



**NO. 01-1034**  
**Criminal**

**UNITED STATES COURT OF APPEALS**  
**FOR THE EIGHTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

**Plaintiff and Appellant,**

**vs.**

**MANUEL RODRIGUEZ-ARREOLA,**

**Defendant and Appellee.**

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**Appeal from the United States District Court**  
**for the District of South Dakota**  
**Southern Division**

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**The Honorable Lawrence L. Piersol**  
**Chief United States District Judge**

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**APPELLANT'S BRIEF**

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**SUMMARY OF THE CASE AND REQUEST FOR  
ORAL ARGUMENT**

Manuel Rodriguez-Arreola was indicted for illegal reentry in violation of 8 U.S.C. § 1326(a). He filed a motion to suppress all evidence and statements obtained from his detention, including his identity. The district court granted the motion to suppress. The government has filed an interlocutory appeal.

The United States requests 15 minutes for oral argument.

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## **JURISDICTIONAL STATEMENT**

This is an interlocutory appeal by the United States from a district court order suppressing evidence against the Defendant in a prosecution for illegal reentry into the United States in violation of 8 U.S.C. § 1326(a). Jurisdiction of this Court is based upon 18 U.S.C. § 3731.

The district court granted the Defendant's motion to suppress on December 22, 2000. The United States timely filed a notice of appeal on December 29, 2000.

The United States Attorney for the District of South Dakota certified that this appeal was not taken for purpose of delay and that the suppressed evidence is a substantial proof of a fact material in the proceeding.

## **STATEMENT OF THE ISSUES**

### **I.**

**WHETHER, DURING THE COURSE OF A STOP FOR A TRAFFIC VIOLATION, AN OFFICER'S UNRELATED INQUIRIES OF THE DRIVER AS TO THE DEFENDANT PASSENGER'S IMMIGRATION STATUS VIOLATED THE FOURTH AMENDMENT RIGHTS OF THE DEFENDANT.**

*Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)

*United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 1175 (2000)

## II.

### WHETHER THE DISTRICT COURT ERRED IN SUPPRESSING EVIDENCE OF THE DEFENDANT'S IDENTITY AS AN ILLEGAL ALIEN IN A PROSECUTION FOR ILLEGAL REENTRY.

*INS v. Lopez-Mendoza*, 468 U.S. 1032 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984)

*United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994)

*United States v. Harris*, 453 F.2d 1317 (8th Cir. 1972)

### STATEMENT OF THE CASE

On October 18, 2000, a one-count indictment was filed in the United States District Court for the District of South Dakota, charging the Defendant, Manuel Rodriguez-Arreola, with being an illegal alien found in the United States after deportation, in violation of 8 U.S.C. § 1326(a). The indictment alleged that the Defendant is an aggravated felon having previously been convicted for delivery of heroin in the Circuit Court of the State of Oregon on December 21, 1990.

On September 14, 2000, the Defendant filed a motion to suppress all evidence obtained as a result of his detention. A hearing on the motion to suppress was held on November 6, 2000. The Magistrate entered a report and recommendation on November 21, 2000, which recommended the suppression of all evidence and statements obtained from the Defendant. The government filed

objections to the Magistrate's report and recommendation on December 6, 2000.

On December 22, 2000, the district court granted the motion to suppress.

The government has filed an interlocutory appeal to this Court, appealing the district court's order granting the motion to suppress. The government appeals on the basis that the district court erred in finding that the Defendant's Fourth Amendment rights were violated and erred in suppressing the Defendant's identity.

### **STATEMENT OF THE FACTS**

On September 14, 2000, South Dakota Highway Patrolman Chris Koltz encountered a vehicle with tinted windows and Washington State plates speeding on Interstate 90. (Motions hearing transcript, hereinafter referred to as "T," 8). The vehicle was traveling 86 miles per hour in a 75-mile-per-hour zone. Trooper Koltz stopped the vehicle and asked the driver for his license and registration. T 10. He asked the driver to accompany him to the patrol car. Trooper Koltz asked the driver as to the driver and passenger's origin, destination, and purpose of their trip. T 12-13. Within three minutes into the stop, Trooper Koltz asked the driver if he was a United States citizen, or if he was legally in the United States. Initially the driver stated he was not legally in the United States. T 14. He then clarified his response and stated he was legally in the United States. (Video tape, hereinafter "VT," 1:47:00). Trooper Koltz then asked the driver about his

passenger (the Defendant), and the driver stated that his passenger was illegally in the United States. T 57. All of this took place prior to Trooper Koltz issuing a ticket and was within ten minutes of the stop. T 15, 38; VT 1:52:30.

Trooper Koltz then told the driver he was going to do a canine sniff of the exterior of his vehicle. T 15. He asked the passenger (the Defendant) to step out of the vehicle. T 16.

Based upon the driver telling Trooper Koltz that the passenger (the Defendant) was illegally in the United States, Trooper Koltz asked the passenger if he was legally in the United States and asked him to produce a green card. T 17. The Defendant was unable to produce a green card. T 17. The Defendant admitted he was illegally in the United States. T 18.

Trooper Koltz then conducted the exterior search. T 18. Although the drug dog alerted to four different areas of the vehicle, no illegal drugs were found. T 52-53. Trooper Koltz then contacted the INS Command Center in Chicago and was told to detain the Defendant. T 21-23. Trooper Koltz then issued a speeding ticket to the driver. T 23. The driver left and the passenger (Defendant) was detained. T 23.

## **SUMMARY OF THE ARGUMENT**

The record establishes that the Defendant was a passenger in a vehicle stopped as a result of speeding. There is no dispute that the traffic stop was lawful. The driver was questioned briefly. Three to four minutes into the questioning, the driver told Trooper Koltz that his passenger was in the United States illegally. The issue is whether Trooper Koltz violated the Defendant's Fourth Amendment rights by questioning the driver as to both his and the Defendant's immigration status. Even if Trooper Koltz's questions to the driver exceeded the scope of the stop, the Defendant lacks standing to object to them. Fourth Amendment rights are personal and may not be vicariously asserted.

Once the driver told Trooper Koltz that the Defendant was in the United States illegally, Koltz had reasonable suspicion to detain the Defendant. The Defendant was questioned only after the driver told Trooper Koltz that the Defendant was in the United States illegally. Trooper Koltz had reasonable suspicion to follow up on what he had been told. The Fourth Amendment does not prohibit questioning per se; it prohibits unreasonable searches and seizures. The asking of potentially incriminating questions does not alter the fundamental nature of the non-custodial detention involved in a traffic stop.

The questions as to immigration status did not prolong the stop. Those questions led to Trooper Koltz having reasonable suspicion that the Defendant was in the United States illegally. In *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), the Supreme Court distinguishes a traffic stop from an arrest and reasons that most traffic stops resemble in duration and atmosphere the type of detention authorized by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A *Terry* seizure supported by reasonable suspicion is lawful only for the time it reasonably takes to resolve the officer's suspicions. Trooper Koltz detained the Defendant only after INS officials confirmed that the Defendant was in the United States illegally. Prior to Trooper Koltz being so advised by INS officials, he had reasonable suspicion based upon the fact the driver told him the Defendant was illegally in the United States.

The Defendant's identity should not be suppressed even if the Defendant's detention was unlawful. The United States Supreme Court has held that evidence of identity cannot be suppressed, even if the identity was discovered following an unlawful arrest. Inherent in the Supreme Court's decision that identity cannot be suppressed is the principle that the factors law enforcement officers use to determine identity cannot be suppressed.

## ARGUMENT AND APPLICABLE STANDARD OF REVIEW

### I.

DURING THE COURSE OF A STOP FOR A TRAFFIC VIOLATION, AN OFFICER'S UNRELATED INQUIRIES OF THE DRIVER AS TO THE DEFENDANT PASSENGER'S IMMIGRATION STATUS DID NOT VIOLATE THE FOURTH AMENDMENT RIGHTS OF THE DEFENDANT.

The standard of review for a district court's factual determination of a motion to suppress is the clearly erroneous standard. *United States v. Lewis*, 738 F.2d 916, 920 (8th Cir. 1984). The decision of whether the Fourth Amendment was violated is subject to *de novo* review by the appellate court. *United States v. Stephensen*, 924 F.2d 753, 758 (8th Cir. 1991).

The district court determined that the Defendant's Fourth Amendment rights were violated when the driver was questioned. The government asserts that the Defendant lacks standing to object to the questioning of the driver. Fourth Amendment rights are personal and may not be vicariously asserted. *Rakas v. Illinois*, 439 U.S. 128, 138-144, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994). The Defendant has no standing to object to the length or scope of the driver's detention.

The Defendant was sitting in the driver's car while the driver was questioned in the patrol car. The Defendant was not personally detained and was free to leave

until the driver told Trooper Koltz that the Defendant was in the United States illegally. The Defendant's Fourth Amendment rights were not violated by Trooper Koltz asking the driver a moderate number of questions to determine the identity of the driver and the passenger.

Even if the Defendant has standing to raise a violation of the driver's Fourth Amendment rights, there was no violation. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Unlike the Fifth Amendment, which includes a protection against a person's being "compelled . . . to be a witness against himself," U.S. Const. amend. V, the Fourth Amendment is not implicated by questioning per se. The asking of potentially incriminating questions does not alter the fundamental nature of an encounter for purposes of the Fourth Amendment. Such questioning does not change a consensual encounter into a "seizure." *See Florida v. Bostick*, 501 U.S. 429, 439, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). Asking potentially incriminating questions does not transform an investigative detention (including a traffic stop) into the functional equivalent of a custodial interrogation. *See Berkemer v. McCarty*, 468 U.S. at 441-442 (asking motorist if he had been using intoxicants).

In the non-custodial atmosphere of a consensual encounter or an investigative detention, the person questioned does not have to answer and need

not be given a Miranda-type warning that he may remain silent. *See Berkemer v. McCarty*, 468 U.S. at 439 (during a traffic stop, “the detainee is not obliged to respond”); *Florida v. Royer*, 460 U.S. 491, 498, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) (plurality) (during consensual encounter, the person “need not answer any question put to him”). A traffic detention does not become a custodial interrogation requiring Miranda warnings unless the motorist’s “freedom of action is curtailed to a ‘degree associated with formal arrest.’” *Berkemer v. McCarty*, 468 U.S. at 440 (quoting *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)); *see Id.* at 442 (a single police officer asking a motorist “a modest number of questions and request[ing] him to perform a simple balancing test at a location visible to passing motorists,” is treatment that “cannot fairly be characterized as the functional equivalent of formal arrest.”).

In *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), the Supreme Court held that, for Fifth Amendment purposes, questioning during a traffic stop is not a custodial interrogation and therefore does not require Miranda warnings. 468 U.S. at 435-442. To distinguish a traffic stop from an arrest for Fifth Amendment purposes, the Court explained that a traffic stop was “more analogous to a so-called ‘*Terry* stop’.” 468 U.S. at 436-437. A *Terry* stop supported by reasonable suspicion is lawful in duration only for the time

it reasonably takes to “investigate the circumstances that provoke suspicion.” 468 U.S. at 439 (quoting *Brignoni-Ponce*, 422 U.S. at 881). “[T]he stop and inquiry must be ‘reasonably related in scope to the justification for their initiation.’” *Id.* (quoting *Terry v. Ohio*, 392 U.S. at 29). “[T]he officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.” *Id.* See *United States v. Hensley*, 469 U.S. 221, 235, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985) (duration and intrusiveness of a *Terry*-type detention must be reasonable). “[T]here is no rigid time limitation on *Terry* stops,” but if the scope of questioning or investigation strays “unreasonably” beyond what is necessary to “pursue [the] investigation in a diligent and reasonable manner,” the investigative detention becomes unreasonable in duration. *United States v. Sharpe*, 470 U.S. 675, 685, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985).

In drawing the analogy between a traffic stop and a *Terry*-type investigative detention, *Berkemer* cautioned, however:

No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized by *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.

468 U.S. at 440 n.29. The instant case involves “a traffic stop supported by probable cause” to issue a traffic citation, within the caveat of the *Berkemer* opinion. *Id.* The measure of reasonable duration for such a traffic stop is slightly different from the measure of a *Terry* stop based on reasonable suspicion. A traffic stop to issue a citation is lawful for the time “reasonably necessary” to issue the citation and check the regularity of the driver’s license, registration, and proof of insurance. *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994).

The immigration questions Trooper Koltz asked the driver in this case did not prolong the traffic detention. Moreover, those few questions did not transform the fundamental nature of the encounter from a non-custodial detention into the functional equivalent of a custodial interrogation. This is evidenced by the fact that once Trooper Koltz determined the driver was legal, he let him go on his way. Trooper Koltz had an obligation to determine whether or not the passenger was illegal because the driver told Koltz the passenger was illegally in the United States.

In *United States v. Barahona*, 990 F.2d 412 (8th Cir. 1993), this Court held that an officer’s questions must relate to the purpose of the stop and if the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, the officer may broaden the inquiry. Based on the driver’s responses, the lack of eye contact, and his nervousness, Trooper Koltz suspected

the driver might have been involved in illegal drug activity or that he was illegally in the country. He asked the driver if he was legally in the country and after displaying some confusion, the driver stated he was. T 14. He stated his passenger was not. T 57. Since the questions involved in this case did not increase in any legally significant way either the duration or the severity of the seizure that was already justified by the traffic violation, there was no requirement for any additional justification to ensure that the seizure was reasonable under the Fourth Amendment.

The Eighth and Fifth Circuits have held that questioning unrelated to the purposes of a traffic stop does not violate the Fourth Amendment if it does not prolong the stop. *See United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 647-649 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 1175 (2000) (“the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered”); *United States v. Crain*, 33 F.3d 480, 485 (5th Cir. 1994) (“[W]hen questioning takes place while officers are waiting for the results of a computer check – and therefore does not extend the duration of the stop – the questioning does not violate *Terry*.”); *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993) (“[W]e reject any notion that a police officer’s questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment

violation . . . [because] detention, not questioning, is the evil at which *Terry's* second prong is aimed.”). Trooper Koltz’s questions did not prolong the stop. Only minutes into the stop, Trooper Koltz was told the passenger was illegal. VT 1:47:30.

This Court has accepted police questioning and investigation during a traffic stop about travel plans, the identity of passengers, and the driver’s criminal history. None of these matters has any relationship whatsoever to issuing a citation or confirming the driver’s authority to operate the vehicle. *See United States v. Ramos*, 42 F.3d at 1163. In the case at hand, the driver acknowledged that his passenger, the Defendant, was an illegal alien about three or four minutes after he joined the Trooper in the patrol car. The Defendant was still sitting in the driver’s car. Trooper Koltz was not prolonging the traffic stop but was aiming at resolving what the driver told him. The Defendant was not in custody and was free to go until the INS confirmed what the driver had told Trooper Koltz. This is evidenced by the fact that the driver was not detained because INS instructed Koltz to let him go.

This Court has determined that an officer may undertake similar questioning of other vehicle occupants to verify information provided by the driver. *United States v. Foley*, 206 F.3d 802, 805 (8th Cir. 2000). Once the driver told Trooper

Koltz that his passenger (Defendant) was illegal, Koltz had reasonable suspicion to question the Defendant further. In *United States v. Johnson*, 58 F.3d 356 (8th Cir. 1995), this Court held that an officer can ask routine questions of the driver and verify that information with the passenger.

No violation of the Defendant's Fourth Amendment rights occurred. Based on what the driver told Koltz, he had reasonable suspicion to determine whether or not the Defendant was illegally in the country. See *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990) (an officer may ask the detainee questions in order to dispel or confirm his suspicions).

The government does not dispute the fact that the Defendant was not advised under Miranda. The government need not rely on any of the Defendant's statements. Once the Defendant's identity was obtained through the Washington identification document, the INS was able to confirm he was illegally in the country. T 17. Simply put, all that was needed to prosecute the Defendant was his name.

## II.

### THE DISTRICT COURT ERRED IN SUPPRESSING EVIDENCE OF THE DEFENDANT'S IDENTITY AS AN ILLEGAL ALIEN IN A PROSECUTION FOR ILLEGAL REENTRY.

#### A. Standard of review.

The standard of review for a district court's application of the law to the facts dealing with suppression of evidence is *de novo*. *United States v. Tavares*, 223 F.3d 911, 914 (8th Cir. 2000); *United States v. Riedesel*, 987 F.2d 1383 (8th Cir. 1993).

#### B. The Defendant's identity is not suppressible.

The United States Supreme Court has held that “[t]he ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.” *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) (emphasis added).

In the case now before this Court, the United States argues that even if the Defendant's detention was unlawful, his identity cannot be suppressed. The district court did not follow the unequivocal holding of *Lopez-Mendoza*, but instead relied upon its previous decision, *United States v. Mendoza-Carrillo*, 107 F. Supp. 2d 1098, 1107 (D.S.D. 2000), which improperly rejected the Supreme

Court's clear holding that evidence of a defendant's identity is not suppressible. In *Mendoza-Carrillo*, the district court asserts that the holding in *Lopez-Mendoza* "should only be interpreted to mean that a defendant may be brought before a court on a civil or criminal matter even if the arrest was unlawful." *Id.* at 1106.

In *United States v. Roque-Villanueva*, 175 F.3d 345 (5th Cir. 1999), the Fifth Circuit held, "Even if the Defendant was illegally stopped, neither his identity nor his INS file are suppressible." The court also observed:

Other courts have indicated that an individual's identity is not suppressible. In *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984), the respondent objected to being summoned to a civil deportation proceeding following his unlawful arrest. *See id.* at 3484. Rejecting the respondent's argument, the Supreme Court stated that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." *Id.* at 3483. In *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994), an alien convicted of illegally reentering the United States in violation of 8 U.S.C. § 1326 argued that the district court erred by refusing to suppress all evidence of his identity learned from his unlawful arrest. Affirming the conviction, the Ninth Circuit held that the "district court did not err when it held that neither [the defendant's] identity nor the records of his previous convictions and deportations and convictions could be suppressed as a result of the illegal arrest." *Id.* at 422.

*Id.* at 346. *Accord, United States v. Orozco-Gonzalez*, 60 F. Supp. 2d 599, 600 (W.D. Tex. 1999); Wayne R. LaFare, 5 Search and Seizure § 11.4(g) at 324 (3d ed. 1996) (suppression is unavailable in circumstances involving illegal alien

prosecutions where “the illegal arrest leads to determining the defendant’s identity in the limited sense of finding out his name”).

The case of *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994), arose from an illegal arrest. INS agents stopped Guzman-Bruno, took him into administrative custody pending deportation, and questioned him without giving him the Miranda warnings. The district court found that his arrest was illegal and suppressed all evidence except for his identity. On the defendant’s appeal, the Ninth Circuit held that “[a] defendant’s identity need not be suppressed merely because it is discovered as the result of an illegal arrest or search.” *United States v. Guzman-Bruno*, 27 F.3d at 421.

The Ninth Circuit in *Guzman-Bruno* relied on its earlier case of *United States v. Orozco-Rico*, 589 F.2d 433 (9th Cir. 1978), which involved another 8 U.S.C. § 1326 prosecution. In *Orozco-Rico*, the Ninth Circuit held that “[a]n illegal arrest would not serve to suppress [the defendant’s] identity since, ‘there is no sanction to be applied when an illegal arrest only leads to discovery of the man’s identity and that merely leads to the official file or other independent evidence.’” *Id.* at 435 (quoting *Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978)). Relying on this holding, the Ninth Circuit in *Guzman-Bruno* found that “the district court did not err when it held that neither Guzman-Bruno’s identity nor the

records of his previous convictions and deportations could be suppressed as a result of the illegal arrest.” *United States v. Guzman-Bruno*, 27 F.3d at 422.

This court should reverse the district court’s order granting Defendant’s motion to suppress his identity.

C. The Defendant’s fingerprints are not suppressible.

In recommending that the Defendant’s motion to suppress his fingerprints be denied, the magistrate judge was persuaded by the reasoning of *United States v. Aldana-Roldan*, 932 F. Supp. 1455, 1456 (S.D. Fla. 1996), which held: “[I]f a defendant’s identity cannot be suppressed, there is no reason that evidence of his presence can.” *Id.* (citing *INS v. Lopez-Mendoza*, 468 U.S. at 1039).

The district court, however, suppressed the Defendant’s fingerprints, relying on its previous analysis in *United States v. Mendoza-Carrillo*, 107 F. Supp. 2d 1098 (D.S.D. 2000). In that case, the district court stated that “[f]ingerprints which are the result of an illegal detention may be suppressed.” *Id.* at 1107 (citing *Hayes v. Florida*, 470 U.S. 811, 813-817, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985), and *Davis v. Mississippi*, 394 U.S. 721, 724, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969)).

However, in *Hayes v. Florida*, the police detained the defendant specifically to obtain and to compare his fingerprints to fingerprints found at a crime scene. 470 U.S. at 813-817. Likewise, in *Davis v. Mississippi*, the police knew Davis’

identity; they obtained his fingerprints in an attempt to match them to prints found at the scene of a rape. 394 U.S. at 722-723. In other words, in both of these cases the police sought to detain the defendants solely for the purpose of fingerprinting. *See, United States v. Ortiz-Gonzalbo*, 946 F. Supp. 287, 289-290 (S.D.N.Y. 1996) (fingerprints obtained as a result of an illegal arrest should not be suppressed unless the purpose of the arrest was to obtain the fingerprints).

The case at hand is distinguishable from *Hayes* and *Davis* because the Defendant was not detained solely for the purpose of fingerprinting and his identification by the INS based on his fingerprints was sufficiently attenuated from his arrest. *See INS v. Lopez-Mendoza*, 468 U.S. at 1043 (“Since the person and identity of the respondent are not themselves suppressible . . . the INS must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest.”)

The Defendant did not have valid identification documents when he was stopped by the South Dakota Highway Patrol. The INS became involved in the matter after Trooper Koltz called INS to help determine whether the Defendant was illegally in the country. The INS agent used the defendant’s fingerprints taken on September 19, 2000 for this purpose.<sup>1</sup>

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<sup>1</sup>Even if this Section 1326 prosecution against the Defendant is dismissed as  
(continued...)

While the Defendant might object that even new fingerprints would be the indirect fruit of the unlawful arrest, and thus also subject to suppression, the new fingerprints actually would be the fruit of lawful INS custody, or possibly a court order, and thus not subject to suppression. *Cf., New York v. Harris*, 495 U.S. 14, 21, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) (statements taken at the station house after an arrest in violation of law are the fruit of the lawful retention of custody of the defendant, and not of the illegal arrest).

Because suppressing the Defendant's fingerprints is inconsistent with Supreme Court precedent, the district court's suppression order should be reversed.

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<sup>1</sup>(...continued)

a result of the suppression of the fingerprints, the Defendant would be released to the INS's detainer to face immigration charges. At that time, the INS would again be free to fingerprint the Defendant and to compare those fingerprints to the fingerprints of the person previously deported. That comparison would again show that the Defendant is subject to prosecution under Section 1326. *See United States v. Harris*, 453 F.2d 1317, 1324, n.3 (8th Cir. 1972) (citing a case in which a second set of fingerprints was permitted as evidence in a criminal trial because the fingerprints were taken after the first set of fingerprints were excluded from evidence and were not connected with an unlawful arrest).

## CONCLUSION

Based on the arguments and authorities submitted herein, the United States respectfully requests that this Court affirm the judgment and sentence in this case in all respects.

Respectfully submitted this \_\_\_\_\_ day of February, 2001.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Corel WordPerfect 9 and is 30 pages or less in proportional spacing in 14-pt. type and is therefore in compliance with FRAP 32(a)(7). I further certify that I have provided to the Court and to each party separately represented by counsel a 3-1/2" diskette containing the full text of the brief. The diskettes have been scanned for viruses using InoculateIT version 4.53 and are virus free.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing appellant's brief was made upon the appellant by mailing by first class mail, postage prepaid, two true and correct copies thereof and one 3-1/2" diskette containing the brief to appellee's attorney of record at the post office address as shown, on this \_\_\_\_\_ day of February, 2001:

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