

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 (Howard, J.)

REPLY BRIEF FOR APPELLANT

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ARGUMENT

GIVEN ICE'S WIDESPREAD PRACTICE OF UNLAWFUL WARRANTLESS ARRESTS, THE DISTRICT COURT ERRED BY REFUSING TO EXERCISE SUPERVISORY AUTHORITY TO SUPPRESS EVIDENCE OBTAINED FROM THE WARRANTLESS ARREST OF SANTOS-PORTILLO, BASED SOLELY ON HOLDING THIS UNLAWFUL ARREST DID NOT VIOLATE THE FOURTH AMENDMENT.

A. Supreme Court Precedent Does not Require That a Constitutional Violation Accompany a Statutory Violation to Permit Suppression of Evidence Pursuant to Supervisory Authority.

The government acknowledges that the district court denied Santos-Portillo's motion to suppress based on holding his illegal arrest did not violate the Fourth Amendment. Gov't Br. 8-9. It also concedes the court did not address whether widespread and repeated violations of section 1357 warranted suppression pursuant to judicial supervisory authority. *Id.* at 9. And the district court did not separately address whether an unlawful warrantless arrest that violates section 1357 implicates important constitutional interests.

In short, the district court ruled based on a suppression ground Santos-Portillo did not raise, and failed to address the two grounds he did advance. Gov't Br. 3, 13. By failing to do so, the court's denial of Santos-Portillo's motion to suppress was "guided by erroneous legal principles." *United States v. Sanders*, 104 Fed. App'x 916, 921 (4th Cir. 2004) (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999)). This legal error constitutes abuse of discretion and warrants reversal. *Id.*

B. An Arrest That Violates § 1357 Implicates Constitutional Interests.

The government contends a violation of Section 1357 does not implicate constitutional interests simply because the statute includes a likelihood of escape component and the Fourth Amendment does not. Gov't Br. 10, 12 & n.4.¹ The government is wrong, for two reasons.

First, as the Supreme Court explained, a statutory violation implicates important constitutional interests when it is “responsive to the same considerations” underlying “constitutional polic[ies].” *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006) (quoting *Miranda v. Arizona*, 384 U.S. 436, 463 (1966)).² A statute can be responsive to similar considerations underlying the policies of a constitutional provision without having the exact same components.

Second, the government’s hyper-technical test -- whether section 1357’s “escape provision” has a “Fourth Amendment counterpart,” Gov’t Br. 12 & n.4. -- conflates two distinct suppression paradigms, one based on a Fourth Amendment violation, and the other pursuant to judicial supervisory authority. If a statutory text

¹ The government only references the administrative arrest provision, 8 U.S.C. § 1357(a)(2). Gov’t Br. 2-4, 8-10. However, ICE’s warrantless arrest violated both this provision and section 1357(a)(4)’s criminal arrest provision. JA 65-66, 235-236. Given the agents planned to arrest Santos-Portillo in order to pursue criminal charges, the criminal provision also limited their warrantless arrest authority. Op. Br. 9-10 (citing JA 141, 150-151).

² In the opening brief, counsel mistakenly ascribed this quote to *McNabb v. United States*, 318 U.S. 332 (1943). Op. Br. 21.

must exactly match a constitutional provision, a violation of that statute would necessarily also violate the constitution. Using such an exact-match standard would lead a court to conclude that unless a statutory violation also violates the constitution, supervisory authority provides no remedy, the exact error made below.

The cases the government says this Court “should follow,” Gov’t Br. 13, make this same error. Both suggest that a constitutional violation must accompany a statutory violation for the supervisory authority to apply. Important for this appeal, neither case evaluates what it means for a statutory violation to implicate constitutional interests.

The First Circuit concluded, “a statutory violation ‘untethered to the abridgement of constitutional rights’ is insufficient to justify suppression.” *United States v. De La Cruz*, 835 F.3d 1, 6 (1st Cir. 2016) (citation omitted). The Sixth Circuit similarly held, “the warrantless public arrest of Abdi did not violate or implicate Abdi’s Fourth Amendment rights.” *United States v. Abdi*, 463 F.3d 547, 561 (6th Cir. 2006).

Notably, both cases reference constitutional “rights,” rather than “interests,” an important distinction. Op. Br. 18-19. Neither applies the meaning of “implicate constitutional interests” provided by the Supreme Court, a statutory violation that is “responsive the same considerations” underlying a constitutional policy, *Sanchez-Llamas*, 548 U.S. at 348 (internal quotes and citation omitted).

The government's reliance on *Virginia v. Moore*, 553 U.S. 164 (2008) is equally misplaced. Gov't Br. 11-12 & n.3 (asserting Santos-Portillo's "argument that his arrest alone implicated important Fourth Amendment interests is inconsistent with *Virginia v. Moore*"). That case involved an appeal from state court proceedings, therefore federal supervisory authority could not even apply. *Sanchez-Llamas*, 548 U.S. at 345 ("It is beyond dispute that we do not hold a supervisory power over the courts of the several states.") (internal quotes and citation omitted); *see also Moore*, 553 U.S. at 172 (distinguishing other Supreme Court cases, where "decisions rested on our supervisory authority over the federal courts, rather than the Constitution").

Since supervisory authority could not apply in *Moore*, the decision hinged on whether an arrest that violated state law also violated the Fourth Amendment. 553 US at 176, 178 (holding it did not). Therefore, *Moore* does not provide the standard to determine the supervisory authority issues presented in this appeal.

Here, to determine whether a violation of section 1357 implicates important Fourth Amendment interests, the proper inquiry asks whether it "is responsive to the same considerations" as the Fourth Amendment.³ The answer is yes.

As the government acknowledges, both employ the same probable cause standard. Gov't Br. 11; Op. Br. 20-21.

³ *Sanchez-Llamas* includes an additional inquiry -- whether the statutory violation is "connected to the gathering of evidence," 548 US at 349. *See infra* at 10-11.

Moreover, both serve a common purpose – to ensure a “neutral and detached” official makes the requisite probable cause decisions, not the arresting agent. *Illinois v. Gates*, 462 U.S. 213, 240 (1983). Op. Br. 20-21. Contrary to the government’s assertion, the mere fact that section 1357 requires an executive rather than a judicial official to authorize an arrest warrant does not negate this common purpose. Gov’t Br. 11 (relying on distinction between judicial warrant and one required by section 1357).

Finally, the magistrate also recognized the relevant connection between section 1357 and the Fourth Amendment. In rejecting the government’s arguments that ICE agents did not even need to get a warrant, the magistrate cited the above passage from *Gates*, 462 U.S. at 240. JA 239-240 (“To permit the agents to rely on the [prior] removal order as an arrest warrant would eliminate the evaluation by a ‘neutral and detached judicial officer’ demanded by our Fourth Amendment jurisprudence.”).

In sum, the statutory and constitutional warrant provisions employ the same probable cause standard and share a common purpose. Violating the former responds to the same considerations of the latter, and therefore implicates constitutional interests.

C. ICE's Repeated, Widespread, And Systemic Violations of Section 1357 Permit Exercise of the Court’s Supervisory Authority.

As it must, the government concedes that repeated or widespread violations permit a court to suppress evidence pursuant to its supervisory authority. Gov’t Br. 13

(citing *United States v. Johnson*, 410 F.3d 137, 149 (4th Cir. 2005)); *see also Sanders*, 104 Fed. App'x at 921 (recognizing “widespread or repeated” statutory violations warrant suppression) (quoting *United States v. Walden*, 490 F.2d 372, 377 (4th Cir. 1974)). The Government also concedes that neither the magistrate nor the district court addressed this argument. Gov't Br. 13-14. These two concessions support vacating the conviction, reversing the district court's denial of the suppression motion, and remanding this matter so the district court can “apply the proper standard in the first instance,” *United States v. Maclaren*, 866 F.3d 212, 214 (4th Cir. 2017).

Rather than suggest remand, the government asserts this Court, not the district court, should decide whether repeated, widespread, or systemic statutory violations permitted suppression in this case. Gov't Br. 13-15. The government contends the record contains insufficient evidence of these violations to permit use of a court's supervisory authority. *Id.*⁴

Contrary the government's assertion, three key areas of the record reveal the repeated, widespread, and systemic nature of ICE's illegal arrest practices.

⁴ The government asserts that Santos-Portillo only presented this ground for suppression “in a perfunctory and cursory fashion.” Gov't Br. 13. The record refutes this characterization. Counsel identified ICE's routine disregard of section 1357 in the motion to suppress and in reply. JA 66, 92. Four pages of the hearing transcript contain references to ICE's unlawful arrest practices, and emphasis on the need for supervisory authority to remedy and deter these practices. JA 172, 174-175, 177. Finally, the objections to the recommended denial of the suppression motion squarely presented the argument that the “government's widespread and systemic statutory violations compel exercise of the Court's supervisory authority.” JA 250-253.

First, the testimony of the government's own witness shows that ICE agents repeatedly violate section 1357 by conducting warrantless arrests in similar circumstances – where they may or may not have reason to believe a person has a prior deportation, but not that a person would likely escape before agents can secure a warrant. At the detention hearing, Agent Swivel testified he did not get warrants before arresting someone with a prior deportation. JA 36-37; *see also* Op. Br. 6 (quoting testimony). He confirmed this during direct and cross-examination at the suppression hearing. On direct, Swivel testified that agents would not get an arrest warrant for persons “previously deported.” JA 129-130. On cross, Agent Swivel again confirmed that he “didn’t need to get a warrant because there was a prior deportation for Mr. Santos.” JA 146. He further acknowledged it was “common practice” to arrest persons believed to have a prior deportation without first getting a warrant. *Id.*⁵

Second, the government defended ICE’s unlawful arrest practice by arguing, “Title 8 U.S.C. § 1357 does not apply” to arrests of persons believed to have a prior deportation. JA 95. At the suppression hearing, government counsel asserted that a

⁵ The government attempts to minimize the testimony of Agents Swivel and Kitchen from *United States v. Segura-Gomez*, No. 4:17-CR-65-FL, by asserting counsel for Santos-Portillo made “selective references” to their suppression hearing testimony in that case. Gov’t Br. 14. That hearing transcript is publicly available. *Segura-Gomez*, DE 34. A thorough review bolsters the record in this case: (1) ICE Agents do not get a warrant to arrest persons believed to have a prior deportation; (2) see no need to get a warrant; and (3) government counsel condones their warrantless arrest practice by arguing section 1357’s warrant requirement does not apply in those circumstances. JA 250 & n.1; Op. Br. 24-25.

warrant “is not necessary” in those circumstances. JA 103-104 (“The government’s primary argument is that an I-200 [warrant] was not necessary.”).

Rather than assert the unlawful arrest of Santos-Portillo departed from common arrest practice, the government argued that ICE agents did not need to comply with section 1357’s warrant requirement. This imprimatur by government counsel shows that ICE’s widespread violations are also systemic.

Third, in *Segura-Gomez* and this case, the government proffered representations made by ICE counsel, who said that agents would not get a warrant to arrest “a person with a similar set of circumstances” in “immigration court.” Op. Br. 24-25 (quoting *Segura-Gomez*, DE 34, pp.95-96); JA 189 (according to government counsel, “we did reach out to ICE Counsel to make sure we were following proper procedure”). Thus, the government itself put into the record the fact that it condones ICE’s warrantless arrest practices in both criminal and civil immigration cases.

ICE does not limit its disregard of statutory obligations to the Eastern District of North Carolina. In a class action suit brought by people targeted by ICE detainers, the district court determined that ICE’s warrantless arrest policies and practices violated section 1357. *See Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005-1006 (N.D. Ill. 2016) (“ICE agents do not make any determination at all that a class member ‘is likely to escape before a warrant can be obtained for his arrest.’”) (quoting section 1357(a)(2)). Op. Br. 25 & n.6. ICE even acknowledged that its own “policies and

practices do not require” its agents to comply with section 1357). *Moreno*, 213 F. Supp. 3d at 1005 (quoting ICE’s own admissions).

In sum, the record demonstrates that the systemic roots of ICE’s repeated and widespread violations of section 1357 run deep and wide.

D. Supervisory Authority’s Suppression Remedy Preserves Judicial Integrity and Deters Widespread and Systemic Unlawful Arrests.

This record of widespread unlawful ICE arrests that the government itself condoned compels the suppression of evidence obtained from the unlawful arrest of Santos-Portillo. Op. Br. 27-28. As the Supreme Court cautioned:

Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in the willful disobedience of law.

McNabb, 318 U.S. at 345.

Here, the record shows suppression is the only way to deter widespread, repeated, and systemic unlawful arrest practices. Merely declaring ICE’s warrantless arrests illegal, while permitting the government to use the evidence obtained from that unlawful conduct in criminal prosecutions, will not deter continued violations.

Over four decades ago, the Seventh Circuit stated that section 1357 “is always seriously applied.” *United States v. Cantu*, 519 F.2d 494, 496-97 (7th Cir. 1975).

Exercising supervisory authority in this case will go a long way toward making that statement actually true. Failing to do so renders toothless a Congressional mandate that ICE routinely ignores without consequence.

E. *United States v. Oscar-Torres* Requires Suppression of the Post-Arrest Fingerprint Evidence, Attendant Records From the Immigration A-File Linked to Those Prints, and the Admissions and Documents Obtained From the Unlawful Arrest.

The government questions the relevancy of this Court's decision in *United States v. Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007), simply because "the arrest in that case violated the Fourth Amendment." Gov't Br. 13 & n.5. This continued emphasis on whether the illegal arrest violated the Fourth Amendment misses the point.

Oscar-Torres is important for two reasons. First, it is relevant to the determination that supervisory authority applies here. Second, it requires the suppression of the identity and attendant record evidence obtained from the illegal arrest.

First, to determine whether supervisory authority applies in a particular case, *Sanchez-Llamas* emphasized the importance of a connection between unlawful police conduct and the "gathering of evidence." 548 U.S. at 349, 360. Here, the crucial evidence the government needed and used to prosecute Santos-Portillo resulted from the illegal arrest. Op. Br. 12-15. In *Oscar-Torres*, this Court held that the identity and "attendant record evidence" at issue here is subject to suppression. 507 F.3d at 230-232. Thus, the connection is strong between the illegal arrest and evidence that this Court found suppressible in *Oscar-Torres*. This further supports the exercise of supervisory authority in this case.

Second, in *Oscar-Torres*, this Court held that an illegal arrest motivated by “investigative” purposes requires suppression of all identity evidence, including fingerprints, and “attendant record evidence” obtained from that identity evidence. 507 F.3d at 230-32. The government cannot dispute that an investigative purpose motivated ICE’s illegal conduct. *See* Op. Br. 9-10; JA 141, 150-151. Therefore, *Oscar-Torres* applies and requires suppression. Op. Br. 28-29.

Finally, *Oscar-Torres* did not address whether illegal arrests by ICE that violated a statute also permitted suppression of identity and attendant record evidence. That question has remained open since *United States v. Harrison*, 168 F.3d 483 (table), 1999 WL 26921, at *5 (4th Cir. Jan. 25, 1999) (“Whether the exclusionary rule generally applies when the Government violates a statute rather than the constitution presents a difficult question, and one which we need not reach today.”).

This appeal provides the opportunity to answer this question. In *Oscar-Torres*, this Court tackled a related issue that had “bedeviled and divided our sister circuits,” whether identity evidence is suppressible in a criminal prosecution. 507 F.3d at 228. The circuit split resulted from differing interpretations of *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984). *Id.* After “[c]lose examination of *Lopez-Mendoza* itself, as well as other Supreme Court precedent,” this Court concluded, “*Lopez-Mendoza* does not prohibit suppression of evidence of a defendant’s identity.” 507 F.3d at 228. Notably, this conclusion rejected the Sixth Circuit’s interpretation which held that *Lopez-Mendoza* barred suppression of identity evidence. *Id.* (citing Sixth Circuit case).

Santos-Portillo respectfully contends that a “[c]lose examination of [*Sanchez-Llamas*] as well as other Supreme Court precedent,” *Oscar-Torres*, 507 F.3d at 228, establishes that supervisory authority applies here. As in *Oscar-Torres*, this Court should reject the Sixth Circuit’s contrary conclusion, *Abdi*, *supra* at 3, and instead conclude that suppression is the proper remedy for the unlawful arrest of Santos-Portillo.

CONCLUSION

For these reasons, this Court should reverse the lower court’s denial of the motion to suppress, and vacate the conviction and judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,767 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on July 27, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system and by serving a true and correct copy at the address listed below:

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