

No. 20-4159

In the United States Court of Appeals for the
Fourth Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

MARCIO SANTOS-PORTILLO,
Appellant.

On Appeal from the United States District Court
for the Eastern District of North Carolina

BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

JURISDICTION 1

STATEMENT OF THE ISSUE2

STATEMENT OF THE CASE.....2

 A. Procedural History.....2

 B. Statement of Facts2

 C. The Ruling Under Review.....3

SUMMARY OF ARGUMENT3

ARGUMENT4

 THE EXCLUSIONARY RULE DOES NOT APPLY TO A
 VIOLATION OF SECTION 1357(A)(2).4

 A. Standard of Review.....4

 B. The Relevant Statute.....4

 C. Factual Background.....5

 D. Legal Principles and Discussion9

CONCLUSION..... 16

CERTIFICATE OF SERVICE 17

CERTIFICATE OF COMPLIANCE 18

TABLE OF AUTHORITIES

Cases

<i>Abel v. United States</i> , 362 U.S. 217 (1960)	11
<i>Hudson v. Michigan</i> , 547 U.S. 586 (2006)	12
<i>Mallory v. United States</i> , 354 U.S. 449 (1957)	12
<i>McNabb v. United States</i> , 318 U.S. 332 (1943)	12
<i>Missouri v. McNeely</i> , 569 U.S. 141 (2013)	15
<i>Pennsylvania Bd. of Probation & Parole v. Scott</i> , 524 U.S. 357 (1998)	9
<i>Sanchez-Llamas v. Oregon</i> , 548 U.S. 331 (2006)	9, 10, 12
<i>Stone v. Powell</i> , 428 U.S. 465 (1976)	9
<i>United States v. Abdi</i> , 463 F.3d 547 (6th Cir. 2006), cert. denied, 551 U.S. 1104 (2007)	13
<i>United States v. Caceres</i> , 440 U.S. 741 (1979)	9, 10
<i>United States v. Cantu</i> , 519 F.2d 494 (7th Cir. 1975)	11
<i>United States v. Clenney</i> , 631 F.3d 658 (4th Cir. 2011)	10

<i>United States v. De La Cruz</i> , 835 F.3d 1 (1st Cir. 2016).....	13
<i>United States v. Donovan</i> , 429 U.S. 413 (1977).....	10
<i>United States v. Encarnacion</i> , 239 F.3d 395 (1st Cir. 2001)	11
<i>United States v. Fall</i> , 955 F.3d 363 (4th Cir. 2020)	4
<i>United States v. George</i> , 971 F.2d 1113 (4th Cir. 1992).....	14
<i>United States v. Giordano</i> , 416 U.S. 505 (1974).....	10
<i>United States v. Johnson</i> , 410 F.3d 137 (4th Cir. 2005)	13
<i>United States v. Lull</i> , 824 F.3d 109 (4th Cir. 2016)	4
<i>United States v. Miller</i> , 357 U.S. 301 (1958).....	12
<i>United States v. Oscar-Torres</i> , 507 F.3d 224 (4th Cir. 2007)	13
<i>United States v. Sanchez-Velasco</i> , 956 F.3d 576 (8th Cir. 2020)	11
<i>United States v. Santana</i> , 427 U.S. 38 (1976).....	10
<i>United States v. Watson</i> , 423 U.S. 411 (1976).....	10
<i>Utah v. Strieff</i> , 136 S. Ct. 2056 (2016).....	10

Virginia v. Moore,
553 U.S. 164 (2008) 11

Wroblewska v. Holder,
656 F.3d 473 (7th Cir. 2011) 15

Statutes, Rules, and Regulations

8 U.S.C. § 1326..... 2, 8

8 U.S.C. § 1357..... 2, 3, 4, 11

18 U.S.C. § 3109 12

18 U.S.C. § 3231 1

28 U.S.C. § 1291 1

8 C.F.R. § 287.5..... 11

8 C.F.R. § 287.8..... 11

Fed. R. Evid. 201 14

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BRIEF FOR THE UNITED STATES

JURISDICTION

This is an appeal from a final judgment in a criminal case. The district court (Howard, J.) had jurisdiction under 18 U.S.C. § 3231. The judgment was entered on February 12, 2020. Santos-Portillo (Santos) filed a timely notice of appeal on February 21, 2020. J.A. 413. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether, under this Court's supervisory powers, a warrantless administrative arrest on probable cause that violated the escape requirement in 8 U.S.C. § 1357(a)(2) requires suppression of the evidence obtained after that arrest.

STATEMENT OF THE CASE

A. *Procedural History*

Following a one-day jury trial in the United States District Court for the Eastern District of North Carolina, Santos was convicted of illegal reentry by an alien into the United States, in violation of 8 U.S.C. § 1326(a). The district court sentenced him to time-served of 15 months of imprisonment.

B. *Statement of Facts*

On January 9, 2018, Department of Homeland Security (DHS) Special Agent Thomas Swivel saw an individual whom he thought he recognized, later identified as Santos, outside a business in Wilmington, North Carolina. As Santos drove away, Swivel wrote down the license number of his car. Based on a subsequent records check, Swivel learned that Santos, a Honduran national, was present in the United States illegally and that he had previously been deported from the United States based on a felony conviction. On January 16, Swivel, along with Agent Charles Kitchen and two more agents, arrested Santos

outside his residence. As a result of the arrest, the agents obtained fingerprint and other identification evidence regarding Santos. J.A. 31-34.

C. *The Ruling Under Review*

The ruling under review is the district court's denial of Santos' motion to suppress evidence (J.A. 257-259; *see also* J.A. 230-245 (magistrate's memorandum and report)).

SUMMARY OF ARGUMENT

Although the arresting agents violated the escape requirement in 8 U.S.C. § 1357(a)(2), the Supreme Court has made clear that the drastic remedy of suppression is ordinarily limited to (1) constitutional violations, (2) where a statute expressly authorizes suppression for a violation of its provisions, or (3) where the statute implicates important constitutional interests. In this case, suppression is not warranted for the statutory violation because the agents' warrantless arrest of Santos on probable cause in a public place satisfied the Fourth Amendment, Section 1357(a)(2) does not have an express suppression remedy, and the escape requirement in Section 1357(a)(2) does not implicate important Fourth Amendment interests.

Santos' related argument that the government systemically violates Section 1357(a)(2) lacks evidentiary support.

ARGUMENT

THE EXCLUSIONARY RULE DOES NOT APPLY TO A VIOLATION OF SECTION 1357(A)(2).

Santos argues (Br. 17-29) that this Court should use its supervisory power to exclude the identity and related evidence obtained from him after his warrantless arrest because the government violated the escape provision of Section 1357(a)(2). That claim lacks merit.

A. *Standard of Review*

In reviewing the denial of a motion to suppress evidence, this Court evaluates the district court's legal conclusions de novo, and its factual findings for clear error. *United States v. Fall*, 955 F.3d 363, 369-370 (4th Cir. 2020). It also reviews the evidence in the light most favorable to the government as the prevailing party below. *United States v. Lull*, 824 F.3d 109, 114 (4th Cir. 2016).

B. *The Relevant Statute*

8 United States Code § 1357(a) states: “[A]ny officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without a warrant-

(2) to 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.

C. *Factual Background*

Santos filed a pretrial motion to suppress the identification evidence following his arrest on the ground that it violated Section 1357 and implicated the Fourth Amendment. J.A. 63-70. The district court assigned the motion to a magistrate judge (Swank, M.J.), who held an evidentiary hearing on the motion. DHS Agent Swivel was the only government witness at the hearing.¹

a. Swivel investigates immigration violations and criminal law violations, and he has had 21-years of law enforcement experience working as a Border Patrol Agent and a Customs Special Agent in Arizona. J.A. 106-107. On January 9, 2018, Swivel saw Santos outside a business in Wilmington, and thought that he looked familiar. J.A. 108. After Santos drove away, Swivel wrote down the license number of the vehicle, ran the tags, and determined that it was registered to Santos and his wife, who lived in Wilmington. J.A. 108-109, 133.

Swivel reviewed several immigration databases and discovered: (1) an Immigration Judge Order stating that Santos was deportable or about to be deported, (2) a 2010 Texas judgment that reflected Santos' felony conviction for

¹ Santos presented two witnesses, Bobbie Santos, his wife, and Timothy Bannister, his brother-in-law. Both witnesses testified that they were at Santos' residence when the DHS agents arrested Santos outside his residence. J.A. 154-155, 159-160.

cluding police with a vehicle, (3) a Form I-200 Warrant for Arrest of Alien and (4) a Form I-205 Warrant for Removal/Deportation, under which Santos was removed from Houston, Texas, to Honduras on March 21, 2011. J.A. 109-111, 125-128. Swivel also reviewed some photos of Santos in those databases to confirm that Santos was the man that he had seen earlier. J.A. 112-113. Swivel concluded that Santos had previously been deported from the United States and that he had not sought permission to reenter the country. J.A. 113.

On January 11, Swivel went by Santos' residence and saw Santos' vehicle parked outside, but he did not encounter Santos. J.A. 113-114. Afterwards, Swivel and his supervisors decided to continue to surveil Santos. J.A. 138.

At approximately 6:00 a.m., January 16, Swivel and three additional agents went to Santos' residence and waited for him to come outside. J.A. 114-115. The agents did not have an arrest warrant. J.A. 118-119. When Santos exited his residence and walked to his vehicle, Swivel approached Santos, identified himself, and asked Santos to identify himself. J.A. 115-117. After Santos stated his name and that he was from Honduras, Swivel arrested him for an administrative immigration violation. J.A. 117.

Santos was booked and fingerprinted. J.A. 120. Swivel learned that the fingerprints belonged to a previously deported alien. *Ibid.* Swivel then interviewed Santos after advising him of his *Miranda* rights. J.A. 119. After

waiving his rights, Santos identified himself by name, admitted that he was born in Honduras, that he had previously been deported, and that he had no authority to be in the United States. J.A. 120-121.

b. During the suppression hearing, Santos cross-examined Swivel about his authority to arrest suspected aliens without a warrant. J.A. 143-144. Swivel testified that an immigration officer may take a suspected illegal alien into custody to determine alienage and admissibility without an administrative arrest warrant, and that Swivel did that “all the time on Border Patrol.” J.A. 144. Santos stated that Swivel had testified to the “same thing” at an earlier suppression hearing in *United States v. Segura-Gomez*, No. 4:17-cr-65-FL. J.A. 144. Swivel also testified that he did not need an administrative arrest warrant for Santos because the previous arrest warrant was outstanding. J.A. 145. Swivel further testified that an administrative arrest warrant is generated when a person is processed. J.A. 144.

Swivel initially agreed with Santos that in a case where an immigration officer confirms that a suspected alien has a prior deportation order, the subsequent warrantless arrest of that alien is a “common practice,” but when pressed, he testified that “sometimes it is, sometimes it isn’t,” because he could not “speak specifically for Enforcement Removal Operations, which is a different entity from us.” J.A. 146.

After the evidence was presented, during argument, Santos briefly referred to “systemic” violations of Section 1357(a)(2). J.A. 174-175, 177.

c. The magistrate judge issued a memorandum and recommendation (M&R) rejecting Santos’ arguments and recommending that the motion be denied. As to the Section 1357(a)(2) issue, the magistrate concluded that Swivel had probable cause to believe that Santos had violated the illegal reentry statute, 8 U.S.C. § 1326, based on his pre-arrest investigation of Santos, but that the escape requirement was violated because the agents waited five days to arrest Santos and there was no evidence that Santos was aware of the investigation, much less trying to escape. J.A. 236-239.²

The magistrate then ruled that the exclusionary rule did not apply because the warrantless arrest of Santos on probable cause in public complied with the Fourth Amendment, and suppression of evidence is not an authorized remedy for a violation of Section 1357(a)(2). J.A. 241-244.

d. Santos filed an objection to the magistrate’s M&R. First, he argued that suppression of the fingerprint and related evidence was required due to the

² The magistrate rejected a government argument that under a separate statute, DHS agents may arrest suspected aliens absent a likelihood of escape on the ground that the government had forfeited that argument by raising it for the first time in a post-hearing submission. J.A. 240. The court also concluded that the government’s argument lacked merit. *Id.* at 240-241.

Section 1357(a)(2) violation in his case. Second, he argued that the government had systemically violated Section 1357(a)(2) based on Swivel's testimony about the usual practices of arresting suspected aliens at the suppression hearing. In a footnote, Santos referred to the allegedly similar testimony by Swivel and Agent Kitchen on that issue at the suppression hearing in *Segura-Gomez*. J.A. 250-251 n.1.

e. The district court overruled Santos' objections, adopted the M&R, and denied the motion to suppress. The district court agreed with the magistrate that the exclusionary rule does not generally apply to statutory violations. The court also ruled that there was no Fourth Amendment violation because the agents arrested Santos in a public area with probable cause to believe that he was in the country illegally. J.A. 257-259. Like the magistrate, the district court did not address Santos' "systemic" violations argument.

D. *Legal Principles and Discussion*

The Supreme Court has consistently held that the exclusionary rule exists "primarily to deter constitutional violations." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006). *See, e.g., Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998); *United States v. Caceres*, 440 U.S. 741, 754 (1979); *Stone v. Powell*, 428 U.S. 465, 482 (1976).

As a consequence, suppression of evidence is appropriate for violations of a statute only when the violation “implicate[s] important Fourth * * * Amendment interests,” *Sanchez-Llamas*, 548 U.S. at 348, or when the statute expressly provides for suppression. *United States v. Donovan*, 429 U.S. 413, 432 n.22 (1977); *United States v. Giordano*, 416 U.S. 505, 524 (1974); see *Sanchez-Llamas*, 548 U.S. at 347-348 (refusing to impose exclusionary sanction for violation of defendant's rights under Vienna Convention on Consular Relations); *Caceres*, 440 U.S. at 755-756 (refusing to impose exclusionary sanction for violation of regulation governing conduct of criminal investigation); *United States v. Clenney*, 631 F.3d 658, 666-668 (4th Cir. 2011) (no suppression for violation of statute regulating electronic communications privacy). Cf. *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (suppression “has always been our last resort, not our first impulse”) (cleaned up).

Section 1357(a)(2) does not provide for suppression by its terms, nor does it “implicate” important Fourth Amendment interests. Under the Fourth Amendment, law enforcement agents may arrest a suspect upon probable cause in a public place without a warrant. *United States v. Santana*, 427 U.S. 38, 42 (1976); *United States v. Watson*, 423 U.S. 411 (1976). Under the Fourth Amendment, the arrestee’s likelihood of escape is irrelevant to the probable cause requirement.

Any “signatory officer” within DHS (which now has responsibilities previously employed by the office of Immigration and Customs Enforcement) is ordinarily empowered to issue an administrative arrest warrant for violations of immigration law. 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.5(c). An agent can arrest a suspect without a warrant if the officer 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.” 8 U.S.C. § 1357(a)(2); see 8 C.F.R. § 287.8(c)(2)(i-ii). “Reason to believe” means “probable cause” under the Fourth Amendment. *United States v. Sanchez-Velasco*, 956 F.3d 576, 581 (8th Cir. 2020). Because an immigration “warrant” is issued by an immigration official, who is a member of an Executive Branch agency, rather than by a magistrate, such a warrant is “not a judicial warrant within the scope of the Fourth Amendment.” *Abel v. United States*, 362 U.S. 217, 232 (1960); see also *United States v. Cantu*, 519 F.2d 494, 496 n.3 (7th Cir. 1975). Rather, Section 1357(a)(2) provides procedural protections *in addition to* the Fourth Amendment for the purposes of administering the civil detention scheme of the immigration laws. *Abel*, 362 U.S. at 233-234; cf. *United States v. Encarnacion*, 239 F.3d 395, 398-399 (1st Cir. 2001).³

³ Santos’ argument (Br. 20-21) that his arrest alone implicated important Fourth Amendment interests is inconsistent with *Virginia v. Moore*, 553 U.S. 164 (2008),

Nor is suppression appropriate as a matter of “supervisory powers.” The Court’s analysis in *Sanchez-Llamas* makes clear that, whatever supervisory powers might exist to remedy statutory violations through suppression, those powers will not be exercised absent “statutory violations that implicate important Fourth * * * Amendment interests.” 548 U.S. at 348; *see id.* at 346 (discussing supervisory powers cases).⁴ Because the escape provision in Section 1357(a)(2) is a procedural protection that merely *adds* to the protections of the Fourth Amendment, suppression is not warranted for a violation of the statutory escape provision.

which held that suppression was not warranted for a traffic arrest that met the Fourth Amendment’s probable cause requirement, but which violated a state law that required a citation instead of an arrest for a traffic violation. The added statutory benefit did not make the arrest one that implicated the Fourth Amendment.

⁴ In *Sanchez-Llamas*, the Court cited to *United States v. Miller*, 357 U.S. 301 (1958), which suppressed evidence for a violation of 18 U.S.C. § 3109, the “knock and announce” statute, as an example of a statute that implicates Fourth Amendment interests. 548 U.S. at 345. But the “knock and announce” requirement in Section 3109 is also a Fourth Amendment requirement. *See Hudson v. Michigan*, 547 U.S. 586, 589 (2006). *Sanchez-Llamas* also cited *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), but those cases involved rule violations that implicated the Fifth Amendment right against self-incrimination, not the Fourth Amendment. By contrast, the escape provision in Section 1357(a)(2) has no Fourth Amendment counterpart, nor does it implicate the Fifth Amendment’s privilege against self-incrimination.

The Sixth Circuit followed this analysis in concluding that suppression was not warranted for a violation of the escape provision in Section 1357(a)(2). *United States v. Abdi*, 463 F.3d 547 (6th Cir. 2006), cert. denied, 551 U.S. 1104 (2007). The First Circuit has followed *Abdi* in holding that suppression is not authorized for the failure to obtain a warrant under Section 1357. *United States v. De La Cruz*, 835 F.3d 1, 5-6 (1st Cir. 2016). This Court should follow those decisions.⁵

Santos related argument (Br. 23-26) that suppression is warranted due to the alleged “widespread and systemic” violations of Section 1357(a)(2) should also be rejected. This Court has stated in dicta that suppression of the evidence might be warranted for the widespread or repeated violations of a statute, *e.g.*, *United States v. Johnson*, 410 F.3d 137, 149 (4th Cir. 2005), but it has not actually suppressed evidence for that reason in any case. In any event, this is not such a case for several reasons. Santos presented the issue in a perfunctory and cursory fashion. He did not raise that theory in his written pretrial motion to suppress the evidence, other than to note in passing that it appeared that agents “routinely ignored” Section 1357. J.A. 66. During the suppression hearing, Santos

⁵ Santos’ reliance (Br. 28) on *United States v. Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007), overlooks that the arrest in that case violated the Fourth Amendment. As there was no Fourth Amendment violation here, suppression of Santos’ identity evidence was not warranted for the statutory violation.

presented no evidence to support a “systemic” violation theory. Rather, Santos merely cross-examined Swivel about DHS alleged practices, which included references to Swivel’s testimony in the *Segura-Gomez* case. During closing argument, Santos briefly referred to the government’s alleged “systemic” violations of the statute. The magistrate judge did not address the issue.

In his objection to the magistrate’s M&R, Santos raised his “systemic” violations theory based on snippets of Swivel’s testimony during the suppression hearing, and, in a footnote, on selective references to the testimony of Swivel and Kitchen in the *Segura-Gomez* case. J.A. 250-251. But Santos did not move the district court to take judicial notice of the evidence in the *Segura-Gomez* hearing under Fed. R. Evid. 201(b), nor did the district court do so on its own under Fed. R. Evid. 201(c)(1).⁶ The district court did not expressly address this issue.

The record does not support Santos’ “systemic” violations claim. Santos presented no evidence of widespread government violations of Section 1357(a)(2). Santos’ cross-examination of Swivel and his selective references to the testimony at the *Segura-Gomez* hearing were inadequate to support his claim.

⁶ The “systemic” violations issue was properly before the district court even if Santos did not squarely present it to the magistrate. See *United States v. George*, 971 F.2d 1113, 1118 (4th Cir. 1992).

Furthermore, Swivel's testimony about his arrest practices did not establish "systemic" government violations of the statute. First, Swivel's testimony about his prior arrest practices did not establish that every one of those prior arrests was illegal because Swivel did not discuss the facts of those individual cases. Because the validity of an arrest often depends of the particular facts of the case, *e.g.*, *Missouri v. McNeely*, 569 U.S. 141, 150 (2013), broad generalizations about the validity of a class of arrests based on a few sentences by a witness about his practices at a suppression hearing is inapt. Second, Swivel's practices when he was a Border Patrol agent occurred 16 years before his arrest of Santos (J.A. 106), and would not reflect current government practices in any event. Third, the usual warrantless arrest practices of one (or even two) DHS agents does not demonstrate "systemic" violations of Section 1357(a)(2) by the government. Indeed, Swivel testified that he did not know the warrantless arrest practices of another DHS component. J.A. 146. *See, e.g.*, *Wroblewska v. Holder*, 656 F.3d 473, 477 (7th Cir. 2011) (rejecting generalized claims of "widespread and egregious" violations).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that this Brief for the United States was this day served on counsel for Santos by notice of electronic filing with the Fourth Circuit's CM/ECF system.

Dated: July 15, 2020

/s/ Thomas E. Booth

Thomas E. Booth

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Calisto MT 14-point font in text and in footnotes.

DATED: July 15, 2020.

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