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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. FRANK GALLARDO, Defendant.	MJ 15-33-GF-JTJ MEMORANDUM FOR COURT ON IDENTITY HEARING
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I. Introduction

The United States of America, represented by Ryan G. Weldon, Assistant United States Attorney for the District of Montana, provides the Court with a memorandum on the applicable law and facts for the identity hearing.

A federal grand jury from the District of South Dakota indicted Frank Gallardo on May 19, 2015. The indictment contains two charges of Abusive Sexual Contact, both of which occurred in March of 2015.

On October 16, 2015, law enforcement arrested Gallardo on the Blackfeet Indian Reservation. The United States Magistrate Court held an initial appearance two days later. At the initial appearance, Gallardo requested an identity hearing prior to his transfer to South Dakota.

II. Applicable Law and Evidence for the Hearing

Under the Federal Rules of Criminal Procedure, the Magistrate Court “must transfer the defendant to the district where the offense was allegedly committed if . . . the judge finds that the defendant is the same person named in the indictment, information, or warrant.” Fed. R. Crim. P. 5(c)(3)(D)(ii).¹

¹ While Gallardo is entitled to an identity hearing, he is not entitled to a preliminary hearing. A federal grand jury has issued an indictment for his offenses. *See* Fed. R. Crim. P. 5.1(a)(2) (explaining preliminary hearing is not available when a defendant has been indicted.).

When determining the identity of an individual, the proper standard of proof is “probable cause.” *See, e.g., United States v. Saldana-Beltran*, 37 F. Supp. 3d 1180, 1186 (S.D. Calf. 2014); *United States v. Antoine*, 796 F. Supp. 2d 417, 420 (E.D. N.Y. 2011) (reasoning it would be illogical to require only probable cause for a preliminary hearing but require higher standard for identity); *United States v. Rodriguez-Torres*, 2014 WL 2320081, *2 (S.D. N.Y. 2014) (unpublished).

Although other courts have used a higher standard in determining identity, those opinions used such standards without any analysis as to whether that standard was in fact proper. *See, e.g., United States v. Varnes*, 2010 WL 2035573, * 5 (D. Ariz. 2010) (unpublished) (using preponderance of evidence standard); *United States v. Teju*, 2013 WL 820828 (W.D. La. 2013) (unpublished) (using clear and convincing standard). A higher standard would not make sense given that a preliminary hearing requires probable cause, an indictment requires probable cause, and so too should proof of the identity of the individual. *See Saldana-Beltran*, 37 F. Supp. 3d at 1187.

Probable cause exists if “the law enforcement official, on the basis of the totality of the circumstances, has sufficient knowledge or reasonably trustworthy information to justify a person of reasonable caution in believing” that the defendant is the individual named in the warrant. *United States v. Gagnon*, 373

F.3d 230, 234 (2d Cir. 2004). Once the government has introduced reliable evidence of identity, the burden then shifts to the defendant. *Saldana-Beltran*, 37 F. Supp. 3d at 1187. Moreover, an identity of names is sufficient to create an inference of identity which the defendant must then rebut. *Smith v. United States*, 92 F.2d 460, 461 (9th Cir. 1937). While defendants might use other names, it is not necessary to include those aliases in an indictment. *See, e.g., United States v. Wilkerson*, 456 F.2d 57, 59 (6th Cir. 1972) (“We strongly disapprove the practice of including aliases in indictments.”)

A complaint is an accusation against a person, and not against a name, and when the name is unknown, the person may be identified with the best description available. Thus, a defendant may be indicted under a name which he or she is generally known and called, whether this is his or her true name or not, and this will provide the defendant with a constitutionally sufficient notice of the charges against him or her.

41 Am. Jur. 2d *Indictments and Informations* § 135.

When introducing evidence at an identity hearing, the Federal Rules of Evidence do not apply. *See* Fed. R. Evid. 1101(d)(3) (The federal rules “do not apply to . . . a preliminary examination in a criminal case.”). Hearsay evidence is therefore admissible in an identity hearing so long as it is reliable.

Saldana-Beltran, 37 F. Supp.3d at 1187. During the identity hearing, the defendant may not challenge whether the evidence used against him at the hearing was constitutionally obtained.

At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

Fed. R. Crim. P. 5.1(e).

At the hearing, the United States will call two FBI agents. FBI Special Agent Robert Bennett is the case agent from South Dakota, and he will testify via video. (Docs. 7 and 8). Agent Bennett will explain that Frank Gallardo uses the alias name of Frank Thunder Hawk. Agent Bennett will testify that Frank Gallardo and Frank Thunder Hawk are the same individual, with the same date of birth and social security number. More importantly, when law enforcement arrested Frank Gallardo, they took a photograph and sent it to Agent Bennett. Agent Bennett sent the photograph to the defendant's wife, and the defendant's wife confirmed that the individual in the photograph was the individual who committed the crimes in the indictment. In addition, Frank Gallardo provided a phone number to the arresting officers that matched the phone number Gallardo was known to use.

FBI Special Agent Mark Zahaczewsky will also testify. He will explain that he received a tip that Frank Gallardo was at a specific residence on the Blackfeet Indian Reservation. Among other things, Agent Zahaczewsky will

testify that they found Frank Gallardo hiding in a crawl space. Agent Zahaczewsky and others apprehended Gallardo and gave him the indictment and arrest warrant. Gallardo stated that this was because of the lies told by his wife. Gallardo then confirmed that he knew why he was being arrested. At no point did Gallardo claim that agents had the wrong individual. In fact, Gallardo provided Agent Zahaczewsky with a phone number that Gallardo was known to use.

Finally, the U.S. Marshal's Office will testify that the individual in their custody has the same fingerprints as Frank Gallardo, who was previously fingerprinted in 1996. While Gallardo might claim that his actual name is Frank Thunder Hawk, that argument is irrelevant. Frank Thunder Hawk is an alias name, and the grand jury indicts a person, not a name. A "defendant may be indicted under a name which he . . . is generally known and called, whether this is his or her true name or not." 41 Am. Jur. 2d *Indictments and Informations* § 135.

The defendant should be detained and transferred to South Dakota.

DATED this 21st day of October, 2015.

MICHAEL W. COTTER
United States Attorney

/s/ Ryan G. Weldon
RYAN G. WELDON
Assistant U.S. Attorney