IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No. 02-97
	)	
vs.	)	
	)	
JOSE PEREZ-PEREZ a/k/a Felix Zarate-Valazquez,	)	ORDER
	)	

Before the Court are defendant's motions to dismiss the indictment and to suppress evidence allegedly obtained in violation of the Fourth Amendment. The government has resisted these motions, and the Court held an evidentiary hearing on August 13, 2002. The matters are now ready for rulings

I. BACKGROUND

Senior Special Agent Jose A. Aponte of the Immigration and Naturalization Service ("INS") testified at the hearing. In addition to his work with the INS, Agent Aponte was also assigned to the organized crime drug enforcement task force[1] during the time-frame relevant to this case. Aponte would accompany other task force members when they investigated individuals for drug crimes when it was suspected that those same individuals might also be in this country illegally. His primary role was to determine whether INS violations might be at issue, but he would also serve as a translator of the Spanish language for the other members of the task force.

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[1] Aponte's testimony indicated the task force primarily involves members of several state and local law enforcement forces.

On Wednesday April 3, 2002 at approximately 11:00 a.m., Aponte was with approximately ten other task force officers when they went to a business in Des Moines called Kora's Fashions to execute a search warrant. Members of the task force entered the building, served the warrant and began a search. During the search, Jose Perez-Perez, defendant, arrived in his vehicle and parked in front of the building. Officers encountered defendant outside the front door of Kora's Fashions, grabbed him by the arm, and escorted him inside the building.

Agent Aponte watched the other officers bring defendant inside the business. He testified defendant was under arrest the moment the officers brought him into the store. The officers guided defendant to a chair and then called Agent Aponte over to speak with him. Defendant speaks Spanish, and Aponte informed defendant of his *Miranda* rights in Spanish. Defendant than gave Aponte a false name, and made incriminating statements regarding his presence in the United States. Defendant was charged with state drug crimes, under the alias he had given Aponte. Later, while in state custody, defendant was fingerprinted.

Agent Aponte used defendant's fingerprints on April 4 to discover defendant's name was Jose Perez-Perez and filed an administrative detainer with the Polk County Jail that was to take effect upon his release from incarceration on the state drug charges. Aponte then reviewed INS's files on Perez, and engaged in discussions with the United States Attorney's office regarding prosecution of Perez for a violation of 8 U.S.C. 1326(a), being an illegal alien found in the United States without proper consent following deportation.

On April 15, the state drug charges against Perez were dropped. On April 16, Aponte took custody of Perez and brought him to INS offices in Des Moines for deportation processing.[2]

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[2] Perez remained incarcerated through Polk County officials during this time, even when in INS custody, pursuant to agreements INS has with the county.

On this same day, Aponte had further contacts with the United States Attorney's office recommending that Perez be prosecuted. Additionally, at approximately this same time, Aponte informed state law enforcement officials that Perez had another alias, Mike Diaz, and that INS records showed an outstanding case against this individual in state court stemming from a 1996 fraud charge involving fraudulent identification materials. State officials decided to charge defendant with this matter, and on April 20, defendant made an initial appearance and was placed in the custody of the State of Iowa. Aponte and other federal officials were not aware that this charge had been brought in state court.[3]

On April 24, 2002, a grand jury indictment was filed in this Court alleging defendant violated 8 U.S.C. section 1326(a). On April 26, the Clerk of Court appointed counsel for Perez as he was scheduled to be arraigned that day. However, when Aponte attempted to gain custody of Perez from the Polk County jail on the 26th for the arraignment in federal court, he was informed that Perez was actually in state custody and that he was being housed in a county jail elsewhere in Iowa.[4] At the scheduled arraignment, counsel for the defendant was informed by the government that Perez was unavailable and that he would not be arraigned until released from state custody. Counsel for defendant stayed at the courthouse and witnessed the

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[3] At the hearing, defense counsel questioned Aponte regarding his lack of knowledge about the state prosecution. Aponte admitted that he should have been informed about the state charge and the fact that Perez made an initial appearance on April 20, but that in this particular instance federal officials were not notified of the state proceeding.

[4] Aponte noted his surprise that Perez was not available on the 26th for the arraignment in federal court, and stated his opinion that INS should have been informed previously of Perez's unavailability.

arraignment of other defendants who were arraigned on separate charges.[5]

Defense counsel then contacted counsel for the government by letters on May 22 and June 21, 2002 stating that defendant did not waive his right to speedy trial. The government responded by letter dated June 26, 2002 indicating that federal proceedings would commence following the resolution of the state charges. Perez waived his right to a speedy trial on the state charges in that court, and on July 10 or 11, 2002 he pled guilty to the state forgery charge. He received a five year sentence of imprisonment that was suspended subject to the still-existing INS administrative detainer.[6] He was then placed on probation with state officials. On July 11, he was arrested on a federal warrant by United States Marshals and arraigned on the pending charge before this Court by a federal magistrate judge.

II. APPLICABLE LAW & DISCUSSION

A. Motion to Dismiss

Perez argues dismissal is warranted in this case because the government has violated: the Speedy Trial Act, 18 U.S.C. section 3161(c)(1); the Sixth Amendment's clause guaranteeing a speedy trial; the Fifth Amendment's due process clause; and Federal Rule of Criminal Procedure 5(a).

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[5] These other defendants appear from to have been individuals who were before the Court as a result of the execution of the search warrant at Kora's Fashions on April 3.

[6] Agent Aponte indicated that he had to re-file the INS detainer, indicating that Perez was amenable to deportation, on May 1, after the state fraud charge had been filed.

1. Whether Speedy Trial Act or Sixth Amendment Violated by Prosecutorial Delay

Defendant asserts that the government has deprived him of his statutory and constitutional right to a speedy trial. On April 24, 2002 a grand jury indictment was filed charging him with a violation of 8 U.S.C. section 1326(a). His current counsel was appointed to represent him in this proceeding on April 26, 2002, and counsel was advised by the Clerk of Court that arraignment was scheduled for defendant that day. Defendant's counsel was informed a few minutes prior to the scheduled arraignment hearing that defendant was in state custody facing state criminal charges. Defendant was not arraigned on the charges currently pending against him in this Court on April 26, 2002. Nevertheless, defendant claims that his counsel was present and appeared on his behalf for purposes of arraignment on April 26, 2002.

Defendant then demanded, through letters from his attorney, resolution of the federal charges pending against him. The government responded by letter dated June 26, 2002 indicating that federal proceedings would commence following the resolution of the state charges. Defendant pled guilty to state forgery charges on July 10 or 11, 2002, and he was arraigned on the current charges pending before this Court on July 11. Trial was set for September 3, 2002.

Defendant asserts that the delay from April 26, 2002 to July 11, 2002[7] violated his right to a speedy trial in violation of 18 U.S.C. § 3161(c)(1) which provides, in relevant part:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a

[7]According to the Court's calculations, 70 days from April 26, 2002 would have ended on July 5, 2002.

> judicial officer of the court in which such charge is pending, whichever date last occurs.

Despite the fact that defendant did not enter a plea until July 11, 2002, *see* 18 U.S.C. § 3161(c)(1) (the plain language requires a plea of not guilty to be entered by defendant to trigger the statutory rights), defendant asserts that his counsel's appearance and willingness to proceed at the scheduled April 26, 2002 arraignment hearing constitutes an appearance of the defendant for purposes of beginning the running of the 70 day clock in 18 U.S.C. § 3161(c)(1). Defendant urges this Court to accept his attorney's appearance on April 26, 2002 as the triggering event under the Speedy Trial Act, and requests that this Court dismiss the indictment with prejudice as a result of the government's failure to comply with the 70 day requirement.

However, without deciding the effect of an attorney's appearance at a scheduled arraignment, the Court finds that the 70 day requirement in 18 U.S.C. § 3161(c)(1) is subject to the exclusion for periods of "delay resulting from trial with respect to other charges against the defendant." 18 U.S.C. § 3161(h)(1)(D). In *United States v. Goodwin*, 612 F.2d 1106, 1105 (8th Cir. 1980), the Court rejected a claim that defendant's right to a speedy trial was violated because, "[d]uring the time period in question Goodwin was in the custody of the Omaha police . . . awaiting trial with respect to armed robbery charges against him. Thus, there was no violation of defendant's right to speedy trial." *Id.*[8] Therefore, without the necessity of deciding whether the appearance of defendant's attorney at the April 26, 2002 hearing triggered the running of the

[8]The Court notes for clarity that the speedy trial requirement applicable under *Goodwin* was 80 days rather than 70 days; however, the exclusion of time spent in state custody from the period of time included in the calculation required under § 3161(c)(1) remained the same.

70 day requirement under 18 U.S.C. § 3161(c)(1),[9] this Court denies defendant's motion to dismiss the indictment for a violation of his statutory right to a speedy trial.

Turning now to Perez's Sixth Amendment claim, the Court must determine the threshold issue of whether the delay in this case was "presumptively prejudicial." *See Barker v. Wingo*, 407 U.S. 514, 530-31. Even assuming for purposes of this Order that "attachment" of the Sixth Amendment constitutional speedy trial right occurred in this case on April 15, 2002 – the day the state drug charges were dropped and Perez was actually in INS custody because of the effect of the administrative detainer – the 141 day period between April 15 and September 3 (the day trial is scheduled to commence) is not presumptively prejudicial. *See, e.g., United States v. McFarland*, 116 F.3d 316, 318 (8th Cir. 1997) (finding a little more than 7 month delay between indictment and trial is too brief of a delay to be presumptively prejudicial under the Sixth Amendment) (citing *Doggett v. United States*, 505 U.S. 647, 651-52 & n.1 (1992)). The delay at issue in this case is too brief to trigger review of the constitutional speedy trial claim. *See Doggett*, 505 U.S. at 651-52 & n.1.

While a full review of the constitutional right can be triggered if defendant can demonstrate the delay was intentional by the United States to gain a tactical advantage, *see Doggett*, 505 U.S. at 656, and defendant has asserted that the government allowed the state prosecution to intercede so that defendant might be faced with harsher penalties at the time of sentencing on the federal claim, the record does not support such an assertion. The record in this case indicates the federal government was unaware the state fraud charges against defendant had

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[9]However, the Court does note that where Congress desired to trigger the running of a time limitation on the appearance of counsel as opposed to the personal appearance of the defendant, it knew how to do so. *See, e.g.* 18 U.S.C. § 3161(c)(2).

been filed. INS Agent Aponte was surprised when defendant was unavailable for federal arraignment on April 26, 2002.

The Court finds that neither the Speedy Trial Act nor the Sixth Amendment were violated by the prosecutorial delay in this case.

2. Whether Due Process Was Violated By Prosecutorial Delay

Perez asserts the Constitution's Fifth Amendment due process requirement was violated by the government's prejudicial pre-indictment delay. Specifically, Perez asserts that the fundamental fairness of this prosecution was violated because the INS and the United States Attorneys office dictated the order and timing of the respective prosecutions to enhance Perez's sentence in this Court. In *United States v. Sprouts*, 282 F.3d 1037, the Eighth Circuit discussed the Fifth Amendment's due process clause as it relates to pre-indictment delay. "To establish pre-indictment delay, a defendant must show that the delay resulted in actual and substantial prejudice to his defense, *and that the government intentionally delayed the indictment to gain a tactical advantage or to harass him.*" *Id.* at 1041. Without considering the first prong – whether Perez was prejudiced – the Court finds the government did not intentionally delay the indictment in this case, as discussed above. Due process was not violated by the prosecutorial delay.[10]

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[10] Defendant also requests the Court use its supervisory power over prosecution to grant dismissal. *See Barker*, 407 U.S. at 530 n. 29. In this case, the federal prosecution could have and should have been handled in a better manner. Specifically, communication between the INS, the Polk County Jail, and Polk County prosecutors would have allowed the INS to become aware that the state criminal prosecution on the fraud charge was underway before the scheduled arraignment on April 26. However, the Court does not find that the order of the prosecutions was designed by federal law enforcement officials to enhance defendant's sentence as Agent Aponte was left in the dark regarding the state prosecution.

3. Whether Federal Rule of Criminal Procedure 5(a) Was Violated

Perez asserts his arraignment was improperly delayed until July 11, 2002 and that the matter should therefore be dismissed. Federal Rule of Criminal Procedure 5(a) requires that an officer making an arrest of a person pursuant to a warrant bring that person before the nearest federal magistrate, or other judicial officer, "without unnecessary delay." Perez asserts that he was arrested for purposes of Rule 5(a) on or about April 15 – when the INS detainer took effect and kept Perez remained housed in Polk County jail, INS had probable cause to believe Perez was in violation of section 1326, and prosecution was contemplated by the United States' Attorney's office. This Court disagrees, and finds that he was not arrested until July 11, 2002 on federal charges.[11]

Initially, Perez was arrested and held on state charges by state officials; once those were dropped on April 15, he was held on a civil INS detainer for deportation purposes; then,

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[11] Perez claims *United States v. Keeble*, 459 F.2d 757 (8th Cir. 1972), *rev'd on other grounds by* 412 U.S. 205 (1973) dictates that Perez was arrested on or about April 15, 2002 at the latest. This Court disagrees.

In *Keeble*, the defendant reported the death of a companion on an Indian reservation in South Dakota. *Id.* at 759. Defendant was arrested on March 7, 1971 at 8:30 a.m. for a tribal offense of disorderly conduct. *Id.* The next day, FBI officials arrived and after three hours of interrogation the FBI received a written statement from defendant incriminating him in the death of his companion. *Id.* On March 9, defendant pled guilty before the tribal court on the lesser charge and federal charges were filed the same day, but defendant was not arraigned before a federal magistrate judge until March 11. *Id.* The Court eventually determined that defendant was arrested on the federal charge on March 7, and that it was a Rule 5(a) delay. However, in that case, the federal arrest was found to occur on March 7 because the officer who arrested the defendant on the tribal disorderly conduct charge was a federal employee working for the Bureau of Indian Affairs. *Id.* at 759-60.

In the case at hand, defendant was arrested by state law enforcement on a state drug charge on April 3, 2002. He was held for a period of time on a federal civil INS detainer, but he was not arrested by federal officials on the federal criminal charge until July 11, 2002. "Rule 5(a) applies only to persons arrested and held under federal law." *Keeble*, 459 F.2d at 749 (citing *United States v. Elliott*, 435 F.2d 1013, 1015 (8th Cir. 1970)).

beginning on approximately April 20, he was arrested and in the custody of state officials on the state forgery charge until his arrest on the federal charges on July 11. Rule 5(a) was not violated in this case as he was arraigned the same day he was actually arrested on the federal charge, and there was not unnecessary delay. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994) (delay measured from time suspect arrested on federal charges until his or her initial appearance).

B. Motion to Suppress

Perez asserts that the United States' Constitution's Fourth Amendment prohibition against unreasonable seizures was violated when he was arrested outside of Kora's Fashions on April 3, 2002 as the officers did not have probable cause to believe he had committed or was committing a crime. Perez asserts that all identity information obtained by officers on and after April 3, 2002 should be suppressed. Hence, two key issues are presented by defendant in this motion: first, whether there was a constitutional violation; and second, whether evidence indicating defendant's identity can or should be suppressed under the law.

1. Whether Defendant's Arrest Constitutes an Illegal Seizure

In this case, the record is undisputed that defendant was arrested before he ever entered Kora's Fashions on April 3, 2002, and therefore issues of *Terry* stops and reasonable suspicion are not applicable.[12] Rather, this Court's focus must be on the Fourth Amendment's requirement that probable cause must exist before an arrest is made by law enforcement. The Eighth Circuit

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[12] In its brief, the government argued that *Terry v. Ohio*, 392 U.S. 2 (1968) and its progeny governed, and that the interview Agent Aponte conducted with defendant was voluntary. *See* United States Citation of Authority in Resistance to Defendant's Motion to Suppress Evidence at 4. However, it became clear at the hearing from Aponte's testimony that defendant was under arrest before he even entered Kora's Fashions on April 3, and that it was not a *Terry* stop nor was defendant's interview voluntary.

has stated that probable cause is assessed "from the viewpoint of a reasonably prudent police officer, acting in the circumstances of the particular case. We remain mindful that probable cause is a practical, factual, and nontechnical concept, dealing with probabilities." *United States v. Crossland*, __ F.3d __, 2002 WL 1869599 at *3 (8th Cir. August 15, 2002) (citation omitted). "[P]robable cause for an arrest exists when the totality of circumstances demonstrates that the arresting officer personally knows or has been reliably informed of sufficient facts to warrant a belief that a crime has been committed and that the person to be arrested committed it." *Id.* (citation omitted).

Probable cause is not established "by the presence of a person in a location known to be frequently involved in narcotics sales or other crimes." *See, e.g., United States v. Everroad*, 704 F.2d 403, 406 (8th Cir. 1983) (citation omitted). The record in this case reveals *only* that the officers decided to arrest defendant based on his appearance outside of Kora's Fashions on a Wednesday during regular business hours.[13] While the officers had obtained a search warrant for Kora's, defendant's appearance outside the building was not enough information to give the officers probable cause to believe defendant had committed or was committing a crime. The government stated in its brief that the task force officers who confronted, and arrested defendant, "were aware that previously the defendant had been in contact with persons involved in narcotics trafficking which had been the subject of their search warrant that they were in the process of executing." *See* United States Citation of Authority in Resistance to Defendant's Motion to Suppress Evidence. However, the government presented no evidence to indicate that

[13] While no record has been made regarding Kora's Fashions specific hours of business, the Court finds it reasonable that it would have been open during customary weekday retail store hours.

the officers were aware of defendant at all before he showed up on the doorstep of Kora's Fashions on April 3, 2002 during regular business hours. Agent Aponte did not indicate he was familiar with defendant before April 3, and his testimony indicated that he only learned of defendant and who he was through conversation with him that day following his arrest and by his own subsequent investigation over the next couple of weeks. *See also Ybarra v. Illinois*, 444 U.S. 85 (1979) (cited in *United States v. Capers*, 685 F.2d 249, 251 (8th Cir. 1982) (indicating that presence of an individual at a scene where search warrant is being executed, standing alone, does not establish probable cause for arrest of that individual)).

The case at hand is distinguishable from a recent Eighth Circuit decision. *See United States v. Villa-Velazquez*, 282 F.3d 553 (8th Cir. March 6, 2002). In that case, law enforcement received a tip from a confidential informant that defendant had illegally returned to the United States following deportation. *Id.* at 554. Law enforcement confirmed the prior deportation of defendant with INS, and the law enforcement officer involved then familiarized himself with a photograph of defendant before conducting surveillance on defendant. *Id.* After confirming defendant's illegal presence in this country, the officer approached and entered defendant's apartment and arrested him. *Id.*[14] In this case, the record reveals that officers did not receive nor

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[14] At this stage of the analysis in its Order, the Court references *Villa-Velazquez* only to demonstrate a factual scenario where officers had probable cause to arrest a defendant for illegal reentry following deportation. By comparing the facts of the two cases, it is clear that probable cause was not present in the case at hand.

However, it is worth noting for purposes of this Order that because there was probable cause to arrest defendant in *Villa-Velazquez*, defendant's identity was not suppressed despite the finding of a constitutional violation. The entry of defendant's apartment in *Villa-Velazquez* without a warrant was found to be in violation of the Fourth Amendment's prohibition against unreasonable searches. *Id.* at 555. Some evidence obtained by the officer after entering the apartment was suppressed, but the district court did not suppress the defendant's identity. The Eighth Circuit found that the officer still had probable cause to arrest defendant and therefore identity information obtained post-arrest was not tainted by the illegal entry into defendant's

confirm any such information about Perez. The fact that Perez appeared at the scene where an search warrant was being executed did not give law enforcement probable cause to arrest him on drug charges, nor on a charge of illegal re-entry. Law enforcement did not have probable cause to arrest defendant, and his arrest was an illegal seizure in violation of the Fourth Amendment.

2. Whether Identity Evidence Should Be Suppressed

The government asserts that even if a defendant's arrest is found unlawful, his identity cannot be suppressed. The government relies on *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1989), *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir.) *cert. denied*, 513 U.S. 975 (1994), and *United States v. Roque-Villanueva*, 175 F.3d 345 (5th Cir. 1996) in support of its position. While all of these cases are relevant to the issue, the Supreme Court opinion has been fully analyzed in a different fashion by the Eighth Circuit in *United States v. Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001) and its analysis, not that of *Guzman-Bruno* or *Roque-Villanueva*, provides the controlling law in this case.

Guevara-Martinez was stopped in his car, and officers found methamphetamine. *Id.* at 752. He was arrested for the drug violation, and transported to jail. *Id.* An INS agent was then called to interview Guevera-Martinez, who admitted he was an illegal alien but gave a false name. The record showed that his fingerprints were taken without his consent and from his fingerprint information, INS was able to determine who Guevera-Martinez was and that he had been previously deported. *Id.* After this time the defendant was indicted on the drug charge, but it was later dismissed as the district court determined that the traffic stop was illegal. *Id.* After this charge was dropped, defendant was indicted a second time for being an illegal alien found in

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residence. *Id.* at 556 (citing *New York v. Harris*, 495 U.S. 14, 18-19 (1990)).

the United States after deportation under section 1326. *Id.* The defendant challenged the admissibility of fingerprint evidence and the admissibility of statements he made. The district court suppressed that evidence. *Id.* at 752-53. On interlocutory appeal, the government challenged the district court's ruling only with respect to the suppression of the fingerprint evidence. *Id.* at 753.

The Eighth Circuit concluded that the district court's decision to suppress fingerprint evidence obtained after the unlawful traffic stop was correct. *Guevara-Martinez*, 262 F.3d at 756-57. The panel analyzed the Supreme Court's decision in *Lopez-Mendoza*, 468 U.S. 1032 (1984), where the Court reviewed two civil deportation cases following unlawful arrests. The *Guevara-Martinez* Court found that the Supreme Court made a very important distinction in *Lopez-Mendoza*: that for jurisdictional purposes, evidence relating to a defendant's identity may not be suppressed; but, for evidentiary purposes, such identity evidence may be suppressed. *Guevara-Martinez*, 262 F.3d at 753 (citing *Lopez-Mendoza*, 468 U.S. at 1039-41). The *Guevara-Martinez* Court found that two circuit courts have misinterpreted *Lopez-Mendoza*. *Guevara-Martinez*, 262 F.3d at 753-54 (citing *Roque-Villanueva*, 175 F.3d at 346, and *Guzman-Bruno*, 27 F.3d at 421-22) (cases cited by the government in support of its position that the identification evidence in this case may not be suppressed). The Eighth Circuit clarified its position that "'*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.'" *Guevara-Martinez*, 262 F.3d at 754 (quoting *United States v. Mendoza-Carrillo*, 107 F.Supp. 2d 1098, 1106 (D.S.D. 2000)).

The Eighth Circuit found Guevara-Martinez's fingerprint evidence should be suppressed as: the officers exploited the unlawful detention in order to get the fingerprints without defendant's consent, *Guevara-Martinez*, 262 F.3d at 755-56; the fingerprints, obtained the day after the arrest on the drug charge, were obtained during the unlawful detention and not as part of a subsequent investigation, *id.* at 756; and the fingerprints did not happen as a part of a routine booking interview but rather after INS had conducted an interview with defendant. *Id.* The Court stated:

> Here, the authorities desired to gather the fingerprints, and were able to take advantage of the unlawful detention in order to get the fingerprints. Under these circumstances, we believe that suppressing the fingerprint evidence will achieve a deterrent effect.

Id. (distinguishing *United States v. Ortiz-Gonzalbo*, 946 F.Supp. 287, 289-90 (S.D.N.Y. 1996) where the court had refused to suppress fingerprint evidence in a section 1326 case as there was no evidence that law enforcement wanted to take fingerprints of the defendant who was originally arrested on second-degree murder charges).

In this case, as previously determined by the Court, Perez was arrested without probable cause. He was initially arrested on state drug charges that were later dropped. Thereafter, a separate state charge and the pending federal charge were brought against him. Just like in *Guevara-Martinez*, however, Agent Aponte was able to obtain Perez's fingerprints and related information the day after his illegal arrest as a part of the unlawful detention. The initial illegality was not purged, nor was the INS investigation and use of the fingerprint evidence sufficiently attenuated from the illegal arrest to direct an outcome different than that reached in

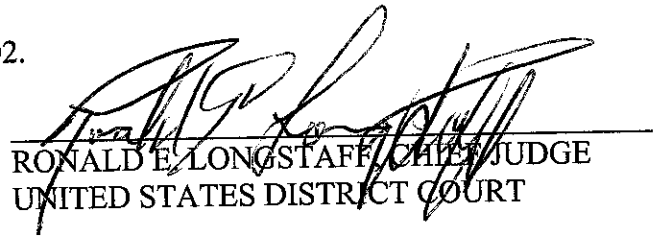
Guevara-Martinez.[15] That recent Eighth Circuit decision is the governing law.

III. CONCLUSION

For the above stated reasons, defendant's motion to dismiss is denied. Defendant's motion to suppress is granted insofar as he requests the exclusion of identification evidence that stemmed from fingerprinting following his illegal arrest.

IT IS SO ORDERED.

Dated this 21st day of August, 2002.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[15] The Eighth Circuit noted:

> As a final, separate matter, the government points out that a set of untainted fingerprints can be obtained in the civil deportation proceedings that Guevara-Martinez will inevitably face. Since Guevara-Martinez can be recharged using the new set of fingerprints, the government asks us to ignore its use of tainted evidence in this case. We decline to reverse the district court on this alternate ground. In *Davis*, the Supreme Court refused to affirm a conviction because the authorities there could have used a second set of prints that were validly obtained, stating that 'the important thing is that those administering the criminal law understand that they must [obtain the evidence the right way.]'

Guevara-Martinez, 262 F.3d at 756 (quoting *Davis v. Mississippi*, 394 U.S. 721, 726 n.4 (1969)). The Court anticipates the sentiments of this commentary to be equally applicable with respect to future conduct by the government in this case. *See also United States v. Rodriguez-Arreola*, 270 F.3d 611, 617-19 (8th Cir. 2001) (in *dicta* discussing *Guevara-Martinez* and stating that an order suppressing identification evidence does not bar present or future prosecutions under section 1326, so long as the government uses untainted identity evidence).

While agreeing law enforcement must be reminded to obtain evidence the right way, the Court finds the practical effect of its ruling will simply delay the prosecution of defendant as nothing now prevents the government from obtaining untainted fingerprint evidence. Regardless, this Court must follow the law of the Supreme Court as interpreted by the Eighth Circuit and it will do so.