APPENDICES

A. Constitutional and Statutory Provisions Involved

B. Order Denying En Banc Review - USA v. Cobo-Cobo, No. 16-4097 (8th Cir. Dec. 7, 2017)

C. Panel Decision - USA V. Cobo-Cobo, No. 16-4097 (8th Cir. Oct. 12, 2017)

D. Judgment - USA V. Cobo-Cobo, No. 16-4097 (8th Cir. Oct. 12, 2017)

E. Order Appointing CJA Counsel (Nov. 21, 2016)

F. District Court Order Denying Motion to Suppress - USA v. Cobo-Cobo, No. 16-CR-20-LRR (N.D. Iowa Aug. 24 2016)

G. Magistrate Judge Report and Recommendation - USA v. Cobo-Cobo, No. 16-CR-20-lrr (N.D. Iowa July 6, 2016)

A. Constitutional and Statutory Provisions Involved

CONSTITUTIONAL AND STATORY PROVISIONS INVOLVED

I. 4TH AMENDMENT TO U.S. CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." 4th Amendment to U.S. Constitution

II. STATUTE OF CONVICTION - 42 U.S.C.§ 408 (a) (7) (B)

(1) for the purpose of causing an increase in any payment authorized to be made under this subchapter, or for the purpose of causing any payment to be made where no payment is authorized under this subchapter, shall make or cause to be made any false statement or representation (including any false statement or representation in connection with any matter arising under subchapter E of chapter 1, or subchapter A or E of chapter 9 of the Internal Revenue Code of 1939, or chapter 2 or 21 or subtitle F of the Internal Revenue Code of 1954) as to—

(7) for the purpose of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized thereunder, or for the purpose

of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose—

(B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person; or

B. Order Denying En Banc Review - USA v. Cobo-Cobo, No. 16-4097 (8th Cir. Dec. 7, 2017)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-4097

United States of America

Appellee

v.

Nicolas Cobo-Cobo

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:16-cr-00020-LRR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

December 07, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

C. Panel Decision - USA V. Cobo-Cobo, No. 16-4097 (8th Cir. Oct. 12, 2017)

United States Court of Appeals
For the Eighth Circuit

No. 16-4097

United States of America

Plaintiff - Appellee

v.

Nicolas Cobo-Cobo

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: September 22, 2017
Filed: October 12, 2017

Before LOKEN, ARNOLD, and SHEPHERD, Circuit Judges.

ARNOLD, Circuit Judge.

After Nicolas Cobo-Cobo was indicted for misusing a social security number, *see* 42 U.S.C. § 408(a)(7)(B), he moved to suppress evidence obtained during a police encounter that occurred more than four years before. The district court,[1] adopting the

[1]The Honorable Linda R. Reade, then Chief Judge, United States District Court for the Northern District of Iowa.

report and recommendation of the magistrate judge,[2] denied the motion. Cobo-Cobo pleaded guilty but reserved his right to appeal the district court's denial of his motion to suppress. He now appeals that ruling, and we affirm.

Special Agents Michael Fischels and Andrew Lund with the Department of Homeland Security were helping a local police department investigate a stabbing incident when one Elias Mendoza-Marcos piqued their interest. According to Fischels, they followed Mendoza-Marcos to a laundromat and, once he got out of his car, Fischels told him that they were investigating a stabbing and began questioning him. Though it became apparent that Mendoza-Marcos was not involved in the stabbing, the agents began to suspect that Mendoza-Marcos might be in the country illegally when he could not furnish a government-issued form of identification. Mendoza-Marcos told the agents that he lived in an apartment in the building containing the laundromat and acknowledged that other people lived with him. He also admitted that he was from Guatemala and that he had no documentation authorizing him to live in the United States.

The agents then arrested Mendoza-Marcos and asked him if he wanted to retrieve any items from his apartment to take with him to the immigration office. He said he did, and, according to both agents, consented to their entering the apartment with him. On their approach to the apartment, one of Mendoza-Marcos's roommates spoke with him through a window on the second floor. According to Lund, the roommate then opened the apartment door and did not object when the agents entered with Mendoza-Marcos. The agents asked Mendoza-Marcos and the roommate to round up others who were in the apartment, and, when they said that Cobo-Cobo was asleep in a bedroom, the agents requested that they wake him and gather everyone in the living room to speak with the agents. Like Mendoza-Marcos, the other occupants

---

[2]The Honorable Jon Stuart Scoles, then Chief Magistrate Judge, United States District Court for the Northern District of Iowa, now retired.

could not provide government-issued identifications, and, after questioning confirmed that they too were in the country illegally, the agents arrested them. It is important for present purposes that, as a result of this incident, the government obtained Cobo-Cobo's employment identification card from a business called Carlson Building Maintenance and placed it in Cobo-Cobo's "alien file"—a government file that, according to one witness, contains papers and documents pertaining to a person's immigration status.

The identification card resurfaced a little more than four years later after a deportation officer reviewed Cobo-Cobo's alien file. The officer contacted Carlson to request a copy of Cobo-Cobo's I–9 Employment Eligibility Verification Form, and Carlson obliged. Federal law requires employers to verify the identity of their employees by checking certain documents to ensure they are eligible to work in the United States, which the employer, in an I–9 form, must attest to having done. *See Split Rail Fence Co., Inc. v. United States*, 852 F.3d 1228, 1232 (10th Cir. 2017). While reviewing Cobo-Cobo's I–9 form, the deportation officer discovered that Cobo-Cobo had provided Carlson with a social security number that did not belong to him, leading to the indictment here.

Cobo-Cobo asserts that the agents violated the Fourth Amendment by entering his apartment without permission, and so the district court should have suppressed the evidence obtained there. Though police officers generally need a warrant to enter a home to search or make an arrest, they do not need one when someone possessing common authority over the home voluntarily consents to their entry. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). Cobo-Cobo relies on Mendoza-Marcos's testimony that he never gave the agents consent to enter the apartment, whereas the government relies on the agents' testimony to the contrary. When reviewing the denial of a motion to suppress, we review factual findings for clear error. *United States v. Wolff*, 830 F.3d 755, 758 (8th Cir. 2016).

The district court found that Mendoza-Marcos had indeed consented to the agents' entry into the apartment, and it gave several cogent reasons for doing so. For example, since the district court had found that Mendoza-Marcos was placed under arrest outside the apartment, it thought it reasonable to believe that the agents would not allow Mendoza-Marcos to enter the apartment unaccompanied, and so it was in turn reasonable to think that the agents would ask for permission to enter the apartment with him. Similarly, the district court refused to credit Mendoza-Marcos's testimony that the officers did not identify themselves, ask him where he lived, or ask him if he lived alone, given that he had allowed the agents to arrest him and accompany him into the apartment. The district court also found that Mendoza-Marcos's conversation with the roommate in the window did not fit with his testimony that the agents "just went in" to the apartment. The district court's choice between two permissible views of the evidence cannot be considered clearly erroneous, so we are not left with a "definite and firm conviction" that the district court made a mistake here, *see Lockhart v. United States*, 834 F.3d 952, 957 (8th Cir. 2016), especially since a finding on witness credibility is virtually unassailable on appeal. *Wolff*, 830 F.3d at 759.

Cobo-Cobo also argues that, even if Mendoza-Marcos consented to the agents' entry, he did not do so voluntarily since he was under arrest, was not advised of his right to refuse consent, had not received *Miranda* warnings, and had no prior experience with law enforcement officials. We review a determination of whether consent was voluntary for clear error. *United States v. Comstock*, 531 F.3d 667, 676 (8th Cir. 2008). None of the facts that Cobo-Cobo emphasizes automatically renders consent involuntary. Officers need not provide *Miranda* warnings before requesting consent to perform a search, *United States v. Saenz*, 474 F.3d 1132, 1137 (8th Cir. 2007), or inform arrestees of their right to refuse consent. *United States v. Ortega-Montalvo*, 850 F.3d 429, 435 (8th Cir. 2017). While these omissions can influence a finding of whether consent was voluntary, we see no clear error with the finding that Mendoza-Marcos voluntarily consented here. The district court found that he had at least average intelligence and that nothing suggested that he was intoxicated or otherwise without his faculties during the police encounter. The agents confronted Mendoza-Marcos in a public place and did not display their weapons, raise their voices, place restraints on him, or make promises to him before receiving his consent. We have affirmed findings of voluntary consent in similar circumstances. *See, e.g.*, *Comstock*, 531 F.3d at 677–78. Because we conclude that the district court did not clearly err in finding that Mendoza-Marcos's consent was voluntary, we need not determine whether the agents also had authority to accompany him into the apartment to ensure their own safety and to protect the integrity of the arrest. *See United States v. Varner*, 481 F.3d 569, 571–72 (8th Cir. 2007).

We next consider whether the agents had reasonable suspicion to seize Cobo-Cobo by adjuring him to sit in the living room for questioning. We review reasonable-suspicion determinations de novo. *United States v. Fields*, 832 F.3d 831, 834 (8th Cir. 2016). The agents could seize Cobo-Cobo if they had a reasonable, articulable suspicion that criminal activity was afoot; reasonable suspicion is more than a mere hunch but less than probable cause or a preponderance of the evidence. *United States v. Roberts*, 787 F.3d 1204, 1209 (8th Cir. 2015). We consider all the relevant circumstances, keeping in mind that officers may draw on their experience and training to make inferences from the information they have. *Id.*

Cobo-Cobo maintains that the agents' suspicion that he was in the country illegally was based solely on his Hispanic heritage, and points out that a person's heritage alone cannot give rise to a reasonable suspicion that he is in the United States illegally. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975). But his assertion mischaracterizes the record. The district court determined, on a sufficient record, that the agents' suspicion was based on a number of considerations in addition to Cobo-Cobo's heritage. For instance, the court found that the agents, based on their experience, suspected Cobo-Cobo was in the country illegally because it was common for unrelated illegal-alien males to live together, and that when they seized Cobo-Cobo they had already arrested one of his unrelated male roommates for being an illegal alien. The court also credited the agents' testimony that none of the men spoke English, a circumstance that indicated that they had not been in the country for long. In addition, Lund testified that he had been to the same apartment several times and knew that the landlord rented to undocumented aliens. It is inconsequential that one or both of the agents also considered Cobo-Cobo's heritage in seizing him since *Brignoni-Ponce* expressly recognizes that heritage may be a "relevant factor," among others, in forming a reasonable suspicion. *See id.*; *see also United States v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994). We therefore reject this contention.

Cobo-Cobo also emphasizes that his "mere propinquity to others independently suspected of criminal activity" did not provide reasonable suspicion to seize him. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). *Ybarra* is clearly distinguishable. There, the Supreme Court held that the Fourth Amendment protected a bar patron whose proximity to a bartender for whom there was probable cause to search was the only evidence of the patron's criminal activity. *Id.* at 90–91, 96. But as we have already indicated, other facts besides Cobo-Cobo's propinquity to Mendoza-Marcos support a conclusion that the agents had reasonable suspicion to seize Cobo-Cobo. And even assuming *Ybarra* applies in the reasonable-suspicion context, in addition to the probable-cause context in which it arose, Cobo-Cobo was not merely near Mendoza-Marcos; he lived with him. *See United States v. Cowan*, 674 F.3d 947, 954 (8th Cir. 2012). Since we conclude that the agents had reasonable suspicion, we decline to decide whether the deportation officer would have inevitably discovered Cobo-Cobo's misuse of the social security number without the help of the identification card in Cobo-Cobo's alien file.

Affirmed.

D. Judgment - USA V. Cobo-Cobo, No. 16-4097 (8th Cir. Oct. 12, 2017)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-4097

United States of America

Plaintiff - Appellee

v.

Nicolas Cobo-Cobo

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:16-cr-00020-LRR-1)

JUDGMENT

Before LOKEN, ARNOLD and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

October 12, 2017

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

E. Order Appointing CJA Counsel (Nov. 21, 2016)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-4097

United States of America

Appellee

v.

Nicolas Cobo-Cobo

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:16-cr-00020-LRR-1)

ORDER

Attorney, Rockne Ole Cole is hereby appointed to represent appellant in this appeal under the Criminal Justice Act. Information regarding the CJA appointment and vouchering process in eVoucher will be emailed to counsel shortly.

November 21, 2016

Order Entered under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

F. District Court Order Denying Motion to Suppress - USA v. Cobo-Cobo, No. 16-CR-20-LRR (N.D. Iowa Aug. 24 2016)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

UNITED STATES OF AMERICA, Plaintiff, vs. NICOLAS COBO-COBO, Defendant.		No. 16-CR-20-LRR **ORDER**

TABLE OF CONTENTS

I. *INTRODUCTION* *1*

II. *RELEVANT PROCEDURAL BACKGROUND* *2*

III. *STANDARD OF REVIEW* *2*

IV. *RELEVANT FACTUAL BACKGROUND* *3*

A. *December 20, 2011 Search* *3*
B. *The 2015-2016 Investigation* *6*

V. *ANALYSIS* *9*

A. *Consent to Enter* *9*
B. *Voluntary Consent* *12*
C. *Seizure* *15*
D. *Inevitable Discovery Doctrine* *18*

VI. *CONCLUSION* *19*

I. INTRODUCTION

The matter before the court is Defendant Nicolas Cobo-Cobo's Objections to Report and Recommendation ("Objections") (docket no. 41), timely filed in response to United States Chief Magistrate Judge Jon S. Scoles's Report and Recommendation (docket no.

34), which recommends that the court deny Defendant's Motion to Suppress ("Motion") (docket no. 20).

II. RELEVANT PROCEDURAL BACKGROUND

On March 22, 2016, a grand jury returned a one-count Indictment (docket no. 1), charging Defendant with one count of misusing a social security number, in violation of 42 U.S.C. § 408(a)(7)(B). On June 6, 2016, Defendant filed the Motion. On June 10, 2016, the government filed a Resistance (docket no. 27). On June 15 and June 21, 2016, Judge Scoles held hearings on the Motion. *See* June 15, 2016 Minute Entry (docket no. 28); June 21, 2016 Minute Entry (docket no. 32). Defendant appeared in court for both hearings with his attorney, Rockne Cole. Assistant United States Attorney Daniel Tvedt represented the government. On July 6, 2016, Judge Scoles issued the Report and Recommendation, which recommends that the court deny the Motion. On July 21, 2016, Defendant filed the Objections. On July 28, 2016, Defendant entered a conditional plea of guilty to the offense alleged in the Indictment. *See* July 28, 2016 Minute Entry (docket no. 46). On July 29, 2016, the court accepted Defendant's conditional plea. *See* July 29, 2016 Order (docket no. 49). The government has not filed a response to the Objections, and the time for doing so has passed. Defendant requests that the court hear further evidence with respect to the issues raised in the Objections. However, the court finds that an additional hearing is unnecessary for the reasons discussed more fully below. The Report and Recommendation and the Objections are fully submitted and ready for decision.

III. STANDARD OF REVIEW

When a party files a timely objection to a magistrate judge's report and recommendation, "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge must consider de novo any objection to the magistrate judge's recommendation."); *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003) (noting that a district judge must "undertake[] a de novo review of the disputed portions of a magistrate judge's report and recommendations"). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions."). It is reversible error for a district court to fail to engage in a de novo review of a magistrate judge's report when such review is required. *See Lothridge*, 324 F.3d at 601. Accordingly, the court reviews the disputed portions of the Report and Recommendation de novo.

IV. RELEVANT FACTUAL BACKGROUND

Defendant seeks to suppress his "A-file," which allegedly provided law enforcement with the information leading to the Indictment after a routine review of the A-file in early 2016. Defendant argues that the A-file should be suppressed as "fruit of the poisonous tree" stemming from an allegedly unconstitutional search in December of 2011. Because Defendant's arguments concern both the initial search in December of 2011 and the investigation leading to the filing of the Indictment, the court shall discuss each time period separately.

A. December 20, 2011 Search

On December 20, 2011, at around 8:00 a.m., Department of Homeland Security–Homeland Security Investigations Special Agents Michael Fischels and Andrew Lund were assisting the Cedar Rapids Police Department in the investigation of a stabbing unrelated to the events at issue in the Indictment.[1] Agents Fischels and Lund observed a

[1] Agent Fischels's report of the December 20, 2011 investigation has been filed as (continued...)

vehicle driven by Elias Mendoza-Marcos and believed, at that time, that Mendoza-Marcos may have been the suspect for whom they were searching. The agents followed Mendoza-Marcos to the parking lot of a laundromat,[2] exited their vehicle and approached Mendoza-Marcos. According to Agent Fischels, he identified the agents as law enforcement and indicated that Mendoza-Marcos matched the description of the person for whom they were searching, communicating with Mendoza-Marcos in Spanish. *See* Motion Hearing Transcript[3] at 13-15.

Upon further questioning, it became apparent to the agents that Mendoza-Marcos was not the suspect from the stabbing incident. However, after requesting some identification, the agents became suspicious when Mendoza-Marcos failed to produce a driver's license or other government-issued identification.[4] Mendoza-Marcos indicated that he lived in the apartment above the laundromat with other individuals, but also stated that he was unsure whether any of the other residents were in the apartment. Agent Fischels testified that, at that point, he asked Mendoza-Marcos where he was from and Mendoza-Marcos told the agents that he was from Guatemala. Agent Fischels further questioned Mendoza-Marcos regarding whether he had any immigration documents that authorized him to reside or work within the country and Mendoza-Marcos stated that he did not. The

---

[1](...continued)
Government Exhibit 1 (docket no. 33).

[2] Photos of the laundromat have been filed as Government Exhibits 3 and 4 (docket nos. 33-2, 33-3).

[3] The transcripts from the hearings on the Motion have been filed in two consecutively paginated documents (docket nos. 53, 55). The court shall refer to such consecutive pagination when citing to the transcripts.

[4] At the hearing, Agent Fischels indicated that he did not remember precisely what form of identification Mendoza-Marcos produced, but indicated that it was not a government-issued means of identification.

agents testified that they then placed Mendoza-Marcos under arrest and informed him that he would be taken to the immigration office for processing. However, the agents neither placed Mendoza-Marcos in handcuffs nor restrained him in any way. Agent Fischels testified that he asked Mendoza-Marcos whether he had any belonging in the apartment that he wished to retrieve. Mendoza-Marcos indicated that he did. According to the agents, they asked Mendoza-Macos whether they could accompany him in the building and he stated that they could. However, at the hearing, Mendoza-Marcos testified that the agents never identified themselves as law enforcement, asked him where he lived or whether he lived alone, never informed him that he was under arrest or that he was being taken to the immigration office, and never asked whether he had any belongings that he wanted to gather or whether they could accompany him inside.

Before entering the building, Mendoza-Marcos had a conversation with another individual through the window above the door into the building. At the hearing, neither the agents nor Mendoza-Marcos testified as to the content of the conversation. The record is unclear whether Mendoza-Marcos or the other individual then opened the door to the building. The agents and Mendoza-Marcos then entered the building and proceeded up the stairs to the apartment. It is undisputed that Mendoza-Marcos never explicitly told the agents that they could not enter the building.

After entering the apartment, the agents observed two other individuals sitting in a common area. The agents identified themselves and asked whether there were other persons in the apartment. The individuals in the common area indicated that there was another individual sleeping in a bedroom. The agents directed the individuals from the common area to retrieve the individual from the bedroom and they did so. The individual from the bedroom was Defendant. The agents identified themselves to Defendant and directed all of the occupants of the apartment to sit on the couches in the common area. The agents explained that they were searching for the stabbing suspect and requested identification from Defendant and the two other individuals found in the apartment. Though all three occupants complied, none of them were able to produce any government-issued identification. The agents determined that none of the occupants of the apartment were the suspect for whom they were searching but grew suspicious that the occupants may be undocumented aliens.

The agents questioned the individuals and asked whether they were legally in the United States. They admitted that they were not. At that time, the agents placed the three other individuals under arrest and explained that they would be transported to the immigration office for processing and fingerprinting. The agents allowed the occupants to gather certain belongings to take with them to the immigration office and allowed Defendant to change out of his sleeping attire. The occupants, including Defendant, were all transported to the immigration office and processed.[5] Prior to being transported, the occupants were handcuffed, but were not informed of their *Miranda* rights. As part of their processing at the immigration office, the agents obtained biographical information from the individuals and a criminal history check was conducted. None of the individuals, including Defendant, had a criminal history. However, Agent Fischels testified that Defendant had an "immigration history," meaning that Defendant had prior encounters with immigration officials and had been assigned an "A number." At some point, either during their initial encounter or after placing Defendant under arrest, the agents obtained a Carlson Building Management identification card from Defendant and the card was added to Defendant's A-file.

B. The 2015-2016 Investigation

At the hearing on the Motion, Department of Homeland Security–Immigration and Customs Enforcement Officer Justin Osterberg testified that, on or about December 22,

---

[5] Defendant's Report of Deportable/Inadmissable Alien from the December 20, 2011 incident has been admitted as Government Exhibit 2 (docket no. 33-1).

2015 an email from Officer Richard Moore to Officer Jonathan Kovach of the Department of Homeland Security was placed on Officer Osterberg's desk.[6] Officer Kovach had been conducting surveillance on a certain residence and, during the course of that investigation, made note of a series of license plate numbers. The email from Officer Moore to Officer Kovach showed that one of the license plate numbers from that investigation belonged to a 2011 Ford Fiesta registered to Defendant. The email also listed Defendant's address, date of birth and a social security number ending in 4601. At the hearing on the Motion, Officer Osterberg testified that he ordered Defendant's A-file on January 7, 2016 and received it on January 19, 2016.

On January 21, 2016, Officer Osterberg sent an email to investigator Matthew Dingbaum of the Iowa Department of Transportation, asking whether the social security number that Defendant had used to register the Ford Fiesta was used to register any other vehicles.[7] Dingbaum indicated that there was another vehicle registered to Defendant under the social security number ending in 4601. Dingbaum also indicated that the social security number was issued in Colorado in 1997-1998 and "assum[ed] the [social security number] does not belong to [Defendant]." Government Exhibit 7 at 1. Officer Osterberg indicated that he would contact the Social Security Administration to verify.[8] That same date, Officer Osterberg received an email from Special Agent Juston Jennings of the Social Security Administration–Office of Inspector General indicating that the social security

---

[6] The email chain between Officers Moore and Kovach has been admitted as Government Exhibit 6 (docket no. 33-5).

[7] The email chain between Officer Osterberg and Dingbaum has been admitted as Government Exhibit 7 (docket no. 33-6).

[8] Officer Osterberg also requested that Dingbaum run facial recognition using a photo obtained from a February 9, 2004 "border event" involving Defendant under the name Alejandro Hernandez-Hernandez. *See* Government Exhibit 7 at 2. The border event report has been admitted as Government Exhibit 8 (docket no. 33-7).

number ending in 4601 did not belong to Defendant, but rather "is assigned to someone else." Government Exhibit 9 (docket no. 33-8) at 1.

During his review of Defendant's A-file, Officer Osterberg found the Carlson Building Management identification card that had been placed in the A-file following the search in December 2011. On February 12, 2016, Officer Osterberg contacted the human resources manager from Carlson Building Management and requested a copy of Defendant's I-9 employment form.[9] Although the I-9 form from Carlson Building Management was not produced at the hearing, the government contends that the I-9 form shows Defendant used a social security number which does not belong to him—specifically, the social security number ending in 4601.

On March 23, 2016, Officer Osterberg emailed an investigator with Iowa Workforce Development, requesting further information on Defendant's use of the social security number ending in 4601.[10] The investigator with Iowa Workforce Development identified two other employers for the social security number used on the Carlson Building Management I-9: Cancun #2, Inc. and Adelitas Mexican Grill. At the hearing on the Motion, Officer Osterberg testified that he attempted to obtain I-9 forms from Cancun #2, Inc. and Adelitas Mexican Grill but was unable to do so because the forms had been misplaced, could not be found or the company did not have them on hand. However, Officer Osterberg was able to obtain a W-2 or W-4 from Adelitas Mexican Grill, though it was not introduced into evidence.

On May 31, 2016, Judge Scoles held a detention hearing for Defendant. Officer Osterberg testified that he had conducted a review of a range of A numbers after a recent

[9] The email chain between Officer Osterberg and the human resources manager from Carlson Building Management has been admitted as Government Exhibit 10 (docket no. 33-9).

[10] The email between Officer Osterberg and the investigator with Iowa Workforce Development has been admitted as Government Exhibit 11 (docket no. 33-10).

reorganization in his office. *See* Detention Hearing Transcript (docket no. 29) at 4. Officer Osterberg testified that the investigation into Defendant started because of an "expired call-up" or routine check-in on Defendant's A-file. *Id.* After seeing the expired call-up, Officer Osterberg stated that he ordered the A-file at that time, "because the A[-]file was not located centrally in [his] office." *Id.* After reviewing the A-file, Officer Osterberg testified that he found the Carlson Building Management identification card and then began his investigation into Defendant's use of the social security number at issue. However, at the hearing on the Motion, Officer Osterberg stated that he had forgotten about the December 22, 2015 email from Officer Kovach at the detention hearing and that his testimony at the detention hearing that he had no other outside information regarding Defendant was erroneous. He stated that he remembered the December 22, 2015 email after he had left the detention hearing and was driving back to his office.

V. ANALYSIS

In the Objections, Defendant argues that Judge Scoles erred in finding that: (1) Mendoza-Marcos consented to a search of his apartment; (2) any consent, if given, was voluntary; (3) the seizure of the occupants of the apartment, including Defendant, was lawful; and (4) the inevitable discovery doctrine applied to Defendant's A-file. *See* Objections at 1. The court shall address each of these objections separately.

A. Consent to Enter

Defendant argues that Judge Scoles erred in finding that Mendoza-Marcos did, in fact, give verbal consent to Agents Fischels and Lund to enter the apartment on December 20, 2011.[11] Brief in Support of the Objections (docket no. 41-1) at 2. Defendant argues that, because the officers testified that Mendoza-Marcos gave them verbal consent to enter

[11] Defendant repeatedly refers to a "search" of the apartment in 2011. *See* Brief in Support of the Objections (docket no. 41-1) at 2-5. However, there is no evidence that the agents conducted a search within the apartment. Instead, Defendant's arguments make clear that he is alleging that the agents' entry into the apartment was unlawful.

the apartment and Mendoza-Marcos testified that he did not, the court should hear additional evidence to make a credibility finding. *Id.* Defendant argues that such a finding "cannot be determined from the record." *Id.*

The Fourth Amendment to the United States Constitution provides "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. "The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). "Warrantless searches 'are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *United States v. Goodale*, 738 F.3d 917, 921 (8th Cir. 2013) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)). "[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *United States v. Wolff*, ___ F.3d ___, ___, 2016 WL 4010514, at *3 (8th Cir. July 27, 2016) (alteration in original) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). Such consent can be obtained "either from the individual whose property is searched, or from a third party who possesses common authority over the premises." *Rodriguez*, 497 U.S. at 181 (citing *Schneckloth*, 412 U.S. at 218; *United States v. Matlock*, 415 U.S. 164, 171 (1987)).

The court finds that Mendoza-Marcos did consent to the agents' entry into the apartment. It is undisputed that, during the initial encounter between Mendoza-Marcos and the agents, Mendoza-Marcos produced some form of identification. It is also undisputed that, after speaking to the agents, the agents and Mendoza-Marcos entered the apartment. At the hearing on the Motion, Agent Fischels testified that it is standard practice to allow a person being detained for processing to retrieve belongings from their residence. Despite Mendoza-Marcos's testimony to the contrary, the undisputed events, along with Agent

Fischels's testimony, indicate that Mendoza-Marcos was indeed placed under arrest outside of the apartment. Because he was placed under arrest, it is reasonable to believe that the agents would not permit Mendoza-Marcos to enter the apartment unaccompanied, but would rather seek consent to accompany him. Agent Fischels further testified that he asked whether the agents could accompany Mendoza-Marcos into the building and that Mendoza-Marcos consented. This testimony was corroborated by Agent Lund. It is further undisputed that a brief conversation was held with a third-party from the window above the door to the apartment, which is inconsistent with Mendoza-Marcos's testimony that the officers "just went in" to the apartment.

Furthermore, Mendoza-Marcos admitted that he never told the agents that they could not enter the apartment. Insofar as Mendoza-Marcos testified that the agents did not request consent to enter the apartment and Mendoza-Marcos did not act to prevent them from entering with him to retrieve his belongings, it would be reasonable for an agent in Agents Fischels and Lund's position to believe that Mendoza-Marcos consented to entry where Mendoza-Marcos spoke with an occupant of apartment in the agents' presence prior to entry into the appartment, possibly to procure entrance into the apartment, and where Mendoza-Marcos did not attempt to prevent the agents from following. *See United States v. Farnell*, 701 F.3d 256, 263 (8th Cir. 2012) (recognizing that "a person can render a search legal by behaving in a way that would cause a reasonable person to believe that he or she has knowingly and voluntarily consented, whether or not the person actually intends to consent" (quoting *United States v. Cedano-Medina*, 366 F.3d 682, 684 (8th Cir. 2004)). Additionally, the court notes that Mendoza-Marcos denied both relevant and non-relevant facts at the hearing on the Motion. For example, he denied that he ever consented to the agents' entry into the apartment but also denied that the agents ever identified themselves as law enforcement, asked him where he lived or whether he lived alone. Such a general denial undermines Mendoza-Marcos's credibility, especially in light of the unlikelihood that a suspect would allow individuals who did not identify themselves as law enforcement to place that suspect under arrest and then accompany that suspect into his or her place of residence. Testimony so at odds with the objective facts established in the record causes the court to view the entirety of the witness's testimony as less credible.

Based on a review of the record, the court is satisfied that Mendoza-Marcos did, in fact, consent to the agents' entry into the apartment. To the extent that Mendoza-Marcos's testimony is inconsistent with reasonable inferences drawn from the record, the court finds his testimony less credible than that of Agents Fischels and Lund. The court finds that an additional hearing to receive evidence is unnecessary to make a credibility finding. Accordingly, the court shall overrule the Objections with respect to whether Mendoza-Marcos consented to entry into the apartment.

B. Voluntary Consent

Defendant argues that, even if the court finds that Mendoza-Marcos did, in fact, give consent to the agents, Judge Scoles erred in finding that such consent was voluntary. He argues that the "facts developed at the hearing [on the motion] do not support that finding." Brief in Support of the Objections at 3. Any consent, if given, must be voluntary. *See United States v. Comstock*, 531 F.3d 667, 676 (8th Cir. 2008). "The [g]overnment bears the burden of establishing, by a preponderance of the evidence, that consent was voluntary . . . ." *Id.* The scope of the consent "is based on the totality of the circumstances including the interaction between the parties, the purpose of the search, and the circumstantial evidence surrounding the search." *United States v. Beckmann*, 786 F.3d 672, 679 (8th Cir. 2015). Courts consider a variety of factors in determining whether consent was voluntary, including: "a defendant's age, intelligence, and education; whether he cooperates with police; his knowledge of his right to refuse consent; and his familiarity with arrests and the legal system." *United States v. Bearden*, 780 F.3d 887, 895 (8th Cir. 2015). Courts also consider "environmental" factors in determining the voluntariness of consent, including: "whether [law enforcement] threatened, intimidated, punished, or falsely promised something to the defendant; whether the defendant was in custody or under arrest when consent was given and, if so, how long he had been detained; and whether consent occurred in public or secluded area." *Id.* Additionally, courts consider the length of time the subject was detained and whether the subject objects during the course of the search. *See Comstock*, 531 F.3d at 676-77 (quoting *United States v. Saenz*, 474 F.3d 1132, 1137 (8th Cir. 2007)). Though the factors guide the court's analysis, the court does not engage in a mechanical application of them—whether consent was voluntary is determined based on a review of the totality of the circumstances. *Id.*

Defendant relies on the fact that Judge Scoles found that the "record was silent on age and education, and past experience" to argue that the relevant factors "all strongly fa[v]or a finding of involuntary consent." Brief in Support of the Objections at 5. Defendant highlights the facts that he was seized at the time the consent was given and that he was not read his *Miranda* rights at that time. *Id.* At the hearing on the Motion, Agent Fischels testified that, at the time that Mendoza-Marcos gave consent to search the apartment, they neither read him his *Miranda* rights nor informed him of his right to refuse consent. The agents also did not explicitly ask him about his age, education level or whether he was intoxicated. Agent Fischels also admitted that, at the time Mendoza-Marcos gave consent, he had been seized. However, Judge Scoles opined that Defendant appeared to be approximately thirty years of age and Defendant has not objected to this characterization. Additionally, from a review of Mendoza-Marcos's testimony at the hearing and the nature of his answers to questions posed by Agents Fischels and Lund at the time of the entry, it is apparent that Mendoza-Marcos is at least of average intelligence. Mendoza-Marcos gave appropriate answers to questions at the time of the 2011 encounter with the agents and in open court. Furthermore, Judge Scoles found that "there is no evidence [that Mendoza-Marcos] was intoxicated or under the influence of any controlled substance"—a conclusion that Defendant has not challenged and that, in fact, is supported by both the agents' testimony and the fact that Mendoza-Marcos was returning home from work at 8:00 a.m. when he came in contact with the agents. Report and Recommendation at 12. As Judge Scoles found, it is undisputed that Mendoza-Marcos was not informed of his *Miranda* rights and the agents did not inform him of his right to refuse consent, though Mendoza-Marcos's testimony at the hearing on the Motion that he did not provide consent suggests that, at the very least, he may have believed he had the ability to refuse. Additionally, there is no evidence that Mendoza-Marcos had previously been arrested or detained, and the agents testified that the criminal background checks on the occupants of the apartment all came up negative.

While Mendoza-Marcos had indeed been seized at the time he gave his consent, the amount of time between detainment and the consent was negligible. The agents testified that they did not display their weapons or raise their voices, nor did the occupants appear frightened. At the time that consent was given, there is no evidence in the record suggesting that the agents made any promises to Mendoza-Marcos.[12] Additionally, the encounter occurred in a public parking lot; although, as Judge Scoles noted, the parking lot was situated behind a building and there were no witnesses or bystanders.

Having reviewed the factors and viewing the evidence in light of the totality of the circumstances, the court finds that Mendoza-Marcos's consent was freely and voluntarily

---

[12] Although not raised by Defendant, Mendoza-Marcos appeared to testify that the agents made certain promises to the occupants of the apartment that they would be released after a background check. Although the court doubts that such promises were made, as Agents Osterberg and Lund testified that they made no such statements, such promises would not impact the court's findings because the only testimony in the record pertaining to the alleged promises states that they were made after the officers had already obtained consent and entered the apartment. *Cf. Forman v. Richmond Police Dept.*, 104 F.3d 950, 960 (7th Cir. 1997) (noting that evidence found prior to a defendant's withdrawal of consent to search remains admissible).

given. The encounter between the agents and Mendoza-Marcos was non-coercive—he was not placed in restraints, was able to communicate with the agents through Agent Fischels who is fluent in Spanish, the agents did not brandish or draw their weapons, the encounter was carried out in a conversational tone without raised voices or shows of authority and, as the court has previously noted, the agents followed protocol in obtaining Mendoza-Marcos's consent. Few factors, if any, weigh against a finding that consent was voluntary, and a review of the totality of the circumstances convinces the court that Mendoza-Marcos voluntarily consented to the agents' entry into the apartment. Accordingly, the court shall overrule the Objections with respect to the voluntariness of consent.

C. Seizure

Defendant also argues that the agents did not have reasonable suspicion to seize him during the December 20, 2011 entry. Brief in Support of the Objections at 5. He argues that the factors that Judge Scoles found to support a reasonable suspicion that Defendant was in the United States illegally do not, in fact, support such a reasonable suspicion. *Id.* at 6. Specifically, Defendant argues that the facts that the occupants of the apartment were Latino and spoke Spanish was insufficient to establish reasonable suspicion. *Id.* at 7. Defendant further argues that merely residing in the same apartment as Mendoza-Marcos, whom the agents had already determined was in the country illegally, does not create any more reasonable suspicion than "being a bystander in a drug raid." *Id.*

The Fourth Amendment does not prohibit all warrantless seizures of persons. "[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *United States v. Roelandt*, ___ F.3d ___, ___, 2006 WL 3563323, at *1 (8th Cir. June 30, 2016) (alteration in original) (quoting *United States v. Cornelius*, 391 F.3d 965, 967 (8th Cir. 2004)). The court examines "the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Id.* (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). Reasonable suspicion is a standard resistant to any authoritative or neat definition. *See Illinois v. Gates*, 462 U.S. 213, 232 (1983). "Reasonable suspicion must be supported by more than a 'mere hunch,' but 'the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying the preponderance of the evidence standard.'" *United States v. Roberts*, 787 F.3d 1204, 1209 (8th Cir. 2015) (quoting *Arvizu*, 534 U.S. at 274). The demand that the court examine the totality of the circumstances requires the court to view the evidence with the understanding that "officers may 'draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.'" *Id.* (quoting *Arvizu*, 534 U.S. at 273). Additionally, immigration officials may "interrogate any alien or person believed to be an alien as to his right to be or remain in the United States" even absent a warrant. 8 U.S.C. § 1357(a)(1).

Defendant relies on *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975), to argue that the agents' use of apparent ancestry cannot support a reasonable suspicion that the occupants were in the country illegally. *See* Brief in Support of the Objections at 6. In *Brignoni-Ponce*, the Supreme Court held that the apparent Mexican ancestry of a defendant, taken alone, cannot furnish reasonable grounds to believe that individuals are in the country illegally. 422 U.S. at 886. However, the Supreme Court also recognized that a suspect's ancestry can indeed be "a relevant factor." *Id.* at 887. The Supreme Court's admonition that, "standing alone [apparent ancestry] does not justify stopping all Mexican-Americans to ask if they are aliens" does not invalidate every use of apparent ancestry in the investigation of immigration offenses. *Id.* Thus, the Supreme Court has not ruled out the use of a suspect's apparent ancestry to develop reasonable suspicion, so long as it is not the sole basis for such suspicion. Here, Defendant himself admits that the agents relied on several factors to explain their reasonable suspicion. *See* Brief in Support of the Objections at 5-8. Accordingly, Defendant's reliance on *Brignoni-Ponce* is inapposite.

Defendant also cites authority from outside the circuit to argue that "the race of an individual cannot be considered in determining whether an officer has or had reasonable suspicion in connection with a *Terry* stop, including for immigration investigation." *Id.* at 7 (citing *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000)). However, the Eighth Circuit has recognized that factors such as the language a suspect speaks or his or her apparent nationality "may be relevant factors in some instances" to support reasonable suspicion. *United States v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994). The Supreme Court, in *Brignoni-Ponce*, recognized that apparent national origin is relevant to immigration cases. 422 U.S. at 886-87 ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor . . . ."). In any event, Defendant has cited no authority from within the Eighth Circuit that takes such a restrictive view on the factors law enforcement may consider to establish probable cause. The court declines to so shackle law enforcement in this case.

Finally, Defendant cites *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), to argue that Defendant's mere proximity to Mendoza-Marcos, due to their status as roommates, cannot create reasonable suspicion. Brief in Support of the Objections at 8. In *Ybarra*, the Supreme Court noted that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to [seize] that person." 444 U.S. at 91. Instead, "[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another . . . ." *Id.* The court notes that reasonable suspicion is a lesser standard than the probable cause standard addressed in *Ybarra*. In any event, the agents relied on more than Defendant's "mere propinquity" to Mendoza-Marcos in determining that there was reasonable suspicion to believe that Defendant may be in the country illegally. Both agents testified that they observed that all residents of the apartment appeared to be Latino and all spoke Spanish.[13] The agents also testified that, in their experience, it is common for undocumented aliens to reside together and that males around the same age, with no apparent familial connection, further raise the suspicion that they may be in the country illegally. Thus, it was not the mere fact that Defendant was in close proximity to Mendoza-Marcos, or even that he was physically in the apartment at the time that Mendoza-Marcos was seized, that aided the agents in developing reasonable suspicion with respect to Defendant. Rather, it was Defendant's relationship with Mendoza-Marcos, as a non-familial co-occupant of the apartment, that roused suspicion in the agents.

After reviewing all of the information known to and relied upon by the agents at the time they seized Defendant, the court finds that the agents had reasonable suspicion to believe that Defendant may be in the country illegally. They properly observed that the occupants of the apartment appeared to be Latino, primarily spoke Spanish and were unrelated adult males. The agents testified that, based on their experience, these factors are all signs that a person may be an undocumented alien. Based on the totality of the circumstances as outlined by the court and the officers at the hearing on the Motion, the court is satisfied that the agents developed reasonable suspicion to seize Defendant. Accordingly, the court shall overrule the Objections with respect to Defendant's seizure.

D. Inevitable Discovery Doctrine

Finally, Defendant argues that Judge Scoles erred in finding that the inevitable discovery doctrine applies in this case. Brief in Support of the Objections at 8. Defendant relies on Officer Osterberg's conflicting testimony between the detention hearing and the

[13] Agent Lund testified that he placed no weight on the fact that the occupants appeared to be Latino.

hearing on the Motion. *Id.* at 9. He argues that the "two diametrically opposed stories" given by Officer Osterberg require the court to find that the government has failed to carry its burden to establish that it would have inevitably discovered the information leading to the Indictment. *Id.* at 11.

Under the "fruit of the poisonous tree" doctrine, the exclusionary rule not only prohibits introduction of evidence seized during an unlawful search but also any "derivative evidence . . . that is otherwise acquired as an indirect result of the unlawful search." *United States v. Davis*, 760 F.3d 901, 903 (8th Cir. 2014). However, even if a search violates the Fourth Amendment and the fruits of the search would ordinarily be excluded, such evidence "may still be admissible if the government can show it would have been inevitably discovered." *United States v. Allen*, 713 F.3d 382, 387 (8th Cir. 2013). "If the government 'can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . [then] the evidence should be received." *Id.* (alterations in original) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)).

Given the court's finding that the December 20, 2011 entry was constitutional, the court need not address whether the inevitable discovery doctrine applies. Regardless of whether Officer Osterberg would have determined that Defendant misused a social security number absent the entry on December 20, 2011, the court has found that the evidence, including the identification card from Carlson Building Management, was properly seized. Thus, even if the 2015-2016 investigation was prompted by an expired call-up number, as Defendant argues, suppression of the A-file and its contents is unwarranted.

VI. CONCLUSION

In light of the foregoing, the Objections (docket no. 41) are **OVERRULED**, the Report and Recommendation (docket no. 34) is **ADOPTED** and the Motion (docket no. 20) is **DENIED**.

IT IS SO ORDERED.

DATED this 24th day of August, 2016.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

G. Magistrate Judge Report and Recommendation - USA v. Cobo-Cobo, No. 16-CR-20-lrr (N.D. Iowa July 6, 2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	**Case No. CR16-0020**
vs.	**REPORT AND RECOMMENDATION**
NICOLAS COBO-COBO,	
Defendant.	

TABLE OF CONTENTS

I. *INTRODUCTION* 2

II. *PROCEDURAL HISTORY* 2

III. *ISSUE PRESENTED* 2

IV. *RELEVANT FACTS* 3
A. *December 2011 Encounter* 3
B. *Current Investigation* 6

V. *DISCUSSION* 9
A. *December 2011 Encounter* 10
1. *Alleged Unlawful Entry* 10
2. *Alleged Unlawful Seizure* 13
B. *Current Investigation* 15

VI. *RECOMMENDATION* 18

I. INTRODUCTION

On the 15th day of June 2016, this matter came on for hearing on the Motion to Suppress (docket number 20) filed by the Defendant on June 6, 2016. The Plaintiff was represented by Assistant United States Attorney Daniel C. Tvedt. Defendant Nicolas Cobo-Cobo appeared in court and was represented by his attorney, Rockne Cole. The hearing was continued and completed on June 21, 2016.

II. PROCEDURAL HISTORY

On March 23, 2016, Defendant Nicolas Cobo-Cobo was charged by indictment with one count of misuse of a social security number. Defendant appeared on May 6, 2016 and entered a plea of not guilty. Trial was scheduled before Chief Judge Linda R. Reade on July 11, 2016.

On June 6, 2016, Defendant timely filed the instant motion to suppress. The Government filed its resistance on June 10. Because of the pending motion, the trial was continued to August 15, 2016.

III. ISSUE PRESENTED

The indictment charges Defendant with falsely using a social security number when filling out an I-9 employment form on December 10, 2015. In his motion to suppress, Defendant asks the Court to suppress "fruit" of an allegedly illegal search and seizure which occurred on December 20, 2011 — approximately four years earlier. At the time of hearing, Mr. Tvedt advised the Court that the Government does not intend to offer any evidence regarding the December 2011 encounter in support of its claim that Defendant unlawfully used a social security number in December 2015. Defendant asserts, however, that the investigation regarding the 2015 charge came following a routine review of Defendant's file. Defendant argues that if there had been no illegal search and seizure in 2011, then no A-file would have been opened, there would have been no file to review, and authorities would not have discovered Defendant's recent allegedly illegal activity.

That is, Defendant argues that the current investigation is "fruit of the poisonous tree." The Government denies the search and seizure in 2011 were illegal, and argues alternatively that Defendant's recent illegal activity would have been uncovered independent of information found in his A-file.

IV. RELEVANT FACTS

A. December 2011 Encounter

At approximately 8:00 a.m. on December 20, 2011, Special Agents Michael Fischels and Andrew Lund of the Department of Homeland Security-Homeland Security Investigations were assisting the Cedar Rapids Police Department in conducting surveillance following a recent stabbing. The agents observed a vehicle with a driver matching the description of the individual they were looking for.[1] The agents followed the vehicle to a laundromat, where the driver parked and got out. The agents approached the driver, identified themselves, and explained that they were "looking for somebody that matched his description." They asked the driver for identification and were provided with "some sort of identification" at that time — neither agent could recall precisely what identification was provided — but it was not a driver's license or any other government-issued identification.

In response to questioning, the driver told the agents that he lived on the back side of the building with others, but he did not know whether anyone else was at home.[2] The driver told the agents he was from Guatemala. When asked whether he had any immigration documents which would allow him to reside in the United States legally, the driver admitted he had none. The driver was then told he was under arrest.

---

[1] At the hearing, Agent Fischels testified he could no longer recall the description which he had been given at that time. Agent Lund testified that the suspect was an Hispanic male. The agents were given the name of the suspect, but were not given a description of a vehicle.

[2] Agent Fischels was speaking with the driver in Spanish. The driver told the agents he did not speak English.

Elias Mendoza Marcos testified at the instant hearing that he was the driver whom the agents initially approached on December 20, 2011. Marcos testified he drove home from work, parked in the parking lot, and initially noticed the agents as he was approaching the door leading up to his apartment. Mendoza denied that the agents showed their identification, but testified he provided his identification in response to a request by the agents. The agents told Mendoza that they were "looking for someone." According to Mendoza, he did not tell the agents he was from Guatemala and they did not ask him if he had documentation allowing him to be in the United States. Mendoza also denied being told that he was under arrest for immigration violations or that they were taking him to the immigration office. Mendoza testified he was not asked where he lived and the agents did not ask if he lived with anyone else. Mendoza denied the agents asked for permission to enter the apartment and denied giving them consent to enter the apartment. According to Mendoza, "they just went in."

According to Agent Fischels, the driver was told he would be taken to the immigration office in Cedar Rapids for processing and fingerprinting. He was asked whether he had any "belongings" in his apartment that he wanted to take with him to the immigration office. He said yes. Fischels testified he then asked if he could come into the building with him. The driver said he could. Agent Lund testified "we let him know that we would be going in with him" and "he had no problem with that." At that point, another person spoke to the driver and the agents from a window located above the door to the apartment. Either the driver or the second person then opened the door and let them in.

Immediately inside the outside door was a stairway leading up to the apartment. The agents followed the driver up the stairway. When they entered the apartment, there were two other occupants in the common living space. The agents identified themselves and asked the driver and the two other persons to sit on the couch for officer safety purposes. The agents also asked if there were other persons in the apartment. The agents were told that there was another person sleeping in a bedroom. The agents asked one of the individuals to go to the bedroom and retrieve the fourth occupant. (It was Defendant who was sleeping in the bedroom.)

The agents explained they were looking for someone in connection with another investigation. The occupants were then asked for identification. Each of the occupants provided identification, although none of the identification documents were government-issued. While the record is somewhat imprecise, Defendant may have produced an identification card from work.

At that point, the agents suspected the occupants in the apartment were undocumented. The driver had previously admitted he was undocumented, and Agent Fischels testified that based on his experience it is "common for undocumented aliens to reside together." All of the occupants appeared to be Hispanic, but none of the occupants spoke English, which suggested to the agents that they were not born in the United States. None of the occupants were able to provide any government-issued identification, which Fischels testified is common among undocumented aliens. The agents testified that once the occupants were placed on the couch, they were not free to leave until the agents had completed their investigation.

None of the identification documents produced by the occupants matched the name of the suspect the agents were looking for. Accordingly, the agents concluded that the occupants were not suspects in the CRPD investigation. After reviewing the identification provided by the occupants, the agents asked whether they had permission to be in the United States. The occupants admitted they were not legally in the United States. Based on their admitted illegal status, the occupants (including Defendant) were advised that they were under arrest and would be transported to the immigration office to be processed and fingerprinted. Elias Mendoza testified they were told by the agents that if a check of the occupants' fingerprints showed they had no prior criminal record, then "they would take us back to our house." The agents denied the occupants were promised they would be released if they had no prior criminal record. A decision on release would be made by a supervisor.

The agents called the police to assist in transporting the occupants of the apartment to the immigration office. Before leaving, the occupants were given an opportunity to obtain any belongings, which Agent Fischels described as "standard practice." Defendant, who had been sleeping, was allowed to get dressed. The occupants were handcuffed prior to transport. At no time were any of the occupants given a *Miranda* warning.

Upon arriving at the immigration office, a criminal history check was conducted on each of the four occupants of the apartment. None of the individuals had a prior criminal history, although Agent Fischels testified he believed Defendant had an "immigration history." That is, Defendant had previously been encountered by immigration authorities and was assigned an "A number."

While being processed at the immigration office, the agents obtained the occupants' biographical information, including names and birth dates. Generally, fingerprints are taken electronically and submitted to the FBI. Charging documents are issued by a supervisor and served on the alien, together with other forms such as a counselor rights form, legal aid list, and notice to appear.

B. Current Investigation

Justin Osterberg, a deportation officer with the Department of Homeland Security-Immigration and Customs Enforcement, testified regarding the investigation which led to the current indictment. On December 22, 2015, an email from Richard Moore to Jonathan Kovach, both officers with the Department of Homeland Security, was laid on Osterberg's desk. *See* Exhibit 6. Kovach was conducting surveillance at a residence and wrote down a series of license plates numbers. The email showed that one of the license plate numbers corresponded with a 2011 Ford Fiesta registered to Defendant Nicolas Cobo-Cobo. The registration information showed Defendant's date of birth and social security number. That is, the email placed on Osterberg's desk on December 22, 2015 suggested Defendant used a social security number ending in 4601 to register a motor vehicle. At that time, Osterberg did not have a copy of Defendant's A-file. Osterberg ordered Defendant's A-file on January 7, 2016, and it was received on January 19.

After reviewing the email from Moore to Kovach, Officer Osterberg sent the information to the Iowa Department of Transportation ("IDOT") to see if the same social security number was used to register any other vehicles. A copy of the email, dated January 21, 2016, was introduced as Exhibit 7. Matthew Dingbaum, an investigator with the IDOT, responded the same day and advised Osterberg that the social security number "shows it was issued in CO 1997-1998 so I am assuming the SSN does not belong to him." Dingbaum also identified another vehicle apparently registered to Defendant.

Officer Osterberg also obtained a report dated February 8, 2004, showing a "border event" involving Alejandro Hernandez-Hernandez. *See* Exhibit 8. Osterberg testified that the fingerprints obtained during the 2004 event matched the fingerprints obtained from Defendant when he was arrested in December 2011. While the record is somewhat imprecise, the report regarding the border event in 2004 was apparently obtained by Osterberg from Defendant's A-file. (Osterberg referenced the photo on the report when he emailed Investigator Dingbaum on January 21, 2016.)

On January 21, 2016, Osterberg received an email from Juston Jennings, a special agent with the Office of Inspector General for the Social Security Administration, indicating that the social security number provided by Osterberg was "assigned to someone else." *See* Exhibit 9. (In a "timeline" submitted by the Government as Exhibit 5, it is asserted that Osterberg sent the request to the Social Security Administration earlier on January 21, but a copy of that email was not introduced as an exhibit at the hearing.)

When reviewing Defendant's A-file, Officer Osterberg found an employment ID card from Carlson Building Maintenance. On February 12, 2016, Osterberg contacted Carlson Building Maintenance and requested a copy of Defendant's employment form I-9. Carlson Building Maintenance responded on the same day, providing the requested documents. *See* Exhibit 10. The I-9 form completed by Defendant on December 10, 2015, which was not introduced as an exhibit, allegedly shows Defendant used a false social security number.

On March 23, 2016, Officer Osterberg contacted Iowa Workforce Development to ask about Nicolas Cobo-Cobo using the social security number ending in 4601. In a response sent on the same day, Michelle Saddoris, an investigator with Iowa Workforce Development, identified three employers for that social security number. *See* Exhibit 11. In addition to Carlson Building Maintenance, Iowa Workforce Development identified Cancun #2, Inc. and Adelitas Mexican Grill. Osterberg attempted to obtain I-9 forms from those employers, but was told they were misplaced or could not be located. However, Adelitas provided a W-2 or W-4 form.

A detention hearing was held on May 31, 2016. At that time, Officer Osterberg gave a different explanation as to how the current investigation was initiated. Osterberg testified that "things were shuffled around in our office" and he was given a section of A-numbers. According to Osterberg, Defendant's A-number had "an expired call-up." Osterberg explained that "an expired call-up" is a date established by a previous officer "for just a routine check to see what's going on with that particular file." Because of the expired call-up, Osterberg ordered a copy of Defendant's A-file.[3]

According to Officer Osterberg, he reviewed the A-file, saw the work identification card, and sent a request to Carlson's Building Maintenance to obtain a copy of the I-9

[3] Officer Osterberg testified that the immigration proceedings started after the encounter with Defendant in December 2011 was subsequently closed by an immigration judge.

form. Osterberg testified at the detention hearing that he then investigated the social security number found on the I-9 form and discovered it had not been assigned to Defendant. On cross-examination, Osterberg confirmed that "this investigation began during a routine review of the immigration files." Osterberg was asked: "So outside of the immigration file, there was no independent source of information for you to begin the investigation." Osterberg responded: "Not that I know of." Now, Osterberg says that the investigation started on December 22, 2015 when he reviewed the email from Officer Moore to Officer Kovach, *before* he asked for and received a copy of Defendant's A-file. In response to questioning by Defendant's attorney, Osterberg testified that he remembered the investigation began on December 22, 2015 when he was driving back to his office following the detention hearing.

V. DISCUSSION

Relying on Officer Osterberg's testimony at the detention hearing that this investigation began during a routine file review, Defendant asks that all of the evidence obtained during the recent investigation be suppressed. Defendant argues that the "search and seizure" in December 2011 was unlawful. According to Defendant, if the agents had not unlawfully entered his apartment in December 2011, and if he had not been unlawfully seized at that time, then there would have been no A-file established and nothing for Osterberg to review in January 2016. Defendant concludes, therefore, that the entire investigation conducted by Osterberg earlier this year is "fruit" of an illegal entry and seizure in 2011. In response, the Government argues the agents entered the apartment with consent and there was no unlawful seizure. Alternatively, the Government argues that the recent investigation began in December 2015 and Defendant's illegal activity would have been inevitably discovered independent of his A-file.

A. December 2011 Encounter

I will first address Defendant's argument that the agents violated the Fourth Amendment when they entered his apartment without a warrant. I will then address Defendant's argument that, after entering the apartment, the agents unlawfully seized Defendant.

1. Alleged Unlawful Entry

The Fourth Amendment protects persons and property against unreasonable searches and seizures. A person's home is provided special protection. *Payton v. New York*, 445 U.S. 573, 588-90 (1980); *United States v. McMullin*, 576 F.3d 810, 814 (8th Cir. 2009) ("Fourth Amendment law recognizes the inherent sanctity of a person's house."). "The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). A warrant is not required, however, when "voluntary consent has been obtained, either through the individual whose property is searched, or from a third party who possesses common authority over the premises." *Id.* (internal citation omitted).

Here, the Government argues that the warrantless entry into Defendant's apartment was not unlawful because consent to enter the apartment was given by the driver, who also lived there. It is undisputed the driver, Elias Mendoza, lived in the apartment and, therefore, had authority to give consent. Defendant argues, however, that as a factual matter no consent was given.

Agent Fischels testified that after it was determined the driver of the vehicle was unlawfully in the United States, he was arrested and told he would be taken to the immigration office. According to Fischels, the driver was given an opportunity to retrieve any "belongings" from his apartment, which Fischels described as "standard practice." According to Fischels, the driver said he wanted to retrieve certain items from his apartment and Fischels asked if the agents could accompany him into the building. The driver consented. According to Agent Lund, the driver was told "we would be going in with him" and "he had no problem with that." The driver, Elias Mendoza, testified at the instant hearing that no consent was given.

I find Agent Fischels and Agent Lund to be credible. I believe Mendoza consented to the agents entering the apartment with him. Accordingly, if the consent was given voluntarily, then there was no Fourth Amendment violation. In his brief, Defendant asserts that the agents "entered Defendant's apartment without permission and apparently without a warrant," and argues that such a warrantless entry is unconstitutional. Defendant did not address the voluntariness of any consent, however, and did not reply to the Government's brief, which addresses the issue at length.

The Government bears the burden of establishing, by a preponderance of the evidence, that Mendoza's consent to enter the apartment was voluntary. *United States v. Comstock*, 531 F.3d 667, 676 (8th Cir. 2008). In determining whether consent is voluntary, the Court considers the "totality of the circumstances." *Id.* In considering whether a consent is voluntary, the Court may consider the following factors:

> 1) his age; 2) his general intelligence and education; 3) whether he was intoxicated at the time; 4) whether he consented after being informed of his Miranda rights; and 5) whether he was aware of his rights and protections due to previous arrests. Other relevant circumstances include: 1) the length of time the subject was detained; 2) whether the officers acted in a threatening manner; 3) whether any promises or misrepresentations were made; 4) whether the subject was in custody or under arrest at the time; 5) whether the consent occurred in public; and 6) whether the subject was silent as the search was conducted.

Comstock, 531 F.3d at 676-77 (quoting *United States v. Saenz*, 474 F.3d 1132, 1137 (8th Cir. 2007)). These factors are "valuable" in considering whether a consent is voluntary, but the Court does not employ them "mechanically." *Id.* (citing *United States v. Chaidez*, 906 F.2d 377, 380-81 (8th Cir. 1990)).

The first five factors weigh both for and against a finding that consent was given voluntarily. The record is silent regarding Elias Mendoza's age, but he appeared to the Court to be in his 30s. The record is silent regarding Mendoza's education, but based on his testimony it appeared he is of at least average intelligence. Mendoza testified he was returning home from work when the encounter occurred, and there is no evidence he was intoxicated or under the influence of any controlled substance. So, the first three factors support a finding his consent was voluntary. On the other hand, despite being under arrest, Mendoza was not informed of his *Miranda* rights. Mendoza apparently had no prior criminal record and was not informed by the agents that he could refuse their request to enter his apartment.

Similarly, the "environmental" factors are mixed in this case. Mendoza had not been "detained" for a lengthy period of time prior to giving his consent to enter the residence. There is no evidence the agents acted in a threatening manner, or made any promises or misrepresentations prior to Mendoza giving his consent. On the other hand, Mendoza was under arrest at the time consent was given. The encounter occurred "in public," although it was behind a building and there were apparently no bystanders.

After considering the totality of the circumstances, I believe Mendoza's consent to enter the apartment was voluntary. While Mendoza had been placed under arrest shortly prior to giving consent, there were only two officers present, they were in plain clothes, they had not placed Mendoza in restraints, they did not raise their voices or display their weapons, and they made no threats or promises to gain Mendoza's consent to enter. The fact the agents did not tell Mendoza he could refuse consent is a factor which the Court may consider, but the agents had no legal obligation to advise Mendoza of his right to refuse and, standing alone, that fact does not render the consent involuntary. Because

Mendoza voluntarily consented to the agents entering the apartment, there was no Fourth Amendment violation.

2. *Alleged Unlawful Seizure*

Next, Defendant argues he was unlawfully seized. Defendant notes the agents were looking for someone else, and argues "[t]hey had no reason to suspect Defendant was in [the] country unlawfully." Defendant concedes in his brief that "[o]fficers may approach someone to determine [if they] are in the country illegally without violating [the] 4th Amendment," but argues "they may not seize them without a reasonable suspicion to check their alienage." The Government argues Defendant was not seized.

Not all contacts between a law enforcement officer and a private citizen implicate the Fourth Amendment. *United States v. Delgado*, 466 U.S. 210, 215 (1984) ("Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons."). It is undisputed that "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures by merely approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200 (2002). "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage — provided they do not induce cooperation by coercive means." *Id.* Here, the Government argues that "mere questioning" of Defendant in his apartment did not constitute a seizure.

It is noteworthy, however, that the encounter did *not* occur in a public place. That is, Defendant could not simply ignore the agents' inquiries and "walk away." Defendant was in his home and to avoid the agents completely, it would have required Defendant to leave his own home. (Defendant could not demand the agents leave, because Mendoza had given them permission to enter.) After identifying themselves as law enforcement officers, the agents asked the occupants for identification and instructed them to sit on the couch for officer safety. An "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *Delgado*, 466 U.S. at 216. Both agents conceded that Defendant would not have been permitted to leave at that time. After the officers' instruction to sit on the couch, I believe a reasonable person in Defendant's position would have believed he was unable to leave. Accordingly, I believe Defendant was seized at that time.

That does not, however, end the inquiry. The Fourth Amendment prohibits unreasonable seizures. Defendant's seizure was authorized if the agents had reasonable suspicion to believe that he was unlawfully in the United States. *Terry v. Ohio*, 392 U.S. 1 (1968). That is, an officer must have "a reasonable articulable suspicion that criminal activity is afoot." *Id.*

"Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are common sense, nontechnical conceptions that deal with the 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). The reasonable suspicion standard is "a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence," but requires "at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). "The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity." *Id.* at 123-24.

Here, the agents knew that one of the occupants in the apartment was in this country illegally. Elias Mendoza admitted he was undocumented and the agents placed him under arrest. Agent Fischels testified that based on his experience it is "common for undocumented aliens to reside together." After entering the apartment, the agents discovered that the occupants appeared to be Hispanic and none of them spoke English, which suggested to the agents that they were not born in the United States. None of the occupants in the apartment were able to provide government-issued identification, which Fischels testified is common among undocumented aliens. Using a "common sense, nontechnical" approach to the totality of the circumstances, I believe the agents had a reasonable, articulable suspicion that the occupants of the apartment, including Defendant, were in the country illegally. Accordingly, their "seizure" while being subjected to additional questions regarding their legal status was not unlawful. It should be noted that immigration officers may "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" without a warrant. 8 U.S.C. § 1357(a)(1).

In summary, because they received consent from an occupant of the apartment, the agents' entry into the apartment was not violative of the Fourth Amendment. While Defendant was seized by the agents when instructed to sit on the couch in his living room, the agents had reasonable suspicion at that time to believe Defendant was unlawfully in the United States. The agents had statutory authority to then question the occupants of the apartment, including Defendant, regarding his "right to be or to remain in the United States." Accordingly, I find no constitutional violation in December 2011 and Defendant's motion to suppress should be denied.

B. Current Investigation

Because Defendant's constitutional rights were not violated in December 2011, his motion to suppress should be denied. In the event the district court disagrees with my analysis in that regard, however, I will also address the Government's alternative argument that Defendant's recent illegal activity would have been inevitably discovered without reference to Defendant's A-file.

Defendant is charged with one count of misuse of a social security number. It is alleged that he falsely used a social security number when filling out an I-9 employment form at Carlson Building Maintenance on December 10, 2015. At the detention hearing, Officer Osterberg testified that the investigation began with a routine review of Defendant's A-file in January 2016. At the hearing on the motion to suppress, however, Osterberg testified that he realized when driving back to his office following the detention hearing that the investigation actually began on December 22, 2015, when he reviewed an email from Officer Moore to Officer Kovach. I find Osterberg's testimony to be credible.

On December 22, 2015 — *before* asking for and receiving a copy of Defendant's A-file — Officer Osterberg reviewed an email indicating Defendant had registered a 2011 Ford Fiesta with a social security number ending in 4601. Using that social security number, Osterberg later contacted Iowa Workforce Development to determine whether Defendant used the social security number in obtaining employment. The response from Iowa Workforce Development identified three employers, including Carlson Building Maintenance. Osterberg had previously contacted Carlson Building Maintenance because an employment ID card used by Defendant at that business was found in Defendant's A-file.[4] Even if no A-file had been established, however, Osterberg's investigation would have led him to Carlson Building Maintenance.

"The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *United States v. McManaman*, 673 F.3d 841, 846 (8th Cir. 2012) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)). "To have evidence that was obtained after a constitutional violation admitted into court, the government must show that it was not obtained 'by exploitation of that illegality

---

[4] As I understand it, Defendant was working at Carlson Building Maintenance in December <u>2011</u> and a copy of his employment ID card was made and placed in his A-file at that time. The instant charge arises from Defendant filling out an I-9 at the same employer in December <u>2015</u>.

but instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

In *Nix v. Williams*, 467 U.S. 431 (1984), the Court adopted the inevitable discovery doctrine, which it described as "closely related" to the independent source doctrine. Both doctrines constitute exceptions to the exclusionary rule generally associated with policemen's conduct. Under either doctrine, evidence is not excluded if it "would put the police in a worse position than they would have been in absent any error violation." *Id.* at 443. Exclusion of evidence that would have been inevitably discovery would "put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place." *Id.* at 444.

Thus, the exclusionary rule does not apply to "fruit of the poisonous tree" if the inevitable discovery exception applies. The Government must establish by a preponderance of the evidence "(1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial alternative line of investigation at the time of the constitutional violation." *McManaman*, 673 F.3d at 846. Under the unique circumstances in this case, Defendant claims that the "constitutional violation" occurred when investigating officers relied on his A-file, which was established following his allegedly unlawful seizure in December 2011. I find the argument unconvincing.

Officer Osterberg credibly testified that this investigation was initiated on December 22, 2015, *before* he asked for and received a copy of Defendant's A-file. The email which started the investigation contained Defendant's name and a social security number ending in 4601, which was apparently used by Defendant to register a motor vehicle. Osterberg was then able to use Defendant's name and social security number in contacting Iowa Workforce Development to determine if the social security number had been used to obtain employment. That inquiry would have led Osterberg to Carlson Building Maintenance, even if no A-file existed for Defendant. That is, Defendant allegedly using a false social security number to fill out an I-9 form at Carlson Building Maintenance in December 2015 would have been discovered independent of the information found in his A-file. Therefore, even *if* the encounter in December 2011 was unconstitutional and an A-file was improperly established at that time, Defendant's recent allegedly illegal activity would have been inevitably discovered. Accordingly, the exclusionary rule does not apply, and Defendant's motion to suppress should be denied.

VI. RECOMMENDATION

For the reasons set forth above, I respectfully recommend that Defendant's Motion to Suppress (docket number 20) be **DENIED**. The parties are advised, pursuant to 28 U.S.C. § 636(b)(1), that within fourteen (14) days after being served with a copy of this Report and Recommendation, any party may serve and file written objections with the district court. ***The parties are reminded that pursuant to Local Rule 72.1, "[a] party asserting such objections must arrange promptly for a transcription of all portions of the record the district court judge will need to rule on the objections." Accordingly, if the parties are going to object to this Report and Recommendation, they must promptly order a transcript of the hearing held on June 15, 2016.***

DATED this 5th day of July, 2016.

JON STUART SCOLES
CHIEF MAGISTRATE JUDGE
NORTHERN DISTRICT OF IOWA