporaneous admissions, leads, and confessions resulting from illegal searches could be excluded as poisonous fruit, the link here between the admissions and the illegal search was sufficiently attenuated to make the defendant's statements "distinguishable to be purged of the primary taint." *Id.* at 488.

49. 251 U.S. at 392.

50. 371 U.S. at 487, 491, *citing* Nardone v. United States, 308 U.S. 338, 341 (1939).

51. Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Edmons, 432 F.2d 577 (2d Cir. 1970).

52. 435 U.S. 268 (1978). In *Ceccolini,* a police officer noticed an envelope with money lying on the cash register while talking to the employee of a flower shop. He examined the envelope and found policy slips. He asked the employee to whom the envelope belonged without mentioning what he found in it. *Id.* at 270. Later, Ceccolini, the owner of the envelope was indicted and the employee testified against him. Ceccolini tried to suppress the employee's testimony as poisonous fruit evidence from the police officer's illegal search. *Id.* at 270-71. The Supreme Court did not find a causal relationship between the unlawful conduct and the live witness testimony. *Id.* at 279. In addition, it held live witness testimony to a stricter standard before it can be labelled poisonous fruit. *Id.* at 280.

53. *Id.*

54. *Id.*

The Ninth Circuit's *Cuevas-Ortega* alternative would have conflicted with the First Circuit on the issue of applying the exclusionary rule to deportation proceedings. The Ninth Circuit, relying on *United States v. Janis*[55] in its slip opinion, held that the "fruit of the poisonous tree" doctrine was not applicable in federal or state civil proceedings.[56] Since a deportation proceeding is a civil action, it held that the exclusionary rule cannot apply.[57] The First Circuit, on the other hand, in *Wong Chung Che v. INS*[58] and *Navia-Duran v. INS*,[59] has held that the exclusionary rule can apply to a deportation hearing.

In *Wong Chung Che*, two alien crewmen were handcuffed in a Chinese restaurant and taken to their apartment by INS investigators.[60] The investigators then entered the apartment without the aliens' consent and without a warrant.[61] During the search of the apartment, the investigator seized the landing permit of one of the aliens which at the hearing was introduced as the only evidence of his deportability.[62] The Court of Appeals for the First Circuit held that "[i]f" petitioner's Crewman's Landing Permit was obtained through an illegal search, there is no authority of which we are aware that would make it admissible."[63]

In *Navia-Duran*, the illegal alien was arrested without a warrant and interrogated for four hours in the middle of the night.[64] She then gave a statement admitting her illegal presence in the United States. The form contained a printed recitation of her rights, "including the right to a deportation hearing" in English.[65] No effort was made to translate the recitation for the alien, who remained ignorant of her rights when she signed the statement. The Court held that although Miranda warnings are not required in deportation hearings, the INS regulations do provide certain rights of which an alien must be advised when arrested without a warrant.[66] Failure

55. 428 U.S. 433 (1976).
56. *Cuevas-Ortega*, slip op. at 7.
57. *Id.*
58. 565 F.2d 166 (1st Cir. 1977).
59. 568 F.2d 803 (1st Cir. 1977).
60. 565 F.2d at 167.
61. *Id.*
62. *Id.* at 168.
63. *Id.* at 169.
64. 568 F.2d at 805.
65. *Id.*
66. *Id.* at 808.

to advise the arrested alien of these rights rendered Navia-Duran's statements involuntary. The court held that by failing to comply with its own regulations, the INS denied the alien due process.[67] Thus, Navia-Duran's statement was excluded from evidence. The court also took into consideration the coercive atmosphere created by the "overzealous immigration agent" in applying the exclusionary rule.[68]

These two First Circuit cases should not be construed as holding that a deportation is a criminal proceeding with all the constitutional protections afforded in a criminal setting. While an alien is entitled to due process and a fair hearing,[69] the First Circuit has recognized that some of the safeguards required in criminal cases can be omitted in deportation proceedings.[70]

Despite the lack of certain specific criminal safeguards, the First Circuit does not find a justification for admitting evidence obtained by the Government's unlawful conduct in deportation proceedings.[71] The court in *Wong Chung Che* held that:[72]

> While wide latitude is permitted the government in introducing statements of arrested suspects, whether or not they might be suppressed in a criminal proceeding, we can think of not justification by necessity for encouraging illegal searches of premises. There is no doubt that, if the landing permit was obtained through an illegal search, its admission into evidence infected the deportation proceeding.

Thus, while the First Circuit is consistent with the Ninth Circuit *Cuevas-Ortega* alternative in distinguishing deportation proceedings from criminal ones, it is unwilling to overlook the omission of the exclusionary rule safeguard traditionally available in criminal proceedings only.

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67. *Id.* at 810.

68. *Id.*

69. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). *See* Navia-Duran v. INS, 568 F.2d at 808, 810 (1st Cir. 1977).

70. *Id.* at 809. For example, the First Circuit has stated that Miranda warnings are not required in deportation proceedings. *Id.* at 808. *See* Nai Cheng Chen v. INS, 537 F.2d 566, 568 (1st Cir. 1976). *See also* Nason v. INS, 370 F.2d 865, 867 (2d Cir. 1967). The Ninth Circuit has held that an alien has no right to counsel at a preliminary investigation and that double jeopardy does not attach in deportation proceedings. Bridges v. Wixon, 144 F.2d 927 (9th Cir.), *rev'd on other grounds*, 326 U.S. 135 (1945). The Seventh Circuit has held that a presumption of innocence does not necessarily exist in deportation proceedings. Chavez-Raya v. INS, 519 F.2d 397, 401 (7th Cir. 1975).

71. 565 F.2d at 169.

72. *Id.* (footnote omitted).

Factual differences per se between the Ninth and First Circuit cases would not have resolved the conflict. The First Circuit cases involved illegal arrests and searches. Where it found that a fourth amendment violation had in fact occurred, the civil nature of the deportation proceeding did not stop the First Circuit from applying the exclusionary rule.

In *Cuevas-Ortega* and in an earlier Ninth Circuit case,[73] the illegal aliens were not arrested or detained and no fourth amendment violation had occurred. In both cases, the aliens allowed INS agents to enter their homes and gave statements and documents voluntarily. Therefore, the exclusionary rule could have no bearing in those cases. The crux of the conflict with the First Circuit arises because the *Cuevas-Ortega* alternative would have held that even if there had been unlawful conduct, the exclusionary rule would be inapplicable to a deportation proceeding, due to its civil nature.[74] Thus, had the Ninth Circuit been faced with the identical fact patterns of the First Circuit, the *Cuevas-Ortega* alternative suggests that it could have taken the opposing viewpoint.[75]

It is not clear where other circuits stand in this divergence. The Second Circuit, for example, has not enunciated a clear stand on the issue. In *United States v. Barbera*,[76] the court stressed the need to balance an alien's fourth amendment protection from unreasonable searches and seizures and the "Government's conceded right to pro-

73. Cordon de Ruano v. INS, 554 F.2d 944 (9th Cir. 1977). The petitioner admitted two INS investigators who were looking for her husband. She answered their questions voluntarily and gave them her passport which showed her illegal presence in the United States. *Id.* at 945. At her deportation hearing and on appeal, she tried to suppress the admission of her passport into evidence claiming that it was illegally seized. *Id.* at 945-46. The court found that she had given the passport voluntarily and that no Miranda warnings were necessary when the INS investigators questioned her. *Id.* at 946.

74. *Cuevas-Ortega*, slip op. at 6.

75. The Ninth Circuit did come closer to the First Circuit fact patterns in Hoonsilapa v. INS, 575 F.2d 735, *amended*, 586 F.2d 755 (9th Cir. 1978). The court found that INS agents had illegally arrested the alien and searched his home. 575 F.2d at 738. Using the alien's name, the INS then learned from its files that the alien was a student from Thailand whose visa had expired. The alien was found deportable and granted voluntary departure. *Id.* at 737. On appeal, he moved to suppress the information from INS files as "'fruit' of an illegal search and arrest," citing *Wong Sun*, a First Circuit case. *Id.* at 737-38. The court found that the discovery of the alien's name during the unlawful INS conduct did not taint the information that the INS subsequently got from its files. The information came from independent and voluntary sources and was therefore admissible. *Id.* at 738. The court did not go on to discuss the exclusionary rule issue already defined by the circuit.

76. 514 F.2d 294 (2d Cir. 1975).

tect the integrity of its borders."[77] The appellee was travelling on a bus which had crossed into New York from Canada when he was questioned by a "roving patrol". He failed to answer questions about his citizenship and was detained by a border patrol agent.[78] Appellee moved to suppress the evidence, claiming that the seizure was not a proper border search. His motion was granted by the district court and the Government appealed.[79] The Second Circuit affirmed the district court.[80] While the court recognized the problem created by illegal immigration, it stressed the need to protect the alien's fourth amendment rights.[81] The court said that "to respond to the problem by watering down the probable cause requirements of the Fourth Amendment is most surely to take the lowest constitutional road."[82]

Moving from the general climate created by the court in *Barbera*, there has been little effort by the Second Circuit to deal more specifically with the exclusionary rule and its application to deportation proceedings. One such effort occurred in *Melara-Esquivel v. INS.*[83] In this case, the alien was arrested. At his deportation hearing, he gave his name and the Government produced a pre-existing file under that name.[84] The court said that because the evidence was available from an independent and untainted source, it was unnecessary to consider the INS' "alternative argument that the exclusionary rule does not apply to deportation proceedings."[85] Finally, in a recent decision, *Hincapie-Duque v. INS,*[86] an alien was arrested by INS agents in the garage where he worked as a result of an anonymous phone call to the INS mentioning the alien's illegal presence in the United States.[87] The alien challenged the search of the premises where he was apprehended and the constitutionality

77. *Id.* at 301.
78. *Id.* at 296.
79. *Id.*
80. *Id.*
81. *Id* at 301.
82. *Id.* at 301-02.
83. No. 76-4111, slip op.(2d Cir. Oct. 13, 1976) [hereinafter cited as *Melara-Esquivel*, slip op.].
84. *Id.*
85. *Id.*
86. No. 78-4015, slip op.(2d Cir. June 20, 1978) [hereinafter cited as *Hincapie-Duque*, slip op.].
87. *Id.*

of his initial interrogation.[88] The Government, in reply, argued that there had been no unlawful conduct and that the evidence was therefore untainted.[89] Citing the *Cuevas-Ortega* slip opinion,[90] the Government also argued at length that the exclusionary rule did not apply to deportation proceedings.[91] The petition to review Hincapie-Duque's deportation order was denied by the Second Circuit summarily, without indicating a stand on the exclusionary rule issue.[92]

In the Third Circuit, a recent district court decision has indicated, in dicta, a movement toward the *Cuevas-Ortega* alternative. In *Smith v. Morris*[93] the aliens were arrested without a warrant. At the deportation hearing, in order to avoid adverse inferences from remaining silent, the aliens admitted that they had overstayed the time authorized by their visitor's permits.[94] The Government did produce copies of those permits which had been seized at the time of the arrest, but withdrew them. When a deportation order was entered by the immigration judge, the aliens applied to the district court for a writ of habeas corpus.[95] The court denied the petitions holding that the admissions of the aliens at the deportation hearing provided sufficient basis for the deportation order and noted that no illegally-seized evidence had actually been introduced by the Government.[96] The court, in dicta, went on to add that a deportation proceeding is not a criminal proceeding:[97]

> In deportation hearings, the issues are merely identity and status; the consequences are not penal in nature; and the ultimate outcome cannot possibly be tainted by earlier unlawful actions of INS agents. That is to say, application of the exclusionary rule could not have any significant impact on the result of a deportation proceeding.

The court further reasoned that the fourth amendment is fully applicable in a criminal proceeding where the decision results from the occurrence of specific events and not merely upon proof of an alien's status. The court stated:

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88. *Id.*
89. Brief for Respondent at 11-14, Hincapie-Duque v. INS, No.78-4015, slip op. (2d Cir. June 20, 1978).
90. *Id.* at 14 n.12, 25.
91. *Id.* at 15-28.
92. *Hincapie-Duque*, slip op.
93. 442 F. Supp. 712 (E.D. Pa. 1977).
94. *Id.* at 714.
95. *Id.* at 713.
96. *Id.* at 714.
97. *Id.*

> Therefore, assuming the Fourth Amendment is fully applicable to the activities of INS agents, and assuming that aliens are entitled to full protection afforded by the Fourth Amendment, it would nevertheless seem that the exclusionary rule serves no useful purpose in any deportation proceeding in which the decision does not depend on proof of specific events, but merely on proof of status.[98]

The Third Circuit has done little since *Morris* to clarify its position on the use of the exclusionary rule in deportation proceedings. In a recent Court of Appeals decision, *Lee v. INS*,[99] a Chinese crewman was stopped and interrogated by INS agents. Lee admitted that he had deserted his ship and gave the INS agent his crewman's landing permit.[100] At his deportation proceeding, Lee was found deportable but was allowed voluntary departure. Lee appealed, claiming that the interrogation and arrest were not based on probable cause and were therefore illegal. He then requested the application of the exclusionary rule to suppress the evidence against him.[101] The court discussed reasonable suspicion and probable cause justifications as they apply to forcible detention by INS agents.[102] It then concluded that the INS agent had met the necessary standards and that Lee's detention was legal. Therefore the evidence flowing from the detention was admissible.[103]

The *Lee* court found it unnecessary to consider the exclusionary rule arguments raised by the parties since it had decided that none of the evidence before it had been illegally obtained.[104] It also declined to decide whether information from INS files was derived from an illegal detention and thus excludible under the poisonous fruit doctrine.[105] Therefore, by expressly stating that it would not address these issues, the Third Circuit has indicated that it is not ready to commit itself formally to a particular viewpoint. The *Lee* court even went a step further by amending its original slip opinion, deleting all references to the divergent First and Ninth Circuit holdings on the issue.[106]

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98. *Id.*
99. No. 77-2265 (3d Cir. Jan. 4, 1979).
100. *Id.* at 3-4.
101. *Id.* at 5.
102. *Id.* at 5-11.
103. *Id.* at 11.
104. *Id.* at 12.
105. *Id.*
106. The court acknowledged the exclusionary rule issues in its opinion but declined to

The amending of opinions to exclude the exclusionary rule issue by the Ninth and Third Circuits does not diminish the *Cuevas-Ortega* alternative as a reasonable choice. However, the courts' reluctance to allow its views in the slip opinions to stand naturally lends more credence to the clear and firm First Circuit point of view.

Although many of the circuits have yet to comment, the resolution of the exclusionary rule issue in deportation proceedings could have several important effects.

If the First Circuit holding prevails and the exclusionary rule is applied, the Supreme Court's recent decision in *Ceccolini*[107] will become an important factor in the conduct of deportation proceedings. Documentary evidence such as passports and permits could be excluded from evidence if obtained by an illegal search and seizure. Since such documents constitute a major part of the Government's case in deportation proceedings, the Government's position would inevitably be severely handicapped.

The Ceccolini decision could even be taken a step further. If the documentary evidence used by the Government to show deportability has been derived through information obtained by an unconstitutional search and seizure, it could be excluded as "fruit of the poisonous tree". Thus pre-existing Government documents, such as INS records, would become inadmissible in a deportation proceeding if unlawful INS conduct is involved. Under *Ceccolini,* a witness' live testimony might not be excluded because "the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify."[108]

On the other hand, if the *Cuevas-Ortega* alternative were to prevail, the *Ceccolini* distinction between witness testimony and documentary evidence would have no effect in deportation proceedings since the court would refuse to exclude either despite an argument that it had been derived from unlawful INS conduct.

The adoption of the First Circuit view would also effect the conduct of INS investigators. In searches for and encounters with illegal

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address them further. The original opinion, dated Jan. 4, 1979, also cited the divergent First and Ninth Circuit cases dealing with the subject (including the *Cuevas-Ortega* slip opinion) without indicating a Third Circuit position. *Id.* Curiously, on Jan. 25, 1979, an order was entered amending only the exclusionary rule area of the opinion, deleting the cites completely. No. 77-2265 (3d Cir. Jan. 25, 1979).

107. 435 U.S. 268 (1978).

108. *Id.* at 277.

aliens, the weight of the exclusionary rule would encourage INS agents to act more cautiously to prevent possible fourth amendment violations. Such awareness and prudence would protect any evidence found from being tainted and eliminate the Government's burden of finding similar evidence from a wholly independent source. It would also serve as a reminder to overzealous investigators, such as the one in *Navia-Duran,*[109] that even illegal aliens have certain rights which must be protected.

Another effect of resolving the exclusionary rule issue would be on the illegal alien himself. When the INS discovers the illegal alien's presence, deportation proceedings are instituted against him. If a deportation order is entered, the illegal alien has few alternatives remaining that can prevent his actual departure. The exclusionary rule, if permitted in deportation proceedings, could be important legal remedy for the deportable illegal alien.

The final and most dramatic effect of the exclusionary rule issue is that the rule could be an important legal defense for *any* deportable alien. Its application could be crucial, not only to illegal aliens, but permanent resident aliens who have lived in the United States for years and have established themselves in the community, as well as other lawfully-admitted aliens against whom deportation proceedings are instituted.

A recent Ninth Circuit decision, *Larios-Mendez v. INS,*[110] suggested that the exclusionary rule issue is an important defense to lawfully-admitted aliens who subsequently become deportable under 8 U.S.C. § 1251 (a).[111] In *Larios-Mendez,* the petitioner was a permanent resident alien. He was caught smuggling two illegal aliens into the United States by an Arizona border patrol. He pleaded guilty and was sentenced by a U.S. Magistrate for "aiding and abetting the illegal entry of aliens into the United States" in

109. 568 F.2d at 810. For another example of "overzealousness," *see* Bong Youn Choy v. Barber, 279 F.2d 642 (9th Cir. 1960) where a well-educated Chinese alien, who reported voluntarily to the INS office, was interrogated for hours and threatened with deportation and perjury prosecution unless he admitted to being a Communist. After a sleepless night, he returned and signed such a confession. *Id.* at 643-45. The INS then found him deportable. *Id.* at 645. The Ninth Circuit reversed his deportation order finding that the underlying confession was coerced. *Id.* at 647. *See also* Valeros v. INS, 387 F.2d 921 (7th Cir. 1969).

110. No. 76-2362 (9th Cir. Jan. 5, 1979).

111. Section 1251(a) of Title 8 of the United States Code lists reasons for finding an alien, who is in the United States, deportable. 8 U.S.C. § 1251(a) (1976).

violation of 8 U.S.C. § 1325. After the criminal case, the INS instituted deportation proceedings against Larios-Mendez, charging deportability under 8 U.S.C. § 1251 (a)(13), the smuggling provision.[112] At his deportation hearing, Larios-Mendez contended that the statements of the illegal aliens were necessary to show he had helped them enter the United States for a price. He argued that such statements were inadmissible because the stop by the border patrol violated the fourth amendment. The court found enough evidence apart from the challenged statements to support the deportation order and affirmed it "without considering whether the statements in question were the fruits of an illegal stop or arrest or whether the exclusionary rule of the fourth amendment should be applied in the civil proceeding to suppress relevant evidence."[113]

Although the appeal did not succeed, the use of the exclusionary rule argument by the petitioner in *Larios-Mendez* raises interesting questions in extending the issue past illegal alien cases. If there had not been enough additional evidence allowing the court to evade the exclusionary rule issue, would the *Larios-Mendez* court have elected the *Cuevas-Ortega* alternative or the First Circuit view? Although not within the scope of this Casenote, should a legally-admitted alien be given greater exclusionary rule access than an illegal alien? Or will the deportation proceeding's civil nature give the permanent resident alien, who has roots in America, the same odds as the illegal alien vis-a-vis the exclusionary rule? Finally, if the issue is raised often enough by these "legal" aliens who become deportable, will the circuits or ultimately the Supreme Court move more quickly to resolve it?

Other frequently used methods of preventing physical departure after entry of a deportation order have not been very effective. The argument that the immigration judge abused his discretion in denying the alien voluntary departure is routinely raised in petitions to

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112. Section 1251(a)(13) provides:

Any alien in the United States (including an alien crewman) shall, upon order of the Attorney General, be deported who-

(13) prior to, or at the time of any entry or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of the law.

8 U.S.C. § 1251(a)(13) (1976).

113. No. 76-2362 (9th Cir. Jan. 5, 1979).

review deportation orders. It rarely succeeds in appellate courts unless it can be shown that the discretion was exercised arbitrarily and capriciously.[114]

The tactic of delaying departure where "there is not even a colorable legal or factual basis for relief sought"[115] has been attacked in a recent Second Circuit decision.[116] Attorneys frequently use petitions for writs of habeas corpus and appeals of INS decisions to stall the deportable alien's physical departure from the United States. In *Der-Rong Chour v. INS*,[117] the Second Circuit not only affirmed the deportation order, but assessed "damages in the sum of $1,000 and double costs" against the alien and his attorney.[118]

Thus, use of the exclusionary rule in deportation proceedings where there is a question of unlawful INS conduct, could be one of the more viable routes for the deportable alien. The First Circuit view of the exclusionary rule would expand his possible defenses in a deportation hearing. Even though he is in the United States illegally, evidence of his deportability would be suppressed if unconstitutionally obtained. The Ninth Circuit *Cuevas-Ortega* alternative would reduce his defenses, allowing the Government to introduce any evidence of deportability, no matter how it was obtained. Ultimately, to the deportable alien, the applicability of the exclusionary rule to his case could mean the difference between continuing to live in America and returning abroad.

Diane M. Peress

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114. 588 F.2d at 1278. *See also Hincapie-Duque*, slip op.; *Melara-Esquivel*, slip op.

115. Der-Rong Chour v. INS, 578 F.2d 464, 468 (2d Cir. 1978).

116. 578 F.2d 464. Here, a Chinese crewman failed to depart after his stay was extended. He then absconded and was arrested. He then tried to delay his departure by filing various petitions. *Id.* at 465-67. The court found this to be "an outrageous abuse of the civil process through persistent pursuit of frivolous and completely meritless claims." *Id.* at 467.

117. *Id.* at 464.

118. *Id.* at 468-69.