PETITION
APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4159

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

MARCIO SANTOS-PORTILLO,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Malcolm J. Howard, Senior District Judge. (7:18-cr-00010-H-1)

Argued: March 10, 2021 Decided: May 7, 2021

Before WILKINSON, AGEE, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Agee joined. Judge Floyd wrote a dissenting opinion.

ARGUED: James Edward Todd, Jr., OFFICE OF THE FEDERAL PUBLIC DEFENDER, Greenville, North Carolina, for Appellant. Thomas Ernest Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** G. Alan DuBois, Federal Public Defender, Eric Brignac, Chief Appellate Attorney, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Brian C. Rabbitt, Acting Assistant Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Robert J. Higdon, Jr., United States Attorney, Jennifer May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

WILKINSON, Circuit Judge:

Appellant Santos-Portillo unlawfully entered the United States after a prior deportation resulting from a felony conviction. Federal officials arrested him with probable cause but without securing the administrative arrest warrant required by 8 U.S.C. § 1357(a). That arrest produced the evidence that led to Santos-Portillo's present conviction for illegal reentry into the United States under 8 U.S.C. § 1326(a).

On appeal, Santos-Portillo argues that we should suppress all post-arrest evidence against him. But § 1357(a) does not authorize courts to suppress evidence for violations of the provision. Santos-Portillo argues, however, that the federal courts have a broad supervisory power to suppress evidence for statutory violations by law enforcement regardless of whether Congress authorized suppression. But a proper respect for Congress's role in determining the consequences of statutory violations compels rejecting his argument. Even assuming we have the authority to create a suppression remedy where Congress has not provided one, we decline to exercise it in this case. We therefore affirm the judgment.

I.

In January 2018, Department of Homeland Security (DHS) Special Agent Thomas Swivel saw someone whom he thought he recognized from a prior case. This turned out to be Santos-Portillo. As Santos-Portillo drove away, Agent Swivel wrote down his license plate number.

Based on a subsequent records check, Agent Swivel learned that Santos-Portillo was a Honduran national who was in the United States illegally. He discovered a Texas felony

conviction for unlawfully fleeing from law enforcement and that Santos-Portillo had consequently been deported in 2011. Agent Swivel also found a photograph of Santos-Portillo in his immigration file.

Agent Swivel drove to the address to which the car was registered. He saw the car but no people. Concluding that Santos-Portillo was in the United States illegally, Agent Swivel began coordinating with other agents to make an arrest. A few days later, Agent Swivel and four other agents staked out Santos-Portillo's house. When Santos-Portillo exited the house, the agents confronted him. Santos-Portillo then gave his name and admitted he was from Honduras.

Agent Swivel then arrested Santos-Portillo and took him to a nearby ICE office. Santos-Portillo was fingerprinted; when Swivel sent the prints to several law enforcement agencies, they matched the profile of a previously deported alien. Agent Swivel then gave Santos-Portillo *Miranda* warnings and interrogated him. During questioning, Santos-Portillo admitted he was from Honduras, that he had previously been deported, and that he had not obtained permission to return to the United States.

Santos-Portillo was then criminally charged with violating 8 U.S.C. § 1326(a), which prohibits illegal reentry of previously removed aliens.

II.

At Santos-Portillo's detention hearing in February 2018, Agent Swivel testified that he neither sought nor secured an administrative arrest warrant to detain Santos-Portillo. He was asked, "Do you ever get arrest warrants? Or is it generally the nature of the crime that you do these arrests without a warrant?" Swivel answered, "Generally, we encounter

people administratively. And, due to his prior deportation, there was an administrative arrest warrant in the A-File. . . . But–no." J.A. 36–37.

Subsequently, Santos-Portillo moved to suppress all post-arrest evidence. He based this motion on an alleged violation of 8 U.S.C. §1357(a), which permits warrantless arrests only if agents have probable cause and have a "reason to believe . . . there is [a] likelihood of the person escaping before a warrant can be obtained." Santos-Portillo argued that the agents had ample time to secure a warrant before arresting him. He asked the court to exercise its supervisory authority to suppress in order to prevent widespread disregard of a congressional command. J.A. 66.

The government countered by arguing that 8 U.S.C. § 1357(a) was not applicable to the arrest of Santos-Portillo. It argued that the involved agents had dual authority as customs agents to execute warrantless arrests based on probable cause alone. It also argued that the prior deportation order was an adequate substitute for an arrest warrant.

The magistrate judge issued a recommendation finding that 8 U.S.C. § 1357(a) did in fact apply to the arrest. *See United States v. Santos-Portillo*, No. 7-18-CR-10-1H, 2019 WL 3047427 (E.D.N.C. May 31, 2019). She thus concluded the arrest was unlawful because the agents had time to secure an arrest warrant but did not do so. *Id.* at 4–5. In the process, the magistrate judge rejected the government's arguments that the DHS agents had authority to arrest as customs officers and that an arrest warrant was not needed due to the prior deportation order. *Id.*[1] However, the magistrate judge recommended denying the

[1] The government does not challenge these determinations on appeal, and we therefore do not reach these questions.

motion to suppress because the arrest "was consistent with the Fourth Amendment" and because § 1357(a) did not authorize suppression as a remedy. *Id.* at 7. The district court subsequently adopted the magistrate judge's opinion and held that suppression was not warranted.

A trial followed where the post-arrest evidence was introduced against Santos-Portillo. He was convicted and issued a time-served sentence of 15 months. After conviction, Santos-Portillo was taken into custody by ICE agents and deported again.

Santos-Portillo filed a timely appeal.

III.

A.

Santos-Portillo argues that suppressing the evidence against him is necessary to give meaning to 8 U.S.C. § 1357(a)'s general requirement that immigration officials secure an administrative arrest warrant. But our analysis must begin with other statutes.

Congress has expressed its clear desire that aliens who commit felonies in the United States be deported. *See, e.g.*, 8 U.S.C. § 1227 (a)(2). Santos-Portillo is a felon, having been convicted in Texas for unlawfully using a vehicle to flee from the police. And moreover, Congress has expressed its intent that convicted felons who are deported, like Santos-Portillo, stay outside of the United States. 8 U.S.C. § 1326 makes it a federal crime for an alien who has been deported to reenter the United States without permission. Santos-Portillo admits he violated that statute, making him a criminal twice-over.

We thus confront a statutory scheme manifesting Congress's clear intent that individuals like Santos-Portillo be kept out of the United States. Santos-Portillo asks us to

apply 8 U.S.C. § 1357(a) in a way that frustrates that edict. That provision authorizes immigration officials "to make arrests" without a warrant for "any offense against the United States," but only "if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest." Both parties agree that Agent Swivel arrested Santos-Portillo without a serious risk of him fleeing before a warrant could be obtained.

A legal requirement has thus been violated. But the question of what remedy is available to Santos-Portillo—or whether one exists at all for violations of this provision—remains. Absent unusual situations, the power to craft remedies for statutory violations lies with Congress, which after all enacted the statute, not the federal courts. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020). There is absolutely no statutory basis for Santos-Portillo's argument that we should suppress the evidence against him. 8 U.S.C. § 1357(a) makes no mention of suppression or any other remedy for those arrested without an administrative warrant. This absence is notable, considering that Congress has authorized a suppression remedy in other contexts. *See, e.g.*, *United States* v. *Donovan*, 429 U.S. 413, 432 n.22 (1977) ("The availability of the suppression remedy for these statutory, as opposed to constitutional, violations . . . turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights.").

In the Fourth Amendment context, of course, the Supreme Court has required the suppression of incriminating evidence if law enforcement violates the Constitution. *See*

Mapp v. Ohio, 367 U.S. 643, 657 (1961). The exclusionary rule was deemed necessary to avoid the contamination of court proceedings with unconstitutionally gathered evidence. *See id.* at 659. But the parties agree there is no constitutional violation in this case. The Fourth Amendment permits "the warrantless arrest of an individual in a public place upon probable cause . . . ." *United States* v. *Santana*, 427 U.S. 38, 42 (1976). And the Court has specifically upheld a warrantless arrest with probable cause on the front steps of a house, *id.* at 40-41, just like what happened here. In this appeal, Santos-Portillo does not challenge that Agent Swivel had probable cause. Agent Swivel had accessed an immigration file containing an identifying photo and clear proof that Santos-Portillo was a convicted felon who had been deported, meaning he was almost certainly in the United States illegally. It is also worth noting that Agent Swivel did not invade Santos-Portillo's home to make the arrest.

Section 1357(a) thus adds a rule for immigration arrests not required by the Constitution. In fact, the statute's warrant requirement does not even correspond that well to Fourth Amendment concerns. In contexts where the Fourth Amendment does require a warrant, warrant applications must be considered by a "neutral and detached magistrate" and not "a policeman or Government enforcement agent." *Johnson v. United States*, 333 U.S. 10, 14 (1948). That neutral judicial officer determines whether probable cause exists, free of any loyalty to law enforcement. Under § 1357(a), in contrast, an *administrative* official within the Executive Branch issues the arrest warrant. Although this may offer individuals some protection, it is substantially different from that guaranteed by the Fourth

Amendment's warrant requirement. And it offers yet further evidence that *judicial* suppression was decidedly not what Congress had in mind.

In sum, Congress has provided no suppression remedy for § 1357(a) infractions. The Constitution does not provide a remedy because there has been no constitutional violation. It would seem therefore that Santos-Portillo's appeal is at an end.

B.

But no. Pointing to no positive-law authority for suppression, Santos-Portillo nevertheless appeals to the judiciary's alleged inherent power to devise remedies for violations of the law by the government. His primary authority for this asserted judicial supervisory power is *McNabb v. United States*, 318 U.S. 332 (1943). There, the Supreme Court excluded confessions from bootleggers who had been arrested, confined without counsel, and questioned for two days, all in violation of a federal statute requiring prompt delivery of arrestees to a judicial officer. The Court reasoned that it had the power and responsibility to ensure "civilized standards of procedure and evidence" in the federal courts, and that the "principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution." *Id.* at 340-41.

As Santos-Portillo points out, *McNabb* did not identify a positive-law source of authority for its decision. *McNabb* is not unique from that period of the Supreme Court's history, in which "the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). For

example, the Court repeatedly implied private causes of action for violations of federal statutes that did not, by their terms, grant private parties permission to sue. *See, e.g.*, *Borak*, 377 U.S. at 433.

But the winds have changed. Gone are the "heady days in which [the courts] assumed common-law powers to create causes of action" and other remedies. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). The Court has come to recognize that the creation of remedies for violations of federal statutes is generally a legislative power, not a judicial one. *Hernandez*, 140 S. Ct. at 742 ("[A] federal court's authority to recognize damages remedies must rest at bottom on a statute enacted by Congress."). In the process, it has disavowed earlier cases from the period in which *McNabb* was decided, pointedly referring to those cases as being a part of the "*ancien regime*." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Thus, the once freewheeling power of the federal courts to create remedies where Congress did not has met only disfavor from the Court itself.

It is therefore unsurprising that the Supreme Court refused to extend *McNabb* in the one modern case in which it considered the question. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), officials arrested and interrogated a foreign national without informing him, as required under the Vienna Convention, that he could ask for the Mexican Consulate to be notified of his detention. *Id.* at 339-40. The Court cited the "high cost" of the exclusionary rule and noted it had historically "applied the exclusionary rule primarily to deter *constitutional* violations." *Id.* at 348 (emphasis added). The Court went on to explain that in the "few cases in which [it had] suppressed evidence for statutory violations," the

"excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests." *Id.* at 348. Because the provision of the Vienna Convention requiring consular notification was only "remotely connected to the gathering of evidence," the Court declined to suppress the evidence. *Id.* at 349.

Sanchez-Llamas makes clear that the range of cases where courts can on their own suppress evidence for a statutory violation is quite limited. In a recent case limiting the scope of the suppression remedy for *constitutional* violations, the Court has expressed concerns about the "costs" of the exclusionary rule and stated that "exclusion has always been our last resort, not our first impulse." *Herring v. United States*, 555 U.S. 135, 141 (2009). (internal quotation marks and quotation omitted). In a subsequent case again limiting the exclusionary rule, the Court explained that "[e]xclusion exacts a heavy toll on both the judicial system and society at large" because it "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Davis. v. United States*, 564 U.S. 229, 237 (2011).

Our sister circuits have had no difficulty discerning the Supreme Court's direction. Several have declined to suppress evidence obtained in violation of § 1357(a). As the First Circuit explained, "a statutory violation untethered to the abridgment of constitutional rights is insufficient to justify suppression." *United States* v. *De La Cruz*, 835 F.3d 1, 6 (1st Cir. 2016) (internal quotation marks and citation omitted). Or as the Sixth Circuit held: "Although exclusion is the proper remedy for some violations of the Fourth Amendment, there is no exclusionary rule generally applicable to statutory violations." *United States* v.

Abdi, 463 F.3d 547, 556 (6th Cir. 2006). We find these authorities persuasive and decline to create a circuit split.

Our friend in dissent sees things differently, arguing that we should create a new rule of evidence as a matter of our "supervisory authority." But the cases relied upon by the dissent establish only the unremarkable proposition that courts have traditionally had the power to regulate proceedings inside the courtroom. *See Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 808 (1987) (contempt); *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976) (*voir dire*). The dissent proposes a regime to regulate behavior outside the courtroom by creating rules of evidence at odds with congressional intent. This is a remarkable assertion of power, one that fails to set forth any discernible limit that would prevent the power from being put to boundless use. "[T]here is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degan v. United States*, 517 U.S. 820, 823 (1996). In that spirit, we see a stark difference between the judiciary's traditional power to regulate a courtroom proceeding and the dissent's proposed power to refashion Congress's remedial schemes. Moreover, Congress has established a procedure for creating evidentiary rules; claiming that courts can create their own "suggest[s] that those who struggled so long and hard for the Rules Enabling Act of 1934 were wasting their time because the Court could have proceeded without congressional authorization . . ." Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 Notre Dame L. Rev. 1677, 1688 (2004). Even more to the point: Congress chose not to prescribe

suppression for violations of § 1357(a). Suppressing evidence contrary to that choice cannot be a proper use of the judiciary's inherent powers.

C.

Santos-Portillo alleges, however, that courts can suppress evidence in cases of "egregious" or "flagrant" law enforcement behavior. This standard is vague and open-ended. It invites litigiousness. And it fails on its own terms. This case features a perfectly lawful arrest. Agent Swivel did not break into Santos-Portillo's home. He had airtight probable cause to proceed. Mitigating the chance of mistaken identity, Agent Swivel did the background work. He confirmed appellant's previous conviction, his prior deportation, and his subsequent reentry. He got Santos-Portillo to confirm his identity and country of origin before arresting him. And while appellant contends that the violation of § 1357(a) here implicates important Fourth Amendment interests, "the likelihood of the person escaping" does not affect that Amendment's core requirement of probable cause.

Santos-Portillo also alleges on appeal that there is widespread disregard of § 1357(a)'s arrest warrant requirement by immigration officials. But Santos-Portillo only raised this issue in a cursory fashion before the magistrate judge and district court. He did not present or solicit evidence on this issue at the hearing before the magistrate judge. He relies instead upon snippets of testimony from Agent Swivel and another agent brought out in cross-examination. Even assuming that an agent does not secure an administrative arrest warrant, that does not mean all or even most of those arrests were unlawful. Santos-Portillo did not ask about and does not present evidence on other individual cases in which the statute was allegedly violated. This alone is fatal because the statute does not require an

arrest warrant if there is a likelihood of flight. In many of those cases, the agents may have had reason to fear the arrestee would flee. In short, there is before us no evidentiary foundation for appellant's "widespread disregard" claim.

Finally, Santos-Portillo urges us to suppress to maintain the integrity of § 1357(a). How, he asks, can this provision mean anything if there are no consequences when it is violated? First of all, we are not convinced that meaninglessness is the sole alternative to a judicial suppression remedy. The United States is a nation of laws, and we are not prepared to summarily dismiss the prospect that government officials will generally take statutory commands seriously, whatever the remedial scheme. Internal disciplinary proceedings often take cognizance of any expression on Congress's part. *See* Ronald J. Allen et. al., Criminal Procedure Investigation and Right to Counsel 344-45 (3d ed. 2016) (arguing that pressure from the public and elected officials will encourage good behavior by law enforcement). If DHS agents routinely violate rules, they risk consequences, including the potential loss of employment.

But more fundamentally, Congress has the power to pass laws without creating specific legal consequences that flow from their violation. Congress is not prohibited by Article III from passing advisory resolutions and standards. Such hortatory laws encourage admirable behavior rather than mandate it by the threat of punishment. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons From Congressional Practice*, 61 Stan. L. Rev. 573, 584-85 (2008). Hortatory laws have an ancient lineage. Laws encouraging good behavior without threat of punishment existed in ancient Greece. *See, e.g.*, Plato, Laws 151 (Benjamin Jowett trans. 2013) (endorsing the use of hortatory "prefaces" in laws so that

the citizens will be "as readily persuadable to virtue as possible"). Today, such laws are ubiquitous in the federal statute books. *See, e.g.*, *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 173 (2009) (giving several examples of "conciliatory or precatory" statutory provisions that do not create "substantive rights"). For example, 4 U.S.C. § 8 provides that "[n]o disrespect should be shown to the flag of the United States," and that the flag "should not be dipped to any person or thing." Further, "[a]ll private citizens . . . are encouraged to recognize Parents' Day." 36 U.S.C. § 135(b). Many ethical rules for lawyers are hortatory, and yet there is fortunately evidence that they are complied with in spite of there being no clear consequences for breaking them. *See* Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors*, 85 Notre Dame L. Rev. 671, 703 (2010) (arguing that "hortatory or generalized rules may sometimes make sense as a means for developing a culture of introspection and generally moral behavior").

What are we to make of this? We can draw from the long tradition and ubiquity of hortatory laws at least the modest lesson that Congress is not required to deploy in any statutory scheme the full panoply of remedies at its disposal. So it is here. Congress's undeniable power to repeal 8 U.S.C. § 1357(a) altogether implies its concomitant power to make it more in the nature of a hortatory enactment. Or to put it another way, the fact that Congress has decided not to incur the formidable costs of a judicial exclusionary remedy does not make the passage of § 1357(a) any less legitimate or any less worthwhile.

IV.

Manufacturing a remedy in the course of creating a circuit split would be a dramatic step. Whether we think a congressional remedial scheme is optimal cannot in the end be dispositive. We are not lawmakers and must resist the temptation to behave as such. Because the judiciary has "sworn off the habit of venturing beyond Congress's intent," *Sandoval*, 532 U.S. at 287, we cannot accept the invitation to refashion the handiwork of Congress in this case.

The judgment of the district court is accordingly affirmed.

AFFIRMED

FLOYD, Circuit Judge, dissenting:

I agree with the majority that 8 U.S.C. § 1357 does not create an exclusionary remedy by statute and that the arresting agents did not violate the Constitution. My disagreement with the majority is rooted in a difference in opinion over the locus of federal courts' exclusionary authority. Because I believe the majority too narrowly views federal courts' inherent authority to supervise the proceedings before them, I respectfully dissent.

* * *

The majority asserts that the supervisory authority relied on in *McNabb v. United States*, 318 U.S. 332 (1943), has lost its vitality, and has been cabined such that—practically speaking—suppression is warranted only when (1) there is a constitutional violation, or (2) it is explicitly provided for by statute. And because § 1357 evinces no intent on the part of Congress to create an exclusionary rule, the majority argues that we usurp Congress's role by creating one. In reaching this conclusion, the majority situates the exclusionary rule among other judicially crafted remedies—in particular, implied causes of action—that have fallen into disfavor.

Under this reading of post-*McNabb* precedent, the case is a relic of a bygone era in which federal courts often crafted remedies in the face of congressional silence. But judicially implying a cause of action into a statute—thereby creating rights and imposing external liabilities where none previously existed—is a different exercise of judicial authority than imposing evidentiary sanctions. Previously, federal courts purported to create implied causes of action either as an exercise of statutory interpretation as to a

statute's remedial purpose or as an exercise of federal common law. *See, e.g.*, *J. I. Case Co. v. Borak*, 377 U.S. 426, 431–32 (1964); *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916). The Supreme Court's modern rejection of that doctrine emphasizes that federal courts lack common-law powers, so the judicial branch cannot simply graft causes of action onto substantive statutory law. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). Of course, it is for Congress to create substantive law along with causes of action to enforce that law. And I share the majority's concern that federal courts should resist the impulse to improve upon a statute or undercut its objectives.

But the authority of federal courts to order evidentiary suppression for statutory violations does not turn on whether we can imply such a remedy into the statute—either as an act of statutory interpretation or of federal common-law. The Supreme Court in *McNabb* considered the violation by federal officials of the presentment statute. In deciding that the violation in that case merited suppression, the Court declined to address whether the officers' actions independently violated the Constitution. *McNabb*, 318 U.S. at 340. Nor did the Court consider whether the statute somehow implied an exclusionary remedy. Rather, the Court located its power in the "supervisory authority over the administration of criminal justice in the federal courts," *id.* at 341, which tasks courts with "establishing and maintaining civilized standards of procedure and evidence," *id.* at 340.

Thus, supervisory authority is a power inherent to federal courts over the proceedings before them. Our exercise of that authority does not invade the province of the legislature in the same way as other judicially created remedies because it does not seek to supplement or improve upon a statutory scheme, nor does its scope turn on a statute's

purpose. Instead, supervisory authority seeks to govern the integrity of "the enforcement of the federal criminal law in the federal courts." *Id.* at 341. Viewed as an exercise of supervisory authority, suppression is merely an evidentiary remedy to deter government reliance on illegally obtained evidence at trial. *See, e.g.*, *United States v. Payner*, 447 U.S. 727, 734 (1980) (describing the rule as an "exclusionary sanction"); *Herring v. United States*, 555 U.S. 135, 141 (2009) ("[T]he exclusionary rule is not an individual right . . . .").

Accordingly, the question presented by this case is how far federal courts should extend their supervisory authority over federal proceedings. For the reasons set forth above, I do not share the majority's view of *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), as the natural culmination of a broader turn away from supervisory authority. In the years following *McNabb*—and contemporary to the Supreme Court's rejection of implied causes of action—the Court continued to affirm its supervisory authority in a variety of contexts. *See, e.g.*, *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 808 (1987) ("The use of this Court's supervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness."); *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976) (holding that voir dire concerning racial prejudice can be required as an exercise of supervisory authority); *Bank of N.S. v. United States*, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) ("I agree that every United States court has an inherent supervisory authority over the proceedings conducted before it.").

"A federal court 'may, within limits, formulate procedural rules *not specifically required by the Constitution or the Congress*.'" *Bank of N.S.*, 487 U.S. at 254 (emphasis

added) (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)). A core purpose of supervisory authority is "to deter illegal conduct." *Hasting*, 461 U.S. at 505. And one way of doing so is the exclusionary rule—although it should be applied with caution. *See Payner*, 447 U.S. at 734. As the majority notes, the Supreme Court has narrowed the applicability of the exclusionary rule since *McNabb*, and it is not automatically applied to any violation, constitutional or otherwise. *See, e.g.*, *Herring*, 555 U.S. at 141; *United States v. Caceres*, 440 U.S. 741, 755–56 (1979). Instead, we ask whether suppression as an exercise of supervisory authority "serves the 'twofold' purpose of deterring illegality and protecting judicial integrity." *Payner*, 447 U.S. at 735 n.8. And courts must always ask whether exclusion's deterrent benefits outweigh its social costs. *Herring*, 555 U.S. at 141.

Sanchez-Llamas did not displace this balancing test. In that case, the Court held that supervisory authority did not apply because the Court was reviewing state court proceedings. 548 U.S. at 345–46. True, the Court observed that the exclusionary rule has previously been applied to statutes that implicate constitutional interests. But it did so in declining to *imply* that remedy into an international treaty. *Id.* at 347–48. The Court did not thereby limit its understanding of its supervisory authority.

The Court's language in *Sanchez-Llamas* creates a closer call as to whether a standalone violation of § 1357(a) justifies suppression. Indeed, the Supreme Court has declined in the past to craft a sweeping exclusionary remedy for violations of executive regulations. *See Caceres*, 440 U.S. at 755–56. But the ultimate question is always the balance of suppression's benefits and harms. I would hold that systemic or repeated violations of § 1357(a) could tip the balance in favor of the suppression remedy in a given

case. The questions of deterrence and culpability loom large in the Supreme Court's suppression jurisprudence. *See, e.g.*, *Herring*, 555 U.S. at 144. The Court has suggested "recurring or systemic negligence" could trigger exclusion. *Id.* Similarly, we have suggested that we would consider exclusion as an exercise of supervisory authority for "severe official misconduct," *United States v. Neiswender*, 590 F.2d 1269, 1272 (4th Cir. 1979), or "widespread or repeated [statutory] violations," *United States v. Walden*, 490 F.2d 372, 377 (1974); *see also United States v. Johnson*, 410 F.3d 137, 149 (4th Cir. 2005); *United States v. Sanders*, 104 F. App'x 916, 921 (4th Cir. 2004) (per curiam).

Santos-Portillo presented compelling evidence of repeated violations in the face of a plain statutory requirement. Indeed, the record reveals that at least one agent admitted to routinely failing to secure arrest warrants, that five agents participated in this warrantless arrest, and that this conduct was blessed by ICE counsel. And in a separate case in the Eastern District of North Carolina, a similar, 2017 warrantless arrest was found to have violated § 1357(a). *United States v. Segura-Gomez*, No. 4:17-CR-65-FL-1, U.S. Dist. LEXIS 203189, at *1–8 (E.D.N.C. Nov. 30, 2018) (adopting the magistrate judge's report and recommendation that the arrest violated § 1357(a)).[1] Further, the evidence suggests that one of the arresting agent's primary motivations was to collect evidence for criminal prosecution, not merely to enforce civil immigration laws. These are the sort of facts that might justify the use of supervisory authority to prevent the criminal process from

[1] For this reason, this case also differs from the standalone violations considered by the First and Sixth Circuits. *See United States v. De La Cruz*, 835 F.3d 1, 5–9 (1st Cir. 2016); *United States v. Abdi*, 463 F.3d 547, 555–57 (6th Cir. 2006).

implicitly endorsing repeated violations of § 1357 to obtain evidence.[2]

Nor does this case present the same social costs typically at issue in the suppression context. There is no risk that suppression would "set the criminal loose in the community." *Davis v. United States*, 564 U.S. 229, 237 (2011). Whatever the outcome of Santos-Portillo's criminal trial, he still faced removal. Thus, I respectfully disagree with the majority's contention that suppression in a federal criminal trial would undercut Congress's broader, civil immigration objectives. Although I do not decide how the district court should have balanced the scales in this case, Santos-Portillo mustered enough evidence that the district court should have contended with his argument as to the need to deter widespread or repeated violations of § 1357(a). *See James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) (noting that a failure to exercise discretion is itself an abuse of discretion).

For the foregoing reasons, I respectfully dissent.

[2] I note also that this was a remarkably easy procedural safeguard for the arresting agent to comply with. The minimal burden imposed by the statute and its disregard with no suggestion of an exigency also weighs in favor of suppression.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
NO 7:18-CR-10-1H

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	
MARCIO SANTOS-PORTILLO,	)	**ORDER**
	)	
Defendant.	)	
	)	

This matter is before the court on defendant's motion to suppress [DE #22]. The government responded in opposition to the motion to suppress [DE #23] and defendant replied. The government filed a surreply in opposition [DE #30]. The matter was referred to United States Magistrate Judge Kimberly A. Swank for entry of a memorandum and recommendation (M&R). Following an evidentiary hearing, Judge Swank entered an M&R on May 31, 2019, recommending denial of the motion. The defendant filed objections [DE #70] on June 14, 2019. This matter is ripe for adjudication.

Under Rule 59(b) of the Federal Rules of Criminal Procedure, a district judge must consider de novo any portion of the M&R to which objection is properly made.

Defendant objects to the M&R recommending denial of his motion to suppress, raising a legal objection to the recommendation that a violation of 8 U.S.C. § 1357 does not warrant application of the exclusionary rule in this case. Defendant breaks his legal

objection into several arguments: (1) Supreme Court precedent does not require that a constitutional violation accompany a statutory violation for the exclusionary rule to apply; (2) the unlawful arrest implicated important constitutional concerns; (3) the government's widespread and systemic statutory violations compel exercise of the court's supervisory authority; and (4) suppression of the fingerprint evidence and the immigration A-File linked to that fingerprint evidence fulfills the purpose of the exclusionary rule.

The court has reviewed this matter carefully. After careful consideration, the court finds the magistrate judge has made proper and correct findings and conclusions and finds the objections to be without merit. Specifically, the court finds the magistrate judge correctly states the law that there is "no exclusionary rule generally applicable to statutory violations." United States v. Segura-Gomez, No. 4:17-CR-65-1FL, 2018 WL 6259222 at *4 (quoting United States v. Clenney, 631 F.3d 658, 667 (4th Cir. 2011). Additionally, as defendant voluntarily exposed himself to public view upon exiting his residence and his arrest was based upon probable cause to believe his presence in the United States violated 8 U.S.C. § 1326, his arrest was not in violation of the Fourth Amendment.

This court, having conducted a de novo review of the M&R and other documents of record, finds the recommendations of the

magistrate judge are in accordance with the law and should be approved. Accordingly, the court hereby adopts the recommendations of the magistrate judge as its own; and, for the reasons stated therein, the defendant's motion to suppress [DE #22] is hereby DENIED.

This 10th day of July 2019.

Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
#26

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:18-CR-10-1H

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	**MEMORANDUM &**
MARCIO SANTOS-PORTILLO,	)	**RECOMMENDATION**
	)	
	)	
Defendant.	)	

This matter is before the court on Defendant's motion to suppress [DE #22], which has been referred to the undersigned for memorandum and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). The Government has responded in opposition to the motion to suppress [DE #23] to which Defendant has replied [DE #26]. The Government filed a surreply in opposition [DE #30] and the time for further filings has expired. On May 2, 2018, an evidentiary hearing was held before the undersigned at which the Government and Defendant, with counsel, appeared. Accordingly, the matter is ripe for decision.

STATEMENT OF THE CASE

On January 30, 2018, a federal grand jury returned a one-count indictment charging Marcio Santos-Portillo ("Santos-Portillo") with illegal reentry into the United States of an alien removed subsequent to a felony conviction, in violation of 8 U.S.C. § 1326(a) and (b)(1). On March 7, 2018, Santos-Portillo filed a motion to suppress. He contends that his warrantless arrest by immigration agents on January

16, 2018, violated 8 U.S.C. § 1357 and his Fourth Amendment right against unreasonable warrantless seizures. Santos-Portillo demands that any evidence obtained after the January 16, 2018, arrest be suppressed.

STATEMENT OF THE FACTS

At the evidentiary hearing on Santos-Portillo's motion, the court heard the testimony of Special Agent Thomas Swivel ("Agent Swivel") for the Government. Santos-Portillo presented the testimony of his wife, Bobbie Overbey-Santos ("Overbey-Santos"), and his brother-in-law, Timothy Bannister ("Bannister"). The undersigned makes the following findings of fact based upon this testimony and the exhibits admitted into evidence.

Agent Swivel is a Special Agent of Homeland Security Investigations ("HSI") in Wilmington, North Carolina, where he has been employed for approximately sixteen years. (Hr'g Tr. [DE #36] 9.) He previously worked as a Border Patrol Agent and a Customs Special Agent in Arizona and has served a total of twenty-one years in law enforcement. (Hr'g Tr. 9–10.) As a Special Agent, he is charged with enforcing customs and immigration laws as well as investigations under other federal criminal codes. (Hr'g Tr. 10.)

On January 9, 2018, Agent Swivel observed Santos-Portillo at a business in Wilmington, North Carolina, and thought he recognized him as a person he had previously encountered criminally. (Hr'g Tr. 11.) Based upon motor vehicle records, Agent Swivel determined Santos-Portillo was not the person previously encountered

and that the vehicle Santos-Portillo had entered was registered to Overbey-Santos and Santos-Portillo, with an associated Wilmington address. (Hr'g Tr. 11-12.)

Agent Swivel then ran Santos-Portillo's name through an immigration database and found that Santos-Portillo had an alien registration number and had possibly been deported previously. (Hr'g Tr. 12.) Agent Swivel identified Santos-Portillo based on photographs in the database and further requested access to Santos-Portillo's alien file. (Hr'g Tr. 13.) From the alien file, Agent Swivel obtained copies of a 2011 immigration order [DE #23-3] directing that Santos-Portillo be removed from the United States and a 2010 judgment from Harris County, Texas, evidencing Santos-Portillo's conviction for felony evading arrest with a vehicle. (Hr'g Tr. 13–14.) The alien file also included a Form I-200 Warrant for Arrest of Alien [DE #23-3] and a Form I-205 Warrant for Removal/Deportation [DE #23-4], pursuant to which Santos-Portillo was removed from Houston, Texas, to Honduras on March 21, 2011. (Hr'g Tr. 14.) Agent Swivel confirmed that Santos-Portillo had not requested permission to reapply for admission into the United States. (Hr'g Tr. 14.)

The alien file also included pictures of Santos-Portillo from 2011 related to his prior felony conviction. (Hr'g Tr. 15.) Based upon the age of these pictures and on his experience that people's appearances change over time, Agent Swivel wanted to confirm the identity of Santos-Portillo. (Hr'g Tr. 15.)

On January 11, 2018, Agent Swivel continued his investigation by conducting a surveillance of Santos-Portillo's vehicle at the Wilmington address listed on the vehicle registration. Agent Swivel did not approach or alert Santos-Portillo of his

presence. (Hr'g Tr. 17.) Following this surveillance, Agent Swivel discussed with his supervisor and other officers a plan to conduct further surveillance of Santos-Portillo. (Hr'g Tr. 41–42.)

On January 16, 2018 around 6 a.m., Agent Swivel and four other agents established surveillance of Santos-Portillo's residence. (Hr'g Tr. 17–18.) Agent Swivel, HSI Special Agent Charles Kitchin, and HSI Special Agent Richard Davies were parked in a white minivan at a laundromat parking lot adjacent to Santos-Portillo's residence (Hr'g Tr. 34, 38.) HSI Special Agent Richard Everhardt and North Carolina Department of Motor Vehicles License and Theft Officer Brian Guille were parked in a Jeep Cherokee across the street in a parking lot. (Hr'g Tr. 34, 38.) When Santos-Portillo exited his residence and started his vehicle, Agent Swivel approached Santos-Portillo and identified himself as a special agent with Homeland Security. (Hr'g Tr. 19–20.) Upon Agent Swivel's approach, the officers across the street pulled in diagonally behind Santos-Portillo's Tahoe and Overbey-Santos' Chevrolet Suburban. (Hr'g Tr. 39–40, 57, 70–71.) This law enforcement vehicle was half in the dirt area of the driveway and the back-end was in the concrete area of the adjacent laundromat parking lot. (Hr'g Tr. 64.) Agent Swivel's white minivan was still parked in the adjacent asphalt parking lot facing the entrance of the laundromat. (Hr'g Tr. 18, 40, 65.) Santos-Portillo stood outside of his vehicle with the driver's door open as Agent Swivel asked him his name and where he had been born. (Hr'g Tr. 20.) Santos-Portillo responded that his name is Marcio Santos-Portillo and that he was from

Honduras. (*Id.*) Agent Swivel then detained Santos-Portillo for illegal reentry of an alien . (*Id.*)

Bannister, who was staying at Santos-Portillo's residence, went inside the residence to notify his sister, Overbey-Santos, of Santos-Portillo's arrest. (Hr'g Tr. 54–55, 58.) Because Santos-Portillo was wearing flip-flops, one of the agents requested that Bannister have Overbey-Santos bring Santos-Portillo's shoes. (Hr'g Tr. 58–59, 66–67.) Santos-Portillo was handcuffed and taken to the white van in the adjacent laundromat parking lot. (Hr'g Tr. 59, 66.) Overbey-Santos went inside the residence to look for documents showing that Santos-Portillo had filed for citizenship. (Hr'g Tr. 59.)

Santos-Portillo was transported to the Wilmington Immigration and Customs Enforcement ("ICE") office where his fingerprints were taken. (Hr'g Tr. 22–23, 43.) Agent Swivel submitted the fingerprints to several databases, including FBI and immigration databases. (Hr'g Tr. 23, 43.) The databases reported that Santos-Portillo had been previously deported. (Hr'g Tr. 23.) Agent Swivel read Santos-Portillo his *Miranda* rights in Spanish, which he waived in writing. (Hr'g Tr. 23, 44.) Agent Swivel interviewed Santos-Portillo, asking his name, date of birth, and place of birth. (Hr'g Tr. 23.) Santos-Portillo admitted that he had been previously deported and did not have any immigration documents allowing him to be in the United States legally. (Hr'g Tr. 24.) Following the interview, Agent Swivel contacted the U.S. Attorney's office for prosecution. (Hr'g Tr. 44–45.) Agent Swivel swore out a criminal complaint the following day, and a criminal arrest warrant was issued. ([DE #1, 2], Hr'g Tr. 45.)

DISCUSSION

I. Warrantless Arrest Authority

Santos-Portillo argues that his arrest on January 16, 2018, violated the warrantless arrest requirements of 8 U.S.C. § 1357 and constituted an unreasonable seizure of his person in violation of the Fourth Amendment. (Def.'s Mem. Mot. Suppress [DE #22] at 3.) The Government counters that the immigration officers lawfully effected an administrative arrest of Santos-Portillo based on the 2011 order of removal and, alternatively, that they had probable cause to believe Santos-Portillo had committed a felony offense. (Govt's Resp. Mot. Suppress [DE #34] at 3.)

Title 8 U.S.C. § 1357 authorizes an immigration officer to administratively

> arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.

8 U.S.C. § 1357(a)(2). Thus, the two requirements for administrative arrests are (1) the officer must have "reason to believe" the alien is in the United States in violation of the immigration laws or related regulations and (2) the alien is "likely to escape" before a warrant can be obtained. *See id.*

The statute also authorizes an immigration officer to criminally arrest an individual without a warrant for

> felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest.

8 U.S.C. § 1357(a)(4). The two requirements for criminal arrests are (1) the officer must have "reason to believe" the person committed a felony violation of the immigration laws; and (2) the "likelihood" of the person escaping before a warrant can be obtained. *See id.*

In *United States v. Segura-Gomez*, No. 4:17-CR-65-FL-1, 2018 WL 6582823 (E.D.N.C. May 25, 2018), the court explained "that the phrase 'reason to believe' in § 1357 is equivalent to constitutionally required probable cause." No. 4:17-CR-65-FL-1, 2018 WL 6582823, at *6 (citing *Morales v. Chadborne*, 793 F.3d 208, 216 (1st Cir. 2015)), *mem. & recomm. adopted*, 2018 WL 6259222 (E.D.N.C. Nov. 30, 2018). "Probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed . . . an offense." *Id.* (alteration in original) (quoting *Cahaly v. Larosa*, 796 F.3d 399, 407 (4th Cir. 2015)).

The court in *Segura-Gomez* also found the second prong of "likely to escape" under 8 U.S.C. § 1357(a)(2) and "likelihood of the person escaping" under 8 U.S.C. § 1357(a)(4) to be met where the immigration officer "has reason to believe that the person is likely to escape." *Segura-Gomez*, 2018 WL 6582823, at *6 (citing 8 C.F.R. § 287.8(c)(2)(ii)).) The government has the burden to show that the "escape-likelihood

prong is met—that is, that the agents had reason to believe that defendant was likely to escape before a warrant could be obtained." *Id.* at *7.

The facts and circumstances presented here establish that Agent Swivel had probable cause to believe that Santos-Portillo was in the United States in violation of 8 U.S.C. § 1326. Section 1326(a) provides in pertinent part:

> [A]ny alien who–
>
> > (1) has been . . . deported, or removed . . . and thereafter
> >
> > (2) enters, attempts to enter, or is at any time found in, the United States[ ] [without the advance consent of the United States Attorney General] . . . unless . . . he was not required to obtain such advance consent under [the immigration laws],
>
> shall be fined under Title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1326(a). And where the alien's removal has been "subsequent to a conviction for commission of" a felony or aggravated felony, the maximum term of imprisonment increases to ten years or twenty years, respectively. *See* 8 U.S.C. § 1326(b)(1), (2).

Agent Swivel observed Santos-Portillo in Wilmington, North Carolina, on January 9, 2018, and upon searching several databases, had reason to believe Santos-Portillo was present in the United States illegally. Agent Swivel reviewed the alien file, which included a photograph of Santos-Portillo, and from that was able to identify him. The alien file also verified that Santos-Portillo had been deported in 2011 and had been convicted of felony evading arrest with a motor vehicle in Harris

County, Texas, prior to his removal. These facts and circumstances would warrant a reasonable officer to believe that Santos-Portillo was present in the United States in violation of 8 U.S.C. § 1326 and subject to enhanced penalties under 8 U.S.C. § 1326(b)(1). Therefore, Agent Swivel had probable cause to arrest Santos-Portillo either administratively under § 1357(a)(2) or criminally under § 1357(a)(4).

The second prong of § 1357 – that agents had reason to believe Santos-Portillo was likely to escape before a warrant could be obtained – has not been satisfied, however. Where agents "did not deem [defendant] an escape risk at that point sufficient to arrest him" and the defendant did not manifest an intent to escape, this court has held that a court lunch break was sufficiently long for agents to obtain a warrant. *Segura-Gomez*, 2018 WL 6582823, at *7. The court reasoned that the Government failed to meet its burden of showing that agents could not obtain a warrant without the defendant likely escaping. *Id.* "At least in terms of the number of different types of officials who can issue warrants – over 50 – acquisition of a warrant does not appear to be a daunting task." *Id.* at *8 (citing 8 C.F.R. § 287.5(e)(2)).

Here, Agent Swivel first encountered Santos-Portillo on January 9, 2018, outside a business in Wilmington, North Carolina. Santos-Portillo was not approached and arrested until January 16, 2018. Between January 9 and 11, 2018, agents reviewed Santos-Portillo's alien file, verified he had been deported on one prior occasion, learned of a prior conviction of felony evading arrest, and surveilled his house. Agent Swivel testified that he discussed with his supervisor and other agents his investigation plans on January 15, 2018, the day prior to Santos-Portillo's arrest.

During this time period, as in *Segura-Gomez*, there is no indication that "defendant had any awareness that the agents were surveilling him prior to their speaking with him." *Id.* at *7. There is no evidence that the agents had prior dealings with Santos-Portillo that would enable him to identify the agents. Just as a lunch break was sufficient time to obtain an arrest warrant in *Segura-Gomez*, the span of several days was a sufficient period of time for agents to observe Santos-Portillo and acquire a warrant. The Government has failed to show that the time period was too short to enable agents to obtain a warrant without Santos-Portillo escaping.

The court rejects the Government's argument that Santos-Portillo was subject to warrantless arrest based upon the 2011 order of removal. Where a removed alien reenters the United States illegally, the prior "removal order is not a surrogate for an arrest warrant." *Segura-Gomez,* 2018 WL 6582823, at *8 (finding that a removal order lacks the character of an arrest warrant). Courts instead apply the requirements for a warrantless arrest set out in § 1357. *See Segura-Gomez*, 2018 WL 6582823, at *9* (citing *United States v. Encarnacion*, 239 F.3d. 395, 398–99 (1st Cir. 2001); *United States v. Ravelo-Rodriguez*, No. 3:11-CR-70, 2012 WL 1597390, at *1, 12–16 (E.D. Tenn. Mar. 12, 2012)). To permit agents to rely on the removal order as an arrest warrant would eliminate the evaluation by "a neutral and detached judicial officer" demanded by our Fourth Amendment jurisprudence. *See Illinois v. Gates*, 462 U.S. 213, 240 (1983) ("The essential protection of the warrant requirement of the Fourth Amendment . . . is in 'requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of

being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" (alteration in original) (quoting *Johnson v. United States*, 333 U.S. 10 (1948)).); *Segura-Gomez*, 2018 WL 6582823, at *9.

Santos-Portillo points out that regulations promulgated by the Department of Homeland Security also support the need for a warrant absent a likelihood of escape. Title 8 of the Code of Federal Regulations § 287.8 provides "standards for enforcement activities . . . [that] must be adhered to by every immigration officer involved in enforcement activities." 8 C.F.R. § 278.8. Among those standards is subsection (c), which mandates that a "warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained." 8 C.F.R. § 278.8(c).

In a surreply filed without leave of court, the Government cites 19 U.S.C. § 1589a to argue that HSI special agents also "enjoy Title 19 authority as customs officers" to make warrantless arrests even absent likelihood of escape. Given the tardiness of the Government's argument, the court should decline to consider the argument. *See United States v. Williams*, 445 F.3d 724, 736 n.6 (4th Cir. 2006) (concluding that argument raised in reply brief "comes far too late in the day").

Moreover, the Government has not shown that § 1589a is as broad as it claims. Section 1589a provides, in its entirety, as follows:

> Subject to the direction of the Secretary of the Treasury, an officer of the customs may—
>
> (1) carry a firearm;

> (2) execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States;
>
> (3) make an arrest without a warrant for any offense against the United States committed in the officer's presence or for a felony, cognizable under the laws of the United States committed outside the officer's presence if the officer has reasonable grounds to believe that the person to be arrested has committed or is committing a felony; and
>
> (4) perform any other law enforcement duty that the Secretary of the Treasury may designate.

19 U.S.C. § 1589a. Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, certain functions of the United States Customs Service were transferred from the Secretary of the Treasury to the Secretary of Homeland Security. Notwithstanding the statute's introductory clause – "subject to the direction of the Secretary" – which limits the warrantless arrest authority of customs officers, the Government asserts that § 1589a vests customs officers with arrest authority above and beyond that provided by 8 C.F.R. § 278.8. The Government provides no caselaw or regulatory authority for its position, and the undersigned declines to read the statute so broadly.

II. Exclusionary Rule

Since the Government has failed to show that the escape-likelihood prong of § 1357(a)(2) and (4) was met, the court determines that the agents violated 8 U.S.C. § 1357 by failing to obtain a warrant prior to arresting Santos-Portillo. Therefore, the court must determine whether evidence seized as a result of Santos-Portillo's arrest should be suppressed.

The exclusionary rule allows for the suppression of evidence seized as fruits of constitutional violations. *United States v. Doyle*, 650 F.3d 460, 466–67 (4th Cir. 2011). "There is no exclusionary rule generally applicable to statutory violations." *United States v. Segura-Gomez*, No. 4:17-CV-65-1FL, 2018 WL 6259222, at *4 (quoting *United States v. Clenney*, 631 F.3d 658, 667 (4th Cir. 2011)). Suppression of evidence "is an appropriate sanction for a statutory violation only where the statute specifically provides for suppression as a remedy or the statutory violation implicates underlying constitutional rights such as the right to be free from unreasonable search and seizure." *United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006) (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348–49 (2006)). Section 1357 does not expressly provide for suppression of evidence obtained by an officer who has exceeded the scope of his statutory authority. *Segura-Gomez,* 2018 WL 6259222, at *5. In determining whether to suppress evidence obtained in violation of § 1357, courts must therefore look to the reasonableness of the arrest under the Fourth Amendment. *Id.*

The Fourth Amendment guarantees the right of the people to be secure against unreasonable searches and seizures of "their persons, houses, papers, and effects." U.S. CONST. amend. IV. "The Fourth Amendment prohibits law enforcement officers from making unreasonable seizures, and seizure of an individual effected without probable cause is unreasonable." *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996) (citing *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)). The Fourth Amendment is generally not implicated in a consensual police-citizen encounter where law enforcement officers approach someone in a public place and ask him a

few questions. *United States v. Holland,* 749 F. App'x 162, 164 (4th Cir. 2018) (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). Moreover, a warrantless arrest of an individual in a public place is consistent with the Fourth Amendment if supported by probable cause to believe a felony has been committed by the arrestee. *United States v. Watson*, 423 U.S. 411, 423-24 (1976). However, "absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause." *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018) (quoting *Payton v. New York*, 445 U.S. 573, 587–590 (1980)). "That is because being 'arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home.'" *Id.* at 1672.

The Fourth Amendment also considers a home's curtilage—"the area 'immediately surrounding and associated with the home'—to be 'part of home itself for Fourth Amendment purposes." *Collins,* 138 S. Ct.. at 1670 (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013)). However, a front yard that is not surrounded by physical barriers, such as a fence, or marked off by signs, such as "No Trespassing" or "Private Property," lacks the reasonable expectation of privacy needed to trigger Fourth Amendment protection. *United States v. Locklear*, No. 7:11-CR-67-F, 2012 WL 88113, at *3 (E.D.N.C. Jan. 11, 2012), *aff'd*, 514 F. App'x 315 (4th Cir. 2013) ("A front yard and the front porch was as open to the police officer as to any delivery person, guest, other members of the neighborhood, or the general public."). "What a person knowingly exposes to the public, even in his own home . . . , is not a subject of Fourth Amendment protection." *Locklear*, 2012 WL 88113, at *2 (quoting *California*

v. Ciraolo, 476 U.S. 207, 213 (1986)). Thus, a defendant who stands in the doorway of her house, "exposed to the public view, speech, hearing, and touch as if she had been standing completely outside her house" is not entitled to Fourth Amendment protection. *United States v. Santana*, 427 U.S. 38, 42 (1976). "[Defendant] was not merely visible to the public but was as" *Id.*

Here, on January 16, 2018, Agent Swivel surveilled Santos-Portillo's home from a nearby laundromat parking lot. From the parking lot, Agent Swivel observed Santos-Portillo voluntarily leave his home and head to his car, which was parked in the front yard. Santos-Portillo had started his car and was standing outside the vehicle as Agent Swivel approached him. The front yard of Santos-Portillo's home included no physical barriers shielding him from public view. Nor were there any "no trespassing" or "private property" signs suggesting a reasonable expectation of privacy in the front yard area. Upon exiting his residence, Santos-Portillo voluntarily exposed himself to public view; and his arrest, based upon probable cause to believe his presence in the United States violated 8 U.S.C. § 1326, was consistent with the Fourth Amendment. Accordingly, Santos-Portillo's motion to suppress should be denied.

CONCLUSION

For the foregoing reasons, the undersigned RECOMMENDS that Defendant's Motion to Suppress [DE #22] be DENIED.

IT IS DIRECTED that a copy of this Memorandum and Recommendation be served on each of the parties or, if represented, their counsel. Each party shall have

until **June 14, 2019**, to file written objections to the Memorandum and Recommendation. The presiding district judge must conduct his or her own review (that is, make a de novo determination) of those portions of the Memorandum and Recommendation to which objection is properly made and may accept, reject, or modify the determinations in the Memorandum and Recommendation; receive further evidence; or return the matter to the magistrate judge with instructions. *See, e.g.,* 28 U.S.C. § 636(b)(l); Fed. R. Civ. P. 72(b)(3); Local Civ. R. 1.1 (permitting modification of deadlines specified in local rules), 72.4(b) (E.D.N.C. Dec. 2017).

A party that does not file written objections to the Memorandum and Recommendation by the foregoing deadline, will be giving up the right to review of the Memorandum and Recommendation by the presiding district judge as described above, and the presiding district judge may enter an order or judgment based on the Memorandum and Recommendation without such review. In addition, a party's failure to file written objections by the foregoing deadline may bar the party from appealing to the Court of Appeals from an order or judgment of the presiding district judge based on the Memorandum and Recommendation. *See Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985).

This 31st day of May 2019.

Kimberly A. Swank

KIMBERLY A. SWANK
United States Magistrate Judge

APPENDIX D

FILED: June 4, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4159
(7:18-cr-00010-H-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARCIO SANTOS-PORTILLO

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
NO. 7:18-CR-10-1H

UNITED STATES OF AMERICA	)	
	)	
VS.	)	MAY 2, 2018
	)	
MARCIO SANTOS-PORTILLO,	)	GREENVILLE, NORTH CAROLINA
	)	
DEFENDANT.	)	

* *

MOTION TO SUPPRESS
BEFORE THE HONORABLE KIMBERLY A. SWANK
UNITED STATES MAGISRATE JUDGE PRESIDING

APPEARANCES OF COUNSEL:

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INTERPRETERS: MR. JAVIER CASTILLO
MS. SOFIA CREWS

COURT REPORTER: GAYE H. PAUL

PROCEEDINGS TAKEN BY STENOMASK, TRANSCRIPTION PRODUCED FROM DICTATION.

WITNESSES

GOVERNMENT

DEFENSE

EXHIBITS INDEX

THE COURT: Alright.

MS. MORALES: As Your Honor is aware, the Defense's Motion To Suppress essentially depends upon their belief that an administrative arrest warrant should have been issued prior to the defendant's administrative arrest on January 16, 2018. And the administrative arrest warrant we will be referring to today is called at I-200, and that's contained in Exhibit 2 of Your Honor's binder. And so my understanding of the defense's argument, essentially they're saying that this exhibit, this I-200 should have been issued prior to Agent Swivel administratively arresting the defendant on January 16.

And The Government submits that is wrong for three reasons. The first reason is that an I-200, this administrative arrest warrant, is not necessary. And that is supported in Statute. And the main statute The Government will be citing to you is 8 USC 1226, which is contained in Exhibit 5 of your binder. And in 8 USC 1226(a), it states that on a warrant issued by the Attorney General, which is essentially an I-200, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Again, pending a decision. So the purpose of the I-200 is a way for Immigration Authorities to bring the alien into custody before an Immigration Judge so the Immigration Judge can decide whether that alien should be deported from the United States. That's the purpose of the

I-200. That has been decided in this case; it was decided that in 2011. Your Honor has Exhibit 3 before you, I believe, which is the Immigration Judge's Order dated March 2, 2011, where the Immigration Judge ordered the defendant removed from the United States to Honduras.

So essentially, The Government's primary argument is that an I-200 was not necessary, because the decision to remove the defendant from the country had already been made, and the only thing left to do was to reinstate this prior Order contained in Exhibit 3. There was no need for another I-200 to take an alien, or the defendant in this case, into custody.

And we can elaborate further in our closing remarks, Your Honor, but that is also further supported by the CFR, which is contained in Exhibit 6 of your binder.

Just briefly, the other two reasons that the defense's argument fails is that even if Your Honor believes that we should have had a warrant when we administratively encountered him, then 8 USC 1357 would apply, which is contained in Exhibit 7 of the binder. Which the two prongs there that authorize a warrantless arrest is probable cause, the belief a felony occurred, and two, there is a likelihood of the person escaping before a warrant could be issued.

In this case the probable cause to believe the defendant had committed the offense of illegal re-entry, which

A. No, I did not.
Q. So you didn't approach him on that day?
A. No, I did not.
Q. Did you alert anyone of his presence, or did you alert anyone of your presence that day regarding the defendant? For example, did you make the defendant's family members aware that you were investigating him?
A. No, I did not.
Q. What was your purpose of conducting the surveillance?
A. Well, I wanted to see if the vehicle was at the registered owner address. Sometimes the database might be behind and the vehicle might not even be at the address that it's registered to. So I did that just to see if the address for the vehicle was current, and also to see possibly if that's where Mr. Santos-Portillo might reside.
Q. And -- January 16, 2018, was that the date that you actually interacted, encountered, the defendant?
A. Yes.
Q. Can you please tell The Court what happened that day, as it relates to this case?
A. Yes. Four other agents and I established surveillance of Mr. Santos-Portillo's residence. It's adjacent to a laundromat in Wilmington, and across the street is a business parking lot. So three of us were in my vehicle, just waiting to see if we could see Mr. Santos-Portillo come out of his

house, or what I believed to be his house. It was dark at the time.

Q. Okay. So it was early in the morning?

A. It was. It was about 6:00 in the morning.

Q. And it was dark out?

A. Yes, it was.

Q. And you testified that there were five officers total; there were five total including you?

A. Yes. Three of us in one vehicle and then two in another.

Q. So two vehicles total?

A. Correct.

Q. Is that number of officers standard practice when you're making an administrative arrest of an alien who is unlawfully here?

A. I would say, yes. I mean, it depends on the situation. But if you are encountering someone in the dark who might be likely to abscond, you would generally take more agents than just one or two. Actually, you're always at least with two agents, but yes, that's not uncommon, to answer your question directly.

Q. Because again, you knew that the defendant had a felony conviction for evading arrest?

A. That's correct.

Q. And during this immigration -- or these administrative arrests, is one of your priorities as officer safety?

A. Yes. It always is.
Q. And you testified you were also concerned about his risk of escape?
A. Yes.
Q. So did you approach the defendant?
A. Yes, I did.
Q. Was it difficult to see? Because you said it was dark out.
A. It was. There were other people at the residence who had come out prior to Mr. Santos-Portillo coming out. But I was able to recognize when he did come out and started the vehicle that was registered to him.
Q. And when you interacted with the defendant, where was he standing?
A. He was standing outside of his vehicle, but the vehicle was running at that point in time. The driver door was open, and he was standing there. I think he was putting something in the front seat, or getting something out.
Q. So just to paint the picture, the vehicle was turned on and the defendant was standing near the vehicle with the driver's side door open?
A. That's correct.
Q. And again, was this the first time you actually interacted with the defendant?
A. Yes.

Q. Prior to this had you contacted anyone who would have alerted him to your presence?

A. No, I did not.

Q. Did you speak with him?

A. I did.

Q. What did you say?

A. I approached Mr. Santos-Portillo, I showed him my credentials and said that I was a Special Agent with Homeland Security. I asked him his name; he told me his name was Marcio Santos-Portillo. And then I asked Mr. Santos-Portillo where he was born. He responded that he was born in the Honduras. I said, hey, Mr. Santos-Portillo, you're going to have to come with us, and at that point in time I detained him.

Q. Administratively?

A. Yes.

Q. At that point did you have a legal reason to believe that he had committed a crime of illegal re-entry?

A. I did.

Q. At the point that he verified his name and place of birth?

A. Yes.

Q. However, did this belief depend upon a photograph comparison and based upon the information the defendant told you?

A. Yes.
Q. So did you still want to confirm his identity via fingerprint biometric match?
A. Yes, I did.
Q. So once you've developed this reasonable belief that he had committed a felony offense of illegal re-entry, did you -- you testified you detained him. Did you put handcuffs on him?
A. I did.
Q. At that point did you have reason to believe that he was likely to escape before you could go get an administrative warrant?
A. Yes.
Q. Why?
MR. TODD: Your Honor, I mean, she's sort of stating a legal conclusion with questions. And now we're getting a little bit -- basically asking doesn't he have legal standing.
Q. At that --
THE COURT: Alright. Try to let the witness do the testifying, okay?
MS. MORALES: Yes, Your Honor.
Q. Did you have reason to believe that the defendant would flee at this point?
A. Yes, I did.
Q. Why?
A. Well, it's happened numerous times, that when we

encounter people at their residences if they think someone with Immigration Authority is around, they'll abscond, they'll run.

Q. And again, was it also based partly upon your knowledge of his prior conviction for evading arrest?

A. That's correct.

Q. So just to be clear, did you have an arrest warrant in hand when you administratively arrested him?

A. No, I did not.

Q. What's the purpose of an administrative arrest?

A. An administrative arrest for aliens is to take them in to determine alienage and deportability, whether they have any migratory status to be in the United States legally or not. So the administrative process entails taking a person in, asking questions, determining and verifying if he or she is here legally or illegally. And based upon that decision if a person is here illegally, then an alien file is generated, created, to start some type of immigration administrative proceeding for an Immigration Judge to be able to determine if that person is being able to stay in the United States or not.

Q. Is one of the purposes of an administrative arrest also to confirm the identity of the person you're arresting?

A. Absolutely.

Q. So after the administrative arrest what did you do?

A. The other agents -- well, actually one of the other

agents and I transported him to the Wilmington Office. When we got to the Wilmington Office I took Mr. Santos's fingerprints. Once I had his fingerprints, I submitted them to various databases, specifically NCIC or the FBI Database and various Immigration databases.

Q. What was the result?

A. The result was that Mr. Santos-Portillo -- the fingerprints result to a previously deported alien.

Q. And did it match to Mr. Santos-Portillo?

A. Yes, it did.

Q. Did you interview him that same day?

A. I did.

Q. Before interviewing him did you read him his Miranda Rights in Spanish?

A. I did.

Q. So do you speak Spanish?

A. I do.

Q. Did he waive those rights in writing?

A. He did waive those rights.

Q. Can you please tell The Court what happened during that interview?

A. During the interview I asked Mr. Santos-Portillo different questions. I asked him his name; he said it was Marcio Santos-Portillo. I asked him his date of birth, where he was born. He told me that he was born in Honduras. I also

asked if he had ever been deported, and he stated that he had been deported. I asked him if he had any immigration documents allowing him to be in the United States legally. He said that he didn't, but he said that he did get married. I also asked him if he had ever been deported. He said he had been deported one time before. I asked him if he knew it was in violation of law for him to come back into the United States after being deported, and he stated that it was. And I also asked him if he had ever applied with the Attorney General or the Secretary of Homeland Security to legally re-enter the United States. And I explained that basically he would go to the American Consulate in Honduras and request a VISA permit to come back legally, and he told me that he had not.

Q. Thank you. Once you obtained a biometric positive match to a previously deported alien and interviewed the defendant to what you just testified to, was it at that point that you considered presenting the case to the U.S. Attorney's Office for criminal prosecution?

A. That's correct.

Q. Is it your practice to obtain a positive biometric match prior to presenting the case for criminal prosecution?

A. It is.

Q. Why?

A. It is because the U.S. Attorney's Office in the Eastern

District of North Carolina maintains that threshold of some type of biometric match to do a criminal prosecution.

Q. Is it also based in part upon your 20 years of experience that you sometimes encounter aliens to get incorrect names or aliases or incorrect dates of birth?

A. It is.

Q. Can you elaborate on that?

A. It is frequent that we will be given different names by people that we detain or arrest. It's also been my experience on a couple of occasions where a sibling has used another sibling's identity simply because they resemble each other a lot in appearance. And maybe one sibling is no longer in the United States, and gives those documents to the sibling. So really, it's best to have biometrics to make sure you have a positive actual.

Q. To make sure you have the correct person?

A. That's correct.

Q. And so would you agree that a fingerprint match indicates a very high degree of certainty that it is the person who you think it is?

A. It does. And it not only protects the alien, it protects the agents as well.

Q. What do you mean by that?

A. Well, basically we want to make sure that the person we think it is, is the person that we're dealing with. So that's

executed – well, not generally. It's executed just prior to his departure from the United States.

Q. Thank you. Again, I'm sorry, what is the date on which he was physically removed?

A. March 21, 2011.

Q. Okay. I'd now like to briefly talk about what happens when an alien illegally returns to the United States after being deported, like in this case, about what happens in the -- what happens in the Immigration Process?

A. When someone re-enters?

Q. Yes.

A. After having been deported?

Q. Yes.

A. Administratively, what would happen is if that alien is encountered by Immigration Officers here after it's verified by biometrics that the alien is a person who was previously deported, the previous Immigration Judge's Order of Removal is reinstated, and they're reinstated under this Form I-871, and that's executed.

Q. Would an I-200 be issued in that particular scenario?

A. No, it would not.

Q. Why not?

A. Because the Immigration Judge's decision has already been made with respect to the person's admissibility and legal status as far as immigration in the United States. That can

surveilling the residence that's identified in Defendant's 1 and 2?
A. Yes.
Q. Who were those other agents; you said there were five altogether?
A. Yes. There were two in my vehicle with me, HIS Special Agent Charles Kitchin and HIS Special Agent Richard Davies. And then across the street was HIS Special Agent Richard Everhardt and North Carolina Department of Motor Vehicles License and Theft Officer Brian Guille. His first name is actually Christopher, but he goes by his middle name.
Q. So I think I understand that the vehicle you were in was a white mini-van?
A. That's correct.
Q. And there was a dark sedan on the other side of the street with Agent Everhardt and an NCDMV Officer?
A. It was a Jeep Cherokee, I believe.
Q. Prior to 6:00 in the morning on January 16, you communicated with Agents Kitchin and Agent Davies, Agent Everhardt and the NCDMV Officer; correct?
A. Prior to 6:00, yes.
Q. When did you first discuss with them your plan to surveille the residence at 6:00 A.M. on January 16?
A. Yes.
Q. When did you do that; when did you first communicate with

them your plan to surveille the residence on January 16?
A. The previous day.
Q. The previous day, January 15?
A. Which was a Sunday, yes. So I might have mentioned on Friday to them that we might do surveillance Monday morning.
Q. But you said as of January 11 you had confirmed that the vehicle registered to Mr. Santos-Portillo was at the residence reflected in the registration?
A. That's correct.
Q. You had information giving you reason to believe that he was a prior deport --
A. That's correct.
Q. -- as of January 11?
A. That's correct.
Q. Now, on January 16, if we look at Defendant's Exhibit Number 2, that photo there.
A. Yes.
Q. You said you observed somebody outside the residence that wasn't Mr. Santos?
A. I was pretty sure that it wasn't, because it didn't look like the person that I saw at the business on the 9th.
Q. This was before Mr. Santos-Portillo came out?
A. That's correct.
Q. And then when Mr. Santos-Portillo came out, isn't it true that the vehicle that was across the street drove up to the

residence?
A. Yes. It would have driven up after we had some type of communication with him, and that we were with Mr. Santos-Portillo.
Q. It drove across the street?
A. It drove across the street. I don't know exactly where it parked. I think at the laundromat.
Q. You're not sure where it parked?
A. No, I am not.
Q. But it came across the street and parked near the residence?
A. Yes.
Q. Okay. And you just got out of the white van; you didn't move the white van?
A. No, I didn't. I just got out of that and walked over to his vehicle.
Q. And you're certain there was only two vehicles involved; are you sure there wasn't a third vehicle?
A. There were other vehicles, not -- I don't believe right there. I know that we parked the vehicle and got into mine at the Hardee's around the corner. But to my recollection there were two vehicles.
Q. Two vehicles, your van, the vehicle across the street at Strickland's; you said there was a vehicle that parked at Hardee's?

A. Yes.
Q. Okay. So there's three vehicles?
A. Not at the encounter at the residence. Just the two.
Q. Well, in the surveillance operation, there were three vehicles?
A. Sure, yes.
Q. So just to go back, on January 9 you learned his name, his residence and initial information giving you reason to believe he was a prior deportee?
A. Yes.
Q. Then January 11 --
A. I had a residence, but I had not confirmed the vehicle. I hadn't seen the vehicle at that residence.
Q. But you did on January 11?
A. That's correct.
Q. And as early as January 12, the Friday before January 16, you said you may have initially communicated with some of the agents about your intent to conduct surveillance and arrest?
A. Yes.
Q. But definitely on or prior to January 15?
A. Correct.
Q. And when you have these type of operations where you have five agents involved, is there any written plan, a written operations plan, a surveillance plan that you write up?
A. Not for a surveillance, no, sir.

Q. And you didn't in this case?
A. No, I did not. I did notify my supervisor; he knew that we were doing surveillance.
Q. When did you notify your supervisor that you were going to do surveillance?
A. Probably that Sunday, the day before.
Q. January 15?
A. Correct.
Q. Did you notify him or did you get his approval?
A. Yes.
Q. Did you say I'm going to go, or did you say I have this information and would like to do this surveillance and arrest; do I have your permission?
A. I just said that I had this information on this individual; we're going to conduct a surveillance to see if we see him. But if we encounter him, we will probably try to arrest him, or at least determine who he is.
Q. I assume you have some freedom of operation. Would you notify your supervisor at that time, you know, can I go do this?
A. We do have latitude as far as that's concerned. Most agents keep their supervisors apprised of what they're doing out in the field simply because of security reasons and station reasons, things like that.
Q. And also you're involved in not just HIS, but State

involvement also; right?
A. Right. And officers will have one of the task force officers.
Q. Okay. And so you did that with your supervisor?
A. I did.
Q. And you were the one that put handcuffs on Mr. Santos-Portillo; is that correct?
A. That's correct.
Q. Okay. You transported him on January 16 to the ICE Office?
A. I did.
Q. Took his prints?
A. I did.
Q. You submitted them to the databases?
A. Yes, I did.
Q. Hopefully to get a match?
A. That's correct.
Q. Because you needed a match to present the case for criminal prosecution?
A. Well, I need the match to make sure I'm dealing with the person with whom I think I am. And just to make sure that it is somebody who has some type of immigration history. But, yes.
Q. You had to check for the U.S. Attorney's Office of the Eastern District of North Carolina --

Q. And the questions that were asked and answered had to do with the elements you need for illegal re-entry. You know, are you a citizen of another country?

A. That's correct.

Q. And have you been deported before?

A. That's correct. Those questions are asked, whether it's administrative or criminal.

Q. Okay.

A. It's for his statement.

Q. So it's similar for the focuses?

A. That's correct.

Q. And after the interview is when you presented the case for prosecution, and you did that on January 16, sir?

A. Yes.

Q. Is then I believe you then swore out a criminal complaint the next day; correct?

A. I believe I did. I think it was telephonically with Magistrate Judge Jones.

Q. Was it the same day then, January 16?

A. I don't know if it was or not without looking at the actual criminal complaint, Mr. Todd. I don't know.

Q. It does say January 17.

A. So it was the next day.

Q. The next day you swore out a criminal complaint?

A. Yes.

Q. And this was after you had gotten an okay from the U.S. Attorney's Office to pursue criminal prosecution?
A. That's correct.
Q. At no point prior to January -- to January 17, 2018, did you file or prepare a Notice of Reinstatement of the prior deportation?
A. I did in the database, yes. There once you put the fingerprints on there, it generates what's called an Event Number. So there was some administrative paperwork that was generated in the database. I might not have printed it out, but it was --
Q. Didn't print it out or anything like that?
A. No. I did not -- I did not print it out or signed it on that date.
Q. Okay. And on that day, I mean this investigation was an immigration -- it was an investigation of (inaudible) violations?
A. Yes, it was.
Q. You weren't investigating any customs violations on that day?
A. No, not with respect to Mr. Santos, no.
Q. Now I'd like to refer back to some questions I had about the Government's Exhibits. Just want to do this quickly. Exhibit Number 1, the Notice to Appear in and of itself does not grant any authority to take somebody into custody;

correct?
A. No. It's a charging document.
Q. Okay. And that would lead to Exhibit Number 2, the I-200; correct?
A. Yes. An Immigration Officer can still take somebody into custody to determine alienage and admissibility without an I-200.
Q. So you can arrest somebody without a warrant just to determine alienage?
A. Absolutely, and did it all the time on Border Patrol.
Q. In fact, this is the second time you've been through this. We had a Suppression Hearing in March 28, 2018, in the case of United States versus Gomez, Case Number 4:17-CR-65. And you had testified then and you're saying the same thing now, is you typically get an arrest warrant after you arrest them?
A. Administratively or criminally?
Q. Either way.
A. No. The I-200 is generated when the person is processed. Generally, it's generated right then. It might be served at that time if the person is held in custody. There are examples of a person might be released on bond, and then at a later time an Immigration Judge sees that person's case and determines whether or not he or she will be deported. If that person is ordered deported, then the Immigration Officers

would go out with the Administrative Arrest Warrant and serve it at that time and take them back into the custody, administrative custody of Homeland Security.

Q. I just want to make sure I understand your testimony. If you recall, I asked you if what you need to take a person into custody is Exhibit 2, which is the I-200, (inaudible) alien, and your answer was as follows: (inaudible) this particular form, the I-200, is issued by like for example, in my case, my resident agent in charge would issue this after we arrested him and just basically determined whether they would remain in custody or not. Then I asked the question, do you guys get the arrest warrant after you have arrested the person, and the answer, this particular administrative warrant, yes. Is that still accurate?

A. The warrant, the I-200 is generally issued -- it's issued on the first administrative encounter with the alien. I wouldn't have needed one for Mr. Santos because he had already been deported and all I was doing was reinstating the previous Order of Deportation. So I didn't need a 200.

Q. Okay, let's go with that. So it's your -- you are saying that for anybody that is (inaudible) where the Immigration Agent confirms there has been a prior deportation, you're saying the practice is to arrest that person without a warrant, that's the common practice. And you don't get the warrant until after you take them to the station and confirm?

A. Could you ask the question again?
Q. Well, you just said you didn't need to get a warrant because there was a prior deportation for Mr. Santos, an administrative warrant?
A. Yes.
Q. And you're saying that's the common practice. You have someone with a prior Deportation Order, you arrest the person, and your testimony is you don't need a warrant to take that person into custody?
A. That's correct.
Q. That's the practice?
A. Sometimes it is, sometimes it isn't. I can't speak specifically for Enforcement Removal Operations, which is a different entity from us.
Q. I'm talking about the initial taking the person from the street or from their residence, putting them in handcuffs and taking them to the office.
A. In this particular case, no, I did not have to have the warrant.
Q. And you said you don't need one in this instance?
A. No.
Q. You say you don't need one because there is a prior Deportation Order?
A. I assumed that there had been a prior deportation, yes.
Q. And so I believe you didn't verify that prior to --

A. I did after I submitted biometrics.
Q. You said on January 9, and January 11 you had signed for access to his Alien File and verified the Judge's Deportation Order?
A. I did.
Q. You did?
A. I saw his photograph and I believed that to be the same person, yes.
Q. You had reason to believe that the person in that photograph had been deported before?
A. That's correct.
Q. And so the address, the residence where he was arrested on January 16?
A. I wasn't sure, but, yes, he was.
Q. I'm not asking for certainty. I said you had reason to believe --
A. Yes, I did.
Q. And that's why you got four other agents (inaudible)?
A. (Inaudible).
Q. Exhibit 2, the I-200, right above the signature of Oscar Torres, can you read the phrase that begins, "I command"?
A. I command you to take the above named alien into custody for proceedings in accordance with the applicable provisions of the Immigration Laws and Regulations.
Q. Okay. So the phrase applicable provisions of Immigration

Law and Regulations, that's a wide open phrase. It's not specifying a particular provision of Immigration Law; correct?

A. That's correct.

Q. Okay. And you said sometimes the I-200 is executed, sometimes it's not, but in this case it was executed, at least by February 23, 2011, the date down at the bottom?

A. Yes. And that would have been for his first encounter with Immigration.

Q. So you have a warrant that was executed on February 23, 2011?

A. That is correct.

Q. No questions about Exhibit Number 3. Exhibit Number 4, just to clarify, in every situation where there's a deportation before the person is deported, whether it be the first time or the 15th time, you're going to have a Warrant Removal?

A. Yes.

Q. And that authorizes another portion of Homeland Security to physically get that person from the United States to their country of origin?

A. That's correct.

Q. That's typically done by a Enforcement Removal Operations Officer.

A. Yes. Yes.

Q. But that's not you?

A. No, I don't. As an HSI Special Agent, I haven't executed any I-205s.
Q. Because usually the initial criminal investigation --
A. Correct.
Q. No questions about 5. Exhibit Number 6, 8 CFR 236.1 -- that subparagraph references another regulation; correct? References 8 CFR 287.5; do you see that?
A. Under Section 1?
Q. Yes, (b)(1).
A. Yes, 287.5(e)(3).

MR. TODD: Thank you. No more questions at this time.

THE COURT: Any redirect?

MS. MORALES: Just briefly, Your Honor.

REDIRECT - MORALES

Q. Agent Swivel, on January 16, 2018, when you encountered the defendant, did you still need to confirm his name -- or basically who he was?
A. Yes, I did.
Q. And did you -- you testified earlier that you asked him his name and where he was born?
A. Yes, I did.
Q. And was it at that point, when you got his answers to those two questions, that you felt you had reasonable -- reason to believe that he had committed a felony offense of

illegal re-entry?
A. That's correct.
Q. And just to clarify when you decided to present this case for criminal prosecution, when did you decide that; was that after the biometric fingerprint match or before, or when did you decide?
A. I did the fingerprints and I took a sworn statement, which we always do subsequent to that. Then I contacted the U.S. Attorney's Office.
Q. At that point is when you decided to present the case for prosecution?
A. That's correct.
Q. Thank you.
MS. MORALES: I have no further questions, Your Honor.
THE COURT: Anything further, Mr. Todd?
RECROSS - TODD
Q. You decided to present the case prior to the phone call to the U.S. Attorney's Office?
A. I'm sorry, could you say that again, please?
Q. Did you decide to present the case prior to making the phone call to the U.S. Attorney's Office?
A. Yes. After I had run his fingerprints and taken his statement.
Q. After you got the threshold fingerprint match?

A. Yes.

Q. Okay. Thank you.

MR. TODD: No further questions.

THE COURT: Thank you, Officer Swivel.

OFFICER SWIVEL: Thank you.

MS. MORALES: That's all the evidence on behalf of The Government, Your Honor.

THE COURT: Alright.

MS. MORALES: In addition to the exhibits.

THE COURT: Does the defendant wish to present any evidence, Mr. Todd?

MR. TODD: Yes, Your Honor. We have two fact witnesses. The first person I would call is Mr. Timothy Bannister.

THE COURT: Okay.

MR. TODD: Your Honor, if we could go ahead and put Defendant's Exhibits 1 through 3 back on the witness stand, Your Honor?

THE COURT: You may. If you'll come up, sir, and be sworn.

TIMOTHY BANNISTER, DEFENSE WITNESS, SWORN

Q. Mr. Bannister, how do you know my client, Marcio Santos?

A. He is my sister's husband.

Q. And prior to today you've met Marcio?

A. On December 3rd or 4th of last year.

can just hand up and refer to. But other than that, there's no further evidence on our part.

THE COURT: Alright, so this exhibit, is it one that you're seeking to admit?

MR. TODD: Yes, Your Honor. And I've given Ms. Morales a copy. Defendant's Exhibit 4, I will summarize why I'm submitting it, is a Federal Case out of the Northern District of Georgia, United States of America versus Marco Torres Rodriguez, Case Number 115 CR 342. That's what I have identified as Exhibit 4.

THE COURT: Okay.

MR. TODD: The last one is not an exhibit. It is a published case, but I have not used it in my briefings. And I just wanted to give Your Honor a courtesy copy.

THE COURT: Okay, alright.

MR. TODD: May I approach, Your Honor?

THE COURT: You may.

MR. TODD: (Approaches with documents.)

THE COURT: And before I hear arguments, is there any other evidence on behalf of The Government?

MS. MORALES: No, Your Honor.

THE COURT: Alright. I will hear from you, Mr. Todd.

MR. TODD: Thank you, Your Honor. First, I would submit that it's an uncontested fact that the night he was

arrested Mr. Santos (inaudible) and did not get a warrant. And I would submit based on the testimony of Agent Swivel factually as of January 9, or at least by January 11, the facts he had and the information he had gave him reason to believe that Mr. Santos-Portillo was in the United States in violation of Immigration Laws. And also the fact is that once having reason to believe that Mr. Santos-Portillo was here in violation of Immigration Laws, Agent Swivel had time to get a warrant.

The testimony is on January 9 and January 11 when he was doing surveillance, he confirmed the information that he was looking for about Mr. Santos-Portillo for the prior deportation and the residential address and made no contact or did anything to call -- his surveillance -- call attention to the surveillance by Mr. Santos-Portillo or anyone.

At least by January 15 he's coordinated with four other agents with the plan to surveille and to arrest Mr. Santos-Portillo on the early morning of January 16. He also consulted with his supervisor as of January 15. So I would say the uncontroverted testimony of the agent demonstrates that he had time to get a warrant, and there's no reason to believe that Mr. Santos-Portillo was likely to escape before that warrant could be obtained.

So then, Your Honor, what I submit is that is a violation of Title 8 USC 1357, which requires Immigration

Agents to -- permits them to arrest them without a warrant so long as they can demonstrate a reasonable belief that there's likelihood of escape prior to them being able to get a warrant.

Your Honor, the regulations that are associated with 8 USC 1357, I believe I referred to them in my reply brief, which would be ACFR 287.8 and ACFR 287.5, reemphasize the same thing. In fact, 287.5, if I could just read from that. 287.8, I'm sorry, Your Honor. 287.8(c), is crystal clear. 287.8 (c)(2) says a warrant of arrest shall be obtained except when the designated Immigration Officer has reason to believe that the person is likely to escape before a warrant be obtained.

So the applicable Statute and the applicable Regs require -- not only was it not done in this case, but based on the testimony and the arguments of The Government it's their position that not only is it the practice to arrest people without a warrant, but they're saying that the law permits that. However, Your Honor, they cite no case law to support that argument. And in fact, all of the cases that apply, 8 USC 1357 emphasize over and over again the dual requirement. Starting 33 years ago, the case of U.S. V Canton says this requirement likelihood of escape is always seriously applied.

The Fourth Circuit Case of United States versus

Harrison, exactly on point here. It's a planned arrest of someone with a prior deportation. They had time to get a warrant, and they didn't. And the Fourth Circuit said that is a violation of the Statute. Then the only reason why there wasn't a suppression in that case was because that case happened before the Fourth Circuit case of United States versus Oscar Torres, which is the suppression case that actually began in this courtroom, Your Honor, before Judge Daniel, many years ago. That's where the Fourth Circuit made a very, very important holding, and that is this. When there is an unlawful arrest by Immigration, the identity evidence that is obtained following or as a result of that is suppressible, to include identity evidence, fingerprint evidence and attendant records. In that case, and in this case, we're talking about the A-File.

Oscar Torres also says that they recognize that with Immigration Agents there's always a possible dual function. But, where at least part of the purpose of the arrest was for investigative purposes, then the holding of Oscar Torres applies. And once again, if there's an unlawful arrest identity evidence -- that's why Oscar Torres is so crucial, that was the first case that really held that in these type of cases, that the fingerprint evidence and the A-File evidence is suppressible.

Your Honor, even if the United States Supreme Court

after the Case of Canton, after Harrison, and (inaudible) versus Gates, a 2012 case, once again they emphasize the Statute 8 USC 1357 requires in order to arrest without a warrant requires both reason to believe a violation, but also reason to believe that person is likely to escape. There is no case that I have found that supports The Government's interpretation of the regulations. And it seems like the practice is in fact to not do what the Statute requires as a practice, a very system-wide practice at least.

Your Honor, the next issue is this is where the question of once you prove a statutory violation, does suppression apply. And that's where the case we cite in the Supreme Court is crucial, and basically the case -- a statutory violation does not necessarily result in suppression, but if you have a statutory violation, that at least implicates constitutional rights, whether it be Fourth or Fifth Amendment, then the judiciary exercises its supervisory authority to employ that remedy of suppression.

And I would say, Your Honor, this is one of the cases that require the exercise for supervisory authority, because in the cases that the Supreme Court references, they're one-time violations. One is a violation of the 18 USC 3109 Knock and Announce Rule for a No Knock Warrant. The other is for the Rule 5, Delay between arrest and presentation before a judge. They are statutory violations. And it wasn't

the case here. There was an individual violation, an individual case. Here we have a systemic disregard by the Executive Branch of a statute that Congress stands by, and that The Courts have consistently said should be seriously applied. And rather than being seriously applied, it is being systematically disregarded.

So not only do we have a situation where you have an unlawful arrest in violation of 1357, but affects Constitutional Fourth, Fifth and Sixth Amendment Rights. But in this particular case, it's not a one -- it's a systemic violation of the Statute.

The regulations they cite do not -- the regulations they cite do not put forth their argument, Your Honor. She cites 8 CFR 236.1. Nothing about that says that when you have a prior deport you can disregard the warrant requirement. In fact, the reason why I had Agent Swivel read (b)(1) is it references 8 CFR 287.5, which is pointed out in whatever submissions that refers you back to 287.8(c), which re-emphasizes the warrant requirement.

Your Honor, the reason we submitted Exhibit Number 4, The Morgan (inaudible), the Georgia Case, and the substance of that Motion to Dismiss has to do with a challenge to delay between arrest and indictment. That's not the reason I submitted. The reason I submitted, because it is an illegal re-entry case, and Exhibits A and B show what they did in that

case, and something The Government says they can't do, and that is this. When you arrest somebody that has been prior -- a deportation, you have what they call an Exhibit B of Exhibit Number 4. And notice a statement of prior deportation. And accompanying that is the arrest warrant that The Government says they cannot obtain in these cases. And Exhibit A is an I-200 Warrant for the Arrest of the alien. There's nothing in that warrant that suggested it's limited to certain types of arrests. It says, it's a command to take the person in custody for (inaudible) with the applicable provisions of the Immigration Laws and Regulations.

So Your Honor, the fact that for a prior deport, the Statute and the case law now says that the prior Deportation Order will remain in effect. Basically, they're saying the (inaudible) Congress has limited the rights of somebody that's a prior deport to challenge the deportation. I believe the case law is now (inaudible) if there is a Constitutional violation that led to the first deportation. But basically, the reinstatement of prior deportation, it cuts short what I would call step two in the process. Step two in the process is Order of Deportation. Step three is the actual deportation which is proceeded by the Warrant of Deportation that they talked about.

But Step one always has to be before somebody can go into Immigration for deportation, you have to arrest them and

take them into custody. So the fact that Step Two for people like Mr. Santos-Portillo was cut short because he doesn't have the same rights to challenge the deportation, there's no logic that says that that then permits Immigration to arrest him in violation of the Statute. They still have to arrest him lawfully and then file the Notice of Reinstatement. So I don't see how case law or the statute or even logic supports The Government's position. If I may have a moment, Your Honor. I lost my train of thought.

I think that was it, Your Honor, in terms of -- there is no case that exists that I've found that says that if the person is a prior deport 1357 is -- doesn't apply. Then Immigration can systematically arrest people, even though they had no reason to believe he was likely to escape. And I think factually, Your Honor, there's no -- that Agent Swivel could not have gotten a warrant on January 15 when he was consulting with a supervisor about what he was going to do the next day. So the fact that he had knowledge of a fleeing to elude from seven years before, that doesn't change the fact that he could have gotten the warrant before January 16.

Your Honor, in terms of the supervisory authority, I think it's especially crucial in this case also because if Your Honor does not enforce the Statute, then the systematic disregard of that Statute is going to continue. And I think that a crucial part of supervisory authority is the integrity

of the criminal process. So here you have an Executive Branch to disregard of a statutory requirement that Congress has mandated, and the only branch that can ensure compliance by the Executive Branch is the judiciary by suppressing the evidence. Otherwise, those actions (inaudible) either for the integrity of the process, for plans with judicial mandate, or for Mr. Santos-Portillo.

Now Your Honor, case law that Oscar Torres complied recognizes that in fact what the famous quote was, was a criminal may go free, but not if they are (inaudible). And that is to say that if they've got a criminal prosecution in a case due to the order in terms of suppression, Immigration is still free to deport them. So it's not as if Mr. Santos-Portillo is going to be -- go scot free because of this. He's still facing deportation back to Honduras. But the only way in which the Executive Branch is going to start complying with the Statute is by Your Honor and the Judiciary enforcing compliance.

Finally at the end of the day -- the Prosecution submitted a statute from the Customs Statute, Title 19. What cannot happen is there cannot be an argument that's sustained by the Judiciary that renders 8 USC 1357 meaningless or without (inaudible). And that's what essentially The Government would do if they successfully argue that this provision for a Customs Agent in Customs Investigation in

Title 19 somehow renders 8 USC 1357 meaningless or not applicable, especially in light of the consistent case law. I did look at the provision from Title 19. I found no case that says that. I found no case that says that Title 19 trumps and obliterates the required 8 USC 1357.

It's a novel argument, it's the first time it's been brought up. But Your Honor, the final thing I want to point to in terms of the case I submitted to you. It is a published case. I gave you a courtesy copy, Moreno v Napolitano, 213 SF3 999, 2016. That's a different circumstance, but in that case The Government made the argument -- it's totally a different circumstance -- made the argument that for 1357 inherently anybody that's here illegally presents a likelihood of escape. Therefore, in every case we meet that requirement; therefore, we never need a warrant. So what that's showing is The Government keeps coming up with these arguments for why they don't need to comply with 1357. And in Moreno, they came up with the argument that because every illegal alien is an inherent risk of flight. The District Judge shot that down. He says that the Statute, and he cites Cantu, specifically requires that individualized analysis to see whether warrant was required. And number two, I think he does an excellent job basically saying the Chevron Deference can apply in this case because Chevron Deference to what ICE states they can and can't do only applies to statutes ambiguous. And we emphasize

the case law saying that the statute is clear and there is absolutely no deference that is owed to ICE's interpretation. And more importantly, if we don't apply it, it means the Congressional Statute basically has no teeth. And that gets back to my argument in terms of why this court should employ supervised authority.

At the end of the day, Your Honor, you have prosecution of an immigration violation that starts with a violation of Title 8, stating you, HIS and United States Attorney's Office pursuing criminal prosecutions of Title 8 when the initial arrest violates Title 8.

My argument is that that should not continue, that The Court should start seriously applying this Statute, and that this case presents an opportunity for Your Honor to do that.

THE COURT: Let me ask you a question, Mr. Todd.

MR. TODD: Yes.

THE COURT: Assuming that I were to find a violation and assuming that I were to find that violation, the identity information, is suppressible --

MR. TODD: Yes, Your Honor?

THE COURT: -- you mentioned that he would still be subject to deportation.

MR. TODD: Yes, ma'am.

THE COURT: Would still be subject to administrative

MR. TODD: Correct.

THE COURT: But the information prior, from 2011, is still in existence and I don't see how that would be suppressible.

MR. TODD: Because it's attendant record evidence that was obtained by unlawful arrest.

THE COURT: But it wasn't. It was -- it preceded the illegal arrest.

MR. TODD: But the match, I mean that's what the key here is, the fingerprint evidence.

THE COURT: And I'm saying suppress that, but they still have this evidence --

MR. TODD: I'm sure Torres talks about the attendant record reference including the A-File. They ask for the A-File to be suppressed. And based on my understanding, The Government needs the A-File evidence to pursue the prosecution.

THE COURT: Thank you. I'll take a look at Oscar Torres again. It's been a while. Thank you.

MR. TODD: Thank you.

THE COURT: Alright, Ms. Morales?

MS. MORALES: Yes, Your Honor, thank you. Your Honor's question goes to the direct point of what is the purpose of the I-200, which is what the defense is saying we should have had prior to his arrest. The purpose of the I-200

is to bring the alien before an Immigration Judge so that the Immigration Judge can decide whether or not that individual should be deported from the United States. And that was issued in 2011 as in Exhibit 2. And the Immigration Judge made his decision to order the defendant removed from the United States to Honduras in Exhibit 3.

So I believe that Your Honor's question hits upon the point of what interest is protected by the defendant if we were to have this I-200 in hand prior to the administrative arrest. The answer is nothing. There is no interest on behalf of the defendant that would be protected. That this alludes to this systematic disregard of 8 USC 1357(a)(4), which is captured in Government's Exhibit 7. Our argument is that simply does not apply at this stage of the proceedings, as Your Honor has heard several times, there is an Order by the Immigration Judge and the only thing left to do was to reinstate that prior Order.

The Government in this particular case complied with the Statute that Mr. Todd is saying we did not comply with. We complied with it at the appropriate stage when we issued the I-200, which ordered the alien in before the Immigration Judge so the Immigration Judge could determine whether or not he should be deported. That's the purpose of the I-200.

THE COURT: But aside from the I-200, why is a Judicial Warrant not required?

MS. MORALES: A Judicial Warrant is not required because of an Immigration Order. A Judge has already ordered his deportation. And all we're doing at this point when he illegally re-enters is to reinstate that prior Order. On the face of the I-200, it alludes to unspecific provision, and that is Section 236 of the Immigration Nationality Act. And based on my research, that's titled by 8 USC 1226.

And 1226(a), it states that on a warrant issued by the attorney general, basically an I-200, an alien may be arrested and detained pending a decision whether the alien is to be removed. So again, we're saying that that I-200 is appropriate in the context of pending a decision on whether the alien is to be removed. That has already been decided.

THE COURT: And he has already been removed.

MS. MORALES: And he has already been removed seven years ago.

THE COURT: But now when he re-enters it seems to me that you've got a new case. Is that --

MS. MORALES: It's not a new case, Your Honor. It's a reinstatement of the old Order. It's a reinstatement of the old Order, and it goes back to the original date of 2011, when he was ordered removed by the Immigration Judge.

THE COURT: And so my question is, by reinstating that prior Order under what authority does there not need to be another warrant?

MS. MORALES: Under the --

THE COURT: Judicial or Administrative.

MS. MORALES: We would cite to 8 USC 1226(a), which is the provision I just referenced, Your Honor. And then additionally, we would cite to 8 CFR 236.1(b)(1), which is contained in Exhibit B, which talks about the appropriate time to use the I-200, at the time of issuance of a Notice to Appear.

THE COURT: But you said that's already happened. You're not noticing an appearance at this point, because that case is already over and he has been removed.

MS. MORALES: That's correct.

THE COURT: So why would 236.1 apply at all? This, to me, seems to be dealing with the initial administrative procedure. You're beyond that.

MS. MORALES: We are still among that, Your Honor, because it is a reinstatement of the prior Order.

THE COURT: And that's why I'm saying show me where it says on reinstatement you don't need a new warrant.

MS. MORALES: Your Honor, I don't have a statute that specifically says that on point. But I can further talk about the second argument with regard to 1357(a)(4) and how we met that standard, if you would want me to go there.

And again, just going to your prior point, our position is that this is a reinstatement of a prior Order, so

the only thing left to do is to enforce that Order. No arrest warrant is needed.

But going to the second argument, and also if I can just say about the first argument, Your Honor, AUSA Kimonovich and I, he is -- Mr. Todd -- he had a similar case where this is argued before Judge Gates and in that context and the context of this case he did speak with ICE Counsel about this, and we asked what happens in Immigration Court, would another I-200 be issued in this context. And they said, no, because the Immigration Proceeding had been completed and all we were doing was reinstating a prior Order. So I just wanted to proffer that to Your Honor, that we did reach out to ICE Counsel to make sure we were following proper procedures.

THE COURT: And so what do you make of Mr. Todd's Exhibit Number 4 that actually has an I-200 with the reinstatement?

MS. MORALES: I haven't had the opportunity to read this case, Your Honor. I am aware that on occasion, and I don't know if this is a case in this situation, that as you know, sometimes when an alien who has a prior Order of Deportation re-enters the country, and we'll say, for example, has State Drug Trafficking charges and he's encountered while in jail, and while in custody to reinstate that prior Order they will file this Notice of Intent to Reinstate, which is in that exhibit that Mr. Todd had. And sometimes the jail will

require in addition to that document and in addition to a Detainer, the jail will want an arrest warrant. And I think that kind of comes up sometimes in sanctuary city situations. So the jails will often require not only the ICE Detainer Reinstatement, but also an I-200, an arrest warrant. And so I think sometimes I-200s are issued in that illegal re-entry context to satisfy the requirements of a jail so that it can now go into ICE Custody and proceed on with Immigration Proceedings.

So I'm not saying that it can never happen, and I'm sorry I haven't had a chance to read this file.

THE COURT: It really didn't look like that's what the situation was there. The Government's Motion -- or The Government's response to the defendant's Motion makes the factual history that the defendant was encountered by HIS.

MS. MORALES: Okay.

THE COURT: And after being interviewed was arrested and transported to a Detention Center for a continuation of an Administrative Removal Proceedings. There's no indication that there was another arrest.

MS. MORALES: So I wonder if the I-200 was issued after his administrative arrest. Again, it still wouldn't have satisfied what Mr. Todd wants in this case.

So I'm not trying to say that an I-200 would never be possible. I'm just saying that it's not necessary.

into the country twice undetected, and had been in the country for some unknown amount of time undetected. And also based on the fact, Your Honor, the agent had never encountered him before. He had not alerted him of his presence. So the first time he actually spoke with him was on January 16. And so based on all of that, we would submit that there was a likelihood that he could escape before a warrant could be obtained. And again, the reason that we believed that in part as well is that Agent Swivel still needed to confirm his identify when he encountered the defendant on the morning of January 16.

If I can move forward, Your Honor, to the third argument, all of this aside, Agent Swivel is a Special Agent with Homeland Security Investigations. He could have arrested him criminally pursuant to his dual path, his dual authority pursuant to Title 19, 19 USC 1589(a). There's nothing in that Statute that says he has to be arresting based on some sort of Customs violation. In fact, it says that he can make an arrest without a warrant for any offense against the United States committed in an Officer's presence or for a felony. Well, in this case it was a felony, and it was being still committed in his presence, because as I'm sure you know, Your Honor, that evidence of illegal re-entry is an ongoing thing. And so he had probable cause to believe that the defendant was guilty of a felony, illegal re-entry, and could make, based on

that authority, a warrantless arrest. And this is common. This is something that law enforcement officers do all the time, and outside of the Immigration context.

There's no limitation that this has to be some sort of a Customs felony violation or anything of that sort. And most importantly here, there's no requirement of a risk of flight. This does not render the Statute 1357 meaningless. Only Homeland Security Investigatory Special Agents had this dual authority, to my knowledge, Immigration and criminal authority. That was decided and (inaudible) given this dual hat. And so he is authorized under this dual hat in support to find this argument more persuasive.

If I could just distinguish a few of the points that -- or skew the cases that Mr. Todd spoke to, Your Honor. The Harrison Case was a case from 1996. That was an unpublished case from the Fourth Circuit where they did find a violation of 1357 in an illegal re-entry context. That case again, the defendant was arrested in 1996. It's not instructive in this situation because they were working under a completely different immigration framework. There was something called Immigration Reform Act that came into effect in 1997. And so that changed the immigration framework, that is when I-200, from my understanding, came about. That is going to (inaudible) that he cited to in Exhibit 6 came about. So we would distinguish that case based on the fact that it was

Customs Authority. Again here, our third argument is that the agent could have acted under 19 USC 1589(a) and could have criminally arrested him at that time.

And finally, Your Honor, it looks like the defendant also referenced Morano. We certainly agree that -- and we're not trying to say that all aliens are a risk of flight. We are saying based on the individualized analysis in this case, based on the facts that we have at the time of his arrest, we believe that he was a risk of escape before we could obtain a warrant.

So just to summarize, Your Honor, very briefly. Our first and foremost argument is that we do not believe the I-200 was necessary. Two, if you believe the I-200 was necessary, we believe there is ample probable cause and reasons to believe he would escape before our warrant could be obtained. And third and finally, the agent could have criminally arrested him pursuant to his Customs Authority Title 19. So we'd ask that you deny the defense's Motion to Suppress. Thank you.

THE COURT: Thank you. Do you wish to add anything, Mr. Todd?

MR. TODD: Just briefly. First of all, Your Honor, I don't care what they call the warrant, I-200, I-200-2, 1357 doesn't limit it to an I-200. All I'm saying is they have to get a warrant. I don't care what they call it. So if they're

hanging their hat on the fact that for their own race they can't do the I-200, it still doesn't excuse them from getting a warrant, Number one.

Number two, I found no basis in logic or case law that they executed an I-200 from seven years ago, so the -- served to execute it. Where is the case law that says that an executable arrest warrant can become a resurrected Zombie Warrant seven years later and all of a sudden serve as the basis for arrest? There's a Supreme Court Case from 1952, Carson Vs London, 342 US 524. It's an Immigration case. Says my analogy of a deportation case a warrant was executed by taking him and accusing in custody does not continue with the authority for a second arrest.

All I'm saying is, first of all, it doesn't make sense that an executed warrant somewhere can come back to life again. Second, I find no case law to support that.

Your Honor, in terms of Oscar Torres, it all began in this courtroom many years ago. Judge Daniel found a violation of 8 USC 1357. He found that they had the opportunity to get a warrant. Now by the time they got the warrant served, with the issue of Oscar Torres was the issue of whether, and this is not the case, the fingerprint evidence and the A-File is suppressed. And so Judge Daniels found the violation and found that case -- did not support the suppression. The Fourth Circuit decided that (inaudible)

STATE OF NORTH CAROLINA)
)
COUNTY OF BEAUFORT)

C-E-R-T-I-F-I-C-A-T-I-O-N

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I FURTHER CERTIFY THAT I AM NOT FINANCIALLY INTERESTED IN THE OUTCOME OF THIS ACTION, A RELATIVE, EMPLOYEE, ATTORNEY OR COUNSEL OF ANY OF THE PARTIES, RELATIVE OR EMPLOYEE OF SUCH ATTORNEY OR COUNSEL.

THIS THE 3RD DAY OF JUNE, 2018.
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APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff,	**DOCKET NO. 7:18-cr-10-1H**
vs.	
MARCIO SANTOS-PORTILLO, Defendant.	

TRANSCRIPT OF DETENTION HEARING
BEFORE MAGISTRATE JUDGE ROBERT B. JONES, JR.
MONDAY, FEBRUARY 5, 2018; 10:48 AM
WILMINGTON, NORTH CAROLINA

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I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
For the Plaintiff:					
Tom Swivel	5	9			
For the Defendant:					
James Strickland	12	16	22		

RULINGS:	PAGE	LINE
Government's motion for pre-trial detention is granted	34	25

permission from the Attorney General or the Secretary of Homeland Security to come back into the United States. And I asked him a little more specifically about that. I said, that would be if you went to the American Consulate in Honduras and requested a visa to come back in. That's basically the proxy for those two entities. And he said that he hadn't.

Q. So did he admit, essentially, that he was unlawfully present in the United States?

A. Yes, he did.

Q. Did he also mention to you where his family lives?

A. He said that he had three children in Honduras, three sons.

Q. Did he mention that his mom also lives in Honduras?

A. Yes, he did.

Q. And as a result of his arrest on January 16th, 2018, was an ICE detainer lodged?

A. Yes, it was. Um-hum.

MS. MORALES: Thank you. No further questions, Your Honor.

THE COURT: All right. Cross?

MR. BRIGNAC: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BRIGNAC:

Q. You mentioned, Agt. Swivel, you recognized him on January 9th at his business. And then investigation revealed his

deportation. What was that investigation?
A. I thought I recognized Mr. Santos-Portillo. I saw him at a business, not at his business, at a business in Wilmington. And then I actually saw him get in his vehicle and ran the registration. From that registration, I was able to get his name and access to law enforcement databases and immigration databases. And the immigration databases revealed that the person I had seen, based on photographs, had been deported, but it wasn't the person that I actually thought I had recognized before.
Q. Okay. So to be clear, you thought you recognized a person. That person actually has nothing to do with this case. But in running the license plate and registration, you noticed there was a person, Mr. Santos-Portillo, who was here illegally.
A. That's correct.
Q. Okay, that is a correct summation?
A. Um-hum.
Q. And then you went to his home on the 16th. How did you know his address?
A. From the registration of the vehicle.
Q. Okay. And you detained him there. Did you ever get an arrest warrant?
A. No, I did not.
Q. Do you ever get arrest warrants? Or is it generally the

nature of the crime such that you do these arrests without a warrant?

A. Generally, we encounter people administratively. And due to his prior deportation, there was an administrative arrest warrant in the A-File.

Q. Okay.

A. But -- no.

Q. Okay. You mentioned, at the time, he gave -- the time of the 16th, you read him his Miranda Rights, he waived those rights, he gave a statement. So it would be fair to say he was compliant the entire time?

A. Absolutely, yes.

Q. Okay. And do you feel, at any point in that process, he was trying to be evasive, or did he tell you information that later didn't check out?

A. No, he did not.

Q. Okay. What business was it on the 9th? Do you remember where you saw him?

A. Specifically?

Q. Yeah.

A. Yeah, sure. It was Ming Wok Restaurant on Carolina Beach Road.

Q. Okay. Cool.

MR. BRIGNAC: Thank you. Thank you, Your Honor. Nothing further.

CERTIFICATE OF TRANSCRIBER

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Dated this 16th day of February 2018.

/s/Paul T. Abramson
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