CA NO. 10-50091

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. VICTOR MANUEL RIOS-BARRAZA, Defendant-Appellant.	DC NO. CR 08-289-AG

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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United States District Judge

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TABLE OF CONTENTS

PAGE

I. INTRODUCTION. 1

II. ARGUMENT. 1

A. Mr. Rios Was Denied His Right To an Independent Grand Jury. 1

1. The Grand Jury Instruction on Punishment Differed from the Model Instruction and Violated Mr. Rios's Right To an Independent Grand Jury. 1

2. Mr. Rios Preserved His Challenge to Three Additional Instructions. 5

3. Structural, Not Harmless, Error Analysis Applies. 6

4. Even if Harmless Error Analysis Applies, the Error Was Not Harmless. 9

B. The District Court Erred In Denying Mr. Rios's Motion To Suppress Evidence Obtained Pursuant to an Invalid Search Warrant. 10

1. The Search Warrant Is Overbroad. 11

2. The Search Warrant Lacks Particularity. 15

3. The Officers Cannot Rely on the Good Faith Exception. 18

C. The District Court Erred in Denying Mr. Rios's Motion to Suppress the October 16 and 20 Statements. 19

1. Mr. Rios Did Not Knowingly and Intelligently Waive His Right To Appeal the October 16th Statement. . . . 20

2. The October 16th and 20th Statements Must Be Suppressed Under the Holding of *Missouri v. Seibert*. 20

3. The October 20th Statement Also Must Be Suppressed Under the Holding of *Corley v. United States*. . . 25

TABLE OF CONTENTS

PAGE

a. The Prompt Presentment Rule Protects Defendants Such as Mr. Rios Who Are Arrested and Held Pending Federal Criminal Charges. 26

b. The Delay in Presenting Mr. Rios to a Judicial Officer Was Not Reasonable or Necessary. 31

III. CONCLUSION. 34

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

Ali v. Federal Bureau of Prisons,
552 U.S. 214 (2008). 29, 30

Armstrong v. Schwarzenegger,
__ F.3d __, 2010 WL 3465279 (9th Cir. Sept. 7, 2010).. 6

Bank of Nova Scotia v. United States,
487 U.S. 250 (1988). 7, 9

Byrd v. Lewis,
566 F.3d 855 (9th Cir. 2009). . . . .

Campbell v. Louisiana,
523 U.S. 392 (1998). 5

Center Art Galleries-Hawaii, Inc. v. United States,
875 F.2d 747 (9th Cir. 1989). 16

Corley v. United States,
__ U.S. __, 129 S. Ct. 1558 (2009).. . . . . *passim*

Gibson v. Ortiz,
387 F.3d 812 (9th Cir. 2004). 3

Hallstrom v. City of Garden City,
991 F.2d 1473 (9th Cir. 1993). 33

Harisiades v. Shaughnessy,
342 U.S. 580 (1952). 10

Horton v.California,
496 U.S. 128 (1990). 14

J.B. Manning Corp. v. United States,
86 F.3d 926 (9th Cir. 1996). 16

Mallory v. United States,
354 U.S. 449 (1957). 26, 27, 32, 33

McNabb v. United States,
318 U.S. 332 (1943). 27

Millender v. County of Los Angeles,
620 F.3d 1016 (9th Cir. 2010). 13, 17, 18

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

Missouri v. Seibert,
542 U.S. 600 (2004). . . . . *passim*

Oregon v. Elstad,
470 U.S. 298 (1985). 24

Raich v. Gonzales,
500 F.3d 850 (9th Cir. 2007). 6

Sullivan v. Louisiana,
508 U.S. 275 (1993). 8

Thompson v. Runnel,
__ F.3d __, 2010 WL 3489837 (9th Cir. Sept. 7, 2010). 24

United States v. Alvarez-Sanchez,
511 U.S. 350 (1994). 27, 29, 30

United States v. Alvarez-Sanchez,
975 F.2d 1396 (9th Cir. 1992). 33

United States v. Brobst,
558 F.3d 982 (9th Cir. 2009). 24

United States v. Bynum,
362 F.3d 574 (9th Cir. 2004). 20

United States v. Cabral,
1998 WL 1543567 (D. Mass. June 10, 1998). 28

United States v. Cardwell,
680 F.2d 75 (9th Cir. 1982). 16

United States v. Cepeda-Luna,
989 F.2d 353 (9th Cir. 1993). 28, 29

United States v. Clark,
31 F.3d 831 (9th Cir. 1994). 18

United States v. Cortez-Rivera,
454 F.3d 1038 (9th Cir. 2006). 1, 3, 4

United States v. Duque,
62 F.3d 1146 (9th Cir. 1995). 14, 15

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

United States v. Franco-Lopez,
312 F.3d 984 (9th Cir. 2002). 20

United States v. Garcia-Hernandez,
569 F.3d 1100 (9th Cir. 2009). 27

United States v. Garcia-Lopez,
309 F.3d 1121 (9th Cir. 2002). 20

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006). 7

United States v. Holzman,
871 F.2d 1496 (9th Cir. 1989). 14

United States v. Hove,
848 F.2d 137 (9th Cir. 1988). 18, 19

United States v. Juvenile Male,
595 F.3d 885 (9th Cir. 2010). 9

United States v. Laurienti,
611 F.3d 530 (9th Cir. 2010). 11

United States v. Leon,
468 U.S. 897 (1984). 18, 19

United States v. Liera,
585 F.3d 1237 (9th Cir. 2009). 27, 31

United States v. Luong,
470 F.3d 898 (9th Cir. 2006). 18

United States v. Marcucci,
299 F.3d 1156 (9th Cir. 2002). . . . . *passim*

United States v. Mechanik,
475 U.S. 66 (1986). 7, 8

United States v. Melendez,
55 F. Supp. 2d 104 (D.P.R. 1999).. 28

United States v. Navarro,
608 F.3d 529 (9th Cir. 2010). 7, 8, 9

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

United States v. Navarro-Vargas,
408 F.3d 1184 (9th Cir. 2005). . . . . *passim*

United States v. Okuda,
675 F. Supp. 1552 (D. Haw. 1987). 29

United States v. Orbino,
981 F.2d 1035 (9th Cir. 1992). 29

United States v. Osunde,
638 F. Supp. 171 (N.D. Cal. 1986). 28

United States v. Pallares-Galan,
359 F.3d 1088 (9th Cir. 2004). 12

United States v. Percival,
756 F.2d 600 (7th Cir. 1985). 15

United States v. Pineda-Doval,
614 F.3d 1019 (9th Cir. 2010). 12

United States v. Pinto-Roman,
337 F. Supp. 2d 781 (E.D. Va. 2004). 29

United States v. Ramirez,
696 F. Supp. 2d 246 (E.D.N.Y. 2010). 29, 32

United States v. Redlightning,
__ F.3d __, 2010 WL 4158583 (9th Cir. Oct. 25, 2010). 27, 33

United States v. Reivich,
793 F.2d 957 (8th Cir. 1986). 15

United States v. Restrepo,
59 F. Supp. 2d 133 (D. Mass. 1999). 29

United States v. San Juan-Cruz,
314 F.3d 384 (9th Cir. 2002). 22, 23

United States v. Sotoj-Lopez,
603 F.2d 789 (9th Cir. 1979). 27, 28

United States v. Spilotro,
800 F.2d 959 (9th Cir. 1986). 16, 19

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

United States v. Superville,
40 F. Supp. 2d 672 (D.V.I. 1999). 28

United States v. Terry,
911 F.2d 272 (9th Cir. 1990). 13

United States v. Valente,
155 F. Supp. 577 (D. Mass. 1957). 28

United States v. Vasquez,
30 F. Supp. 2d 1364 (M.D. Fla. 1998). 28

United States v. Williams,
435 F.3d 1148 (9th Cir. 2006). 21, 24

United States v. Wilson,
838 F.2d 1081 (9th Cir. 1988). 33

Vasquez v. Hillery,
474 U.S. 254 (1986). 5, 7

FEDERAL STATUTES

8 U.S.C. § 1357. 30

18 U.S.C. § 922. . . . . 1, 27, 31

18 U.S.C. § 3501. . . . . 25, 26, 33

Fed. R. Crim. P. 5. . . . . *passim*

MISCELLANEOUS

Webster's Third Int'l Dictionary (1986). 4

I. INTRODUCTION

Mr. Rios pled guilty to being an illegal alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5), pursuant to a conditional plea agreement preserving his right to appeal the denial of pretrial motions to dismiss his indictment due to flawed grand jury instructions, to suppress evidence found during the search of his home based on an invalid warrant, and to suppress statements he made that violated his rights under *Missouri v. Seibert*, 542 U.S. 600 (2004) (plurality), and *Corley v. United States*, __ U.S. __, 129 S. Ct. 1558, 1562 (2009).

II. ARGUMENT

A. Mr. Rios Was Denied His Right To an Independent Grand Jury

1. The Grand Jury Instruction on Punishment Differed from the Model Instruction and Violated Mr. Rios's Right To an Independent Grand Jury

In his opening brief, Mr. Rios argued that the grand jury instructions, which differed in an important respect from the model instructions, violated his Fifth Amendment right to be indicted by a properly instructed grand jury and constituted an unlawful exercise of the district court's power to supervise the grand jury. (Appellant's Opening Br. ("AOB") 12-23.) Specifically, this Court has upheld the model grand jury instruction stating that "when deciding whether or not to indict, you *should not* consider punishment in the event of conviction," but only because it leaves room for the grand jury to exercise its independent authority to refuse to indict on the basis of punishment. *United States v. Cortez-Rivera*, 454 F.3d 1038, 1040 (9th Cir. 2006) (emphasis added). However, in Mr. Rios's case,

the grand jury was misinstructed that "when deciding whether or not to indict, you *cannot* consider punishment in the event of conviction." (ER 247 (emphasis added).) This instruction removed from the grand jury its crucial ability to refuse to indict even where probable cause exists. The Government has two responses.

First, the Government cites to several other instructions the district court read that discuss the grand jury's independence generally. (Govt. Answering Br. ("GAB") 21-22, 24-25.) According to the Government, this Court upheld grand jury instructions in *United States v. Marcucci* and *United States v. Navarro-Vargas* because the grand juries in those cases were informed of their independence. (GAB 20-21.) The Government misreads these cases and makes too much of the general instructions on independence.

In both *Marcucci* and *Navarro-Vargas*, this Court upheld model instructions that specifically left room for the grand jury to refuse to indict. *United States v. Navarro-Vargas*, 408 F.3d 1184, 1205 (9th Cir. 2005) (en banc); *United States v. Marcucci*, 299 F.3d 1156, 1159, 1164 (9th Cir. 2002) (per curiam). It was in that context that this Court held the instructions, which included statements of the grand jury's independence, sufficiently informed the jurors of their ability to refuse to indict. In Mr. Rios's case, by contrast, the instructions did not follow the model and *precluded* the jurors from refusing to indict on the basis of punishment. *Marcucci* and *Navarro-Vargas* nowhere hold that such an instruction is cured by general language about a grand jury's independence.

It is not enough to inform a grand jury that it is an independent body if the jurors are then informed more specifically that they may not refuse to indict based on punishment. As with all jury instructions, "a contrary general instruction does

not automatically cure a deficient specific instruction." *Gibson v. Ortiz*, 387 F.3d 812, 823 (9th Cir. 2004), *overruled on other grounds by Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009). The specific instruction precluding Mr. Rios's grand jury from considering punishment was not cured by abstract references to the grand jury's independence.[1]

Second, the Government contends the variation in wording between the model charge and the charge given to Mr. Rios's grand jury is of little consequence. (GAB 22-24.) This argument ignores the clear holdings in *Marcucci*, *Navarro-Vargas*, and *Cortez-Rivera* that highlight the important distinction between "should" on the one hand and "shall" or "cannot" on the other. In *Marcucci*, this Court explained that the distinction is not academic but instead crucial to assessing whether a grand jury instruction is constitutional:

> The charge, by telling the jury that it "should" rather than "shall" or "must" indict if it finds probable cause, leaves room—albeit limited room—for a grand jury to reject an indictment that, although supported by probable cause, is based on governmental passion, prejudice, or injustice. The difference between "should" and "shall" is not, as the dissent suggests, a lawyer's distinction, but a commonplace understanding; "shall" is used to "express what is mandatory," "should" to express "what is

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[1] The Government notes that the grand jury was aware the charges against Mr. Rios involved punishment. (GAB 24 n.2.) But that simply begs the question whether the grand jury believed it was empowered to reject the charges against him because of that punishment.

> probable or expected." *Webster's Third Int'l Dictionary* 2085, 2104 (1986). If a grand jury were to refuse to indict a defendant under those extreme circumstances of governmental overreaching, the charge to the grand jury would not be violated.

Marcucci, 299 F.3d at 1164. In *Navarro-Vargas*, this Court further explained,

> The language of the model charge does not state that the jury "must" or "shall" indict, but merely that it "should" indict if it finds probable cause. As a matter of pure semantics, it does not eliminate discretion on the part of the grand jurors, leaving room for the grand jury to dismiss even if it finds probable cause.

Navarro-Vargas, 408 F.3d at 1205 (internal quotation marks omitted).

In addressing the model charge on punishment at issue in this case, in *Cortez-Rivera*, this Court could not have been clearer: "The model instruction did not infringe upon the grand jury's independence because it used the term 'should' rather than 'shall,' giving the grand jury leeway to depart from the instruction. This leeway, albeit slight, is sufficient to immunize the instruction from constitutional infirmity." *Cortez-Rivera*, 454 F.3d at 1039. The Government's argument that the variation in language is of no import is unpersuasive in light of these precedents.

The Government correctly points out that this Court in *Navarro-Vargas* upheld a model instruction that employed the word "cannot," specifically, "You cannot judge the wisdom of the criminal laws enacted by Congress . . . ."

Navarro-Vargas, 408 F.3d at 1202. *Navarro-Vargas* explained, however, "that the weight of U.S. history favors instructing the grand jury to follow the law without judging its wisdom," *id.* at 1199, and thus "the instruction is not contrary to any long-standing historical practice surrounding the grand jury," *id.* at 1202; *see id.* at 1204 (upholding the model charge because "the grand jury's power to judge the wisdom of the laws is [not] so firmly established"). By contrast, the Supreme Court explicitly has recognized the historical power of a grand jury to consider punishment in deciding whether to issue an indictment. *See Campbell v. Louisiana*, 523 U.S. 392, 399 (1998); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). *Navarro-Vargas*'s holding on a different instruction in therefore inapposite.

2. Mr. Rios Preserved His Challenge to Three Additional Instructions

Mr. Rios also challenged three additional instructions in his opening brief—although he recognized that a prior en banc decision of this Court rejected the same challenges and explained he raised the issues to preserve them for further review. (AOB 17 n.6, 21-22.) The Government responds that Mr. Rios did not raise these challenges in district court. The Government is mistaken.

In district court, defense counsel specifically informed the district court that he was challenging not only the punishment instruction but the grand jury instructions as a whole:

> But I also would like to state for the record, for here and for appellate review and higher court review, should the court deny our motion, that we are

> raising—we are attacking the entire instruction.
>
> I specified this argument, and I raised this argument in detail, but for all the reasons cited in *Navarro-Vargas II*, en banc dissent by Judge Hawkins, we are also challenging the instruction here. It seems to have some flaws, telling the Grand Jury that it cannot consider the wisdom of the laws, telling the jury that—well, urging the jury to indict on finding probable cause. All this—these and other reasons, Your Honor, I just wanted that to be clear.

(ER 132.) Especially when coupled with counsel's citation to *Navarro-Vargas*, which addressed these three instructions, the district court was on notice of the nature of Mr. Rios's argument. The challenge to these three instructions was preserved.[2]

3. Structural, Not Harmless, Error Analysis Applies

Mr. Rios argued in the opening brief that the instructional errors are structural and require dismissal of the indictment. (AOB 23-24.) The Government responds that any errors are subject to harmless error analysis. (GAB 29-31.) The Government is mistaken; precedents from this Court and the Supreme Court demonstrate that such an error is structural.

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[2] Even if this Court were to find otherwise, this Court may consider an issue raised for the first time on appeal so long as "'the issue presented is a pure question of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court,' conditions which here obtain." *Armstrong v. Schwarzenegger*, __ F.3d __, 2010 WL 3465279, at *6 n.4 (9th Cir. Sept. 7, 2010) (quoting *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007)).

It is true that, "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). There exists, however, a limited class of grand jury errors that are so "fundamental" they "render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 256-57. One can identify such errors by the fact that "any inquiry into harmless error would . . . require[] unguided speculation." *Id*. at 257; *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (explaining that structural error is defined by "the difficulty of assessing" it); *Vasquez*, 474 U.S. at 264 (holding that racial discrimination in grand jury selection is structural error because "we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted").

By contrast, prejudice is required where a procedural error affects the grand jury's evaluation of evidence and can be quantified. In *Bank of Nova Scotia*, the Supreme Court required a showing of prejudice where prosecutorial misconduct impacted the grand jury's evaluation of evidence, an error the Court specifically characterized as "nonconstitutional." *Bank of Nova Scotia*, 487 U.S. at 256. In *United States v. Mechanik*, the Court similarly required prejudice where two witnesses were simultaneously sworn and questioned before the grand jury, in violation of a procedural rule that "protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty." *United States v. Mechanik*, 475 U.S. 66, 70 (1986). In *United States v. Navarro*, this Court followed *Bank of Nova Scotia* and *Mechanik* and required prejudice where a grand jury was misinstructed that the prosecutor was

bound to present exculpatory evidence to them. *United States v. Navarro*, 608 F.3d 529, 538-39 (9th Cir. 2010).

In each of these cases, the defect was in the grand jury's evaluation of the evidence. Such a defect could be cured by a subsequent verdict by a petit jury that the defendant is guilty beyond a reasonable doubt. This is because the petit jury necessarily finds that probable cause exists by reaching a guilty verdict upon a higher standard of proof. *See Mechanik*, 475 U.S. at 70; *Navarro*, 608 F.3d at 539-40. Thus, the impact of the error could be evaluated—the petit jury verdict demonstrates that it was harmless.

The error in Mr. Rios's case is different. His grand jury had a right to reject the indictment even in the presence of probable cause, but was stripped of that right by the erroneous instructions. There is no way to assess the potential prejudice of this error or to later compensate for it through a finding that Mr. Rios was in fact guilty of the charged crime. It is an error that is akin to a faulty "beyond a reasonable doubt" instruction, which "vitiate[s] *all* the [petit] jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

Although this Court has not directly addressed whether such error is structural or harmless, the five dissenting judges in *Navarro-Vargas* expressed their opinion that giving the instructions challenged by Mr. Rios amounts to structural error because any inquiry into their harmlessness requires "unguided speculation." *Navarro-Vargas*, 408 F.3d at 1216-17 (Hawkins, J., dissenting); *see also Marcucci*, 299 F.3d at 1172-73 (Hawkins, J., dissenting) (concluding grand

jury instruction removing jurors' power to refuse to indict is structural error).[3] That analysis is sound and should be adopted here.

4. Even if Harmless Error Analysis Applies, the Error Was Not Harmless

Even if prejudice is necessary for this Court to dismiss the indictment on the basis of the flawed grand jury instructions, that standard is met in this case.[4] Specifically, there exists "grave doubt that the decision to indict was free from such substantial influence." *Bank of Nova Scotia*, 487 U.S. at 263; *see Navarro*, 608 F.3d at 539.

As the Supreme Court recognized in *Bank of Nova Scotia*, where a grand jury's independence is infringed, "[s]uch an infringement may result in grave doubt as to a violation's effect on the grand jury's decision to indict." *Bank of Nova Scotia*, 487 U.S. at 259. And as this Court recognized in *Navarro-Vargas*, grand juries traditionally exercise their independence by refusing to indict in cases where the law at issue is unpopular politically. *Navarro-Vargas*, 608 F.3d at 1192-94; *see also Marcucci*, 299 F.3d at 1162.

Mr. Rios was charged with being an illegal alien in possession of a firearm. His punishment thus hinged on his unlawful status in this country, a politically

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[3] Because the majorities in *Navarro-Vargas* and *Marcucci* found no error, they did not consider whether any error was structural.

[4] As it is the Government's burden to demonstrate that any alleged error was harmless, *see United States v. Juvenile Male*, 595 F.3d 885, 904 (9th Cir. 2010) (per curiam), Mr. Rios was not required to allege prejudice in his opening brief. Moreover, the Government has wholly failed in its answering brief to explain why the error was harmless. (*See* GAB 29-31.) For that reason alone, Mr. Rios is entitled to relief.

volatile issue. Moreover, his punishment for this offense would not simply be jail time but also deportation to Mexico. "Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while." *Harisiades v. Shaughnessy*, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).

A properly instructed jury, aware that it could refuse to indict based on its disagreement with this harsh punishment, might have learned that Mr. Rios has lived in this country his entire life; has a United States citizen wife; has two United States citizen children to whom he is a dedicated and loving father; had no prior adult felony convictions; was raised in an economically disadvantaged home; lived in a dangerous area where he felt the need to protect his family; and absent this conviction, had a path toward lawful residence and citizenship through his citizen wife, but with the conviction is subject to deportation for life and permanent separation from his family. (ER 185.) A properly instructed grand jury may well have exercised its independence to refuse to indict, or to indict on a lesser charge that would not inevitably lead to deportation. At the very least, there is grave doubt as to what such a jury might have done.

B. The District Court Erred In Denying Mr. Rios's Motion To Suppress Evidence Obtained Pursuant to an Invalid Search Warrant

On October 16, 2008, seven law enforcement officers broke down the door to Mr. Rios's home and conducted a search. During the search, they discovered a firearm and ammunition. Mr. Rios argued in his opening brief that the warrant authorizing the search was overbroad because: (1) it authorized the search of *any* vehicles in any way "connected" to Mr. Rios's residence or to anyone located at that residence without establishing probable cause that contraband would be found

in a vehicle; (2) it authorized the search of *any* firearms at Mr. Rios's residence or under control of the residents, without establishing probable cause to believe any firearms might be contraband; and (3) it authorized a search for evidence of gang membership or affiliation without establishing probable cause to believe Mr. Rios's purported gang ties were evidence of any crime. (AOB 30-38.) Mr. Rios further argued that the search warrant was not sufficiently particular because: (1) it authorized the search of *any* vehicles "connected" to Mr. Rios's residence or "connected" to anyone at the residence without defining what "connected" means; (2) it authorized a search for "any" firearms at Mr. Rios's residence or under control of the residents, even though firearms are not by their nature contraband and law enforcement had specific information that Mr. Rios used only a blue-steel handgun; and (3) it authorized a search for visual evidence of "any criminal activity," which is the epitome of a general search. (AOB 26-30.)

1. The Search Warrant Is Overbroad

The Government claims Mr. Rios waived his overbreadth argument with respect to the issues of firearms and gang evidence by failing to raise them in district court.[5] But Mr. Rios's motion to suppress did discuss the lack of probable cause to believe Mr. Rios possessed a gun in his car or committed gang-related crimes, or that anyone else at Mr. Rios's residence possessed a gun that was associated with crime. (SER 2-3.) Moreover, an alternative argument on appeal

[5] Although the Government uses the term "waived" (GAB 33), if this Court were to find that Mr. Rios did not preserve the issues for review, that would not mean he waived them, but rather unintentionally forfeited them. Whereas this Court does not consider issues waived by a party, it does address those forfeited, albeit under the plain error standard of review. *See United States v. Laurienti*, 611 F.3d 530, 543 (9th Cir. 2010).

in support of Mr. Rios's overbreadth claim, repeatedly raised in district court, does not subject that claim to plain error review. *See United States v. Pallares-Galan*, 359 F.3d 1088, 1094-95 (9th Cir. 2004). Finally, even assuming (without conceding) that Mr. Rios did not sufficiently raise these issues in district court, where the question is purely legal as it is here, an objection in district court is not required to invoke this Court's review. *See United States v. Pineda-Doval*, 614 F.3d 1019, 1025 n.2 (9th Cir. 2010).

Turning to the substance of the claims, the Government argues it was reasonable to search for firearms "because the officers received information from the CIs and from their own surveillance that defendant was selling drugs and that he was carrying a gun while doing so." (GAB 34.) This is not an accurate characterization of the facts. In the warrant affidavit, Detective Barnes writes that a confidential informant stated she or he had purchased drugs from Mr. Rios at some unspecified point in the past and separately that she or he had seen him in possession of a handgun while at his own home; a second confidential informant stated that she or he had seen Mr. Rios with a blue-steel handgun in the last month; a third confidential informant stated that in the past two weeks, she or he had observed a man fitting Mr. Rios's description involved in street-level narcotics sales, and that separately she or he had seen this man with a blue-steel semi-automatic handgun; and Detective Barnes's own surveillance had indicated that Mr. Rios was conducting hand-to-hand drug sales. (ER 230-32.) There is absolutely no evidence in the affidavit that Mr. Rios carried a firearm while engaged narcotics sales or any other criminal activity. Possession of a firearm, on its own, is not unlawful.

Even assuming officers had probable cause to search for the blue-steel handgun, this Court sitting en banc recently held in *Millender v. County of Los Angeles* that a search warrant is overbroad if it authorizes a search for more firearms than the one for which probable cause exists. *See Millender v. County of Los Angeles*, 620 F.3d 1016, 1025-30 (9th Cir. 2010) (en banc). Although discussed at length in Mr. Rios's opening brief (AOB 36-37), the Government offers no reasons for distinguishing *Millender*.

As to gang membership, the Government argues that it was reasonable for officers to search for gang evidence because they knew Mr. Rios was a gang member. (GAB 34.) But "[m]erely being a gang member or having gang ties is not a crime in California." *Millender*, 620 F.3d at 1031. Again, Mr. Rios cited *Millender*, which recently held that a warrant affidavit must establish some link between gang evidence and a crime, or a warrant authorizing a search for that evidence is not supported by probable cause. *See id.* at 1030-31. (AOB 38.) And again, the Government wholly fails to distinguish this recent precedent that is directly on point.

As to the language permitting a vehicle search, the Government responds that there was probable cause to believe that Mr. Rios was selling drugs. (GAB 37.) Although the Government is correct that this Court's precedent permits an inference that narcotics evidence will be found in a dealer's home, *see United States v. Terry*, 911 F.2d 272, 275 (9th Cir. 1990), such an inference does not automatically extend to automobiles.

The Government argues that a magistrate judge may rely on an officer's experience in assessing a warrant. (GAB 38.) That may be true, but Detective

Barnes's statement that drug dealers "frequently have [drugs] in their immediate possession; or in a place under their dominion and control" (ER 232) does not support a vehicle search because there was no evidence presented in the warrant affidavit that Mr. Rios owned or had access to a car, or that any cars were in any way "connected" to his residence. The Government suggests that Detective Barnes had previously seen Mr. Rios driving a Honda (GAB 5, 7, 39), but this fact was not included in the warrant application and is not properly considered in the analysis because a reviewing court may not look beyond the "four corners" of the affidavit for facts establishing probable cause. *See United States v. Holzman*, 871 F.2d 1496, 1510 (9th Cir. 1989), *overruled on other grounds by Horton v. California*, 496 U.S. 128 (1990).[6]

The Government cites to *United States v. Duque*, 62 F.3d 1146 (9th Cir. 1995), for the proposition that officers may search vehicles owned or controlled by the owner of, and found on, the premises searched. (GAB 38-39.) As Mr. Rios explained in his opening brief (AOB 35), *Duque* is distinguishable because in that case the defendant's unlawful conduct was directly linked to the use of a vehicle, whereas in Mr. Rios's case there was no evidence that he was ever seen selling or transporting drugs from or with any vehicle.

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[6] The Government does not purport to rely on Detective Barnes's conclusory statement that "in my experience . . . the items sought will likely be found in any of the locations or vehicles to be searched or on the persons of any suspect to be searched pursuant to this warrant" (ER 234), and for good reason. This statement is too general to provide a magistrate with sufficient information to support a vehicle search in this case. The catch-all statement is not the sort of specific officer experience that a magistrate properly may rely on—otherwise, every warrant could include such conclusory language to support a search for any evidence in any location.

Even assuming *Duque* is apposite, the warrant here was overbroad because it allowed not only the search of a vehicle on the premises, or owned or controlled by the owner of the premises, but of *any* vehicle in any way "connected" to *any* persons found at the premises. *United States v. Reivich*, an out-of-district case cited by the Government in support of its argument, specifically explains that under the logic employed in *Duque* a search of "the vehicle of a guest or other caller" is not properly authorized by a search of the premises. *United States v. Reivich*, 793 F.2d 957, 963 (8th Cir. 1986); *see also United States v. Percival*, 756 F.2d 600, 612 (7th Cir. 1985) (approving of case holding that "search of mobile home does not justify search of car parked nearby when car is in common tenant parking lot not annexed to the home or within general enclosure surrounding the home").

2. The Search Warrant Lacks Particularity

Regarding particularity, the Government similarly argues that Mr. Rios's claims with respect to firearms and the language about "any criminal activity" are waived. (GAB 41-42.) As with Mr. Rios's overbreadth challenge, he specifically argued in district court that the warrant was not sufficiently particular and thus was invalid. (SER 3.) For the reasons previously discussed, this Court should review these claims.

As to the broad language authorizing a search for any firearms at the residence or controlled by any of the residents, the Government suggests that it was not problematic because the officers did, in fact, seize only the blue-steel firearm. But the question of particularity is a prospective one—whether the warrant sets forth objective standards for officers to apply. This is because the

particularity requirement is not only concerned with the officers' ability to carry out the search, but also with the magistrate's ability to determine whether probable cause exists for each item and location listed in the warrant. *See United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986) (explaining that the particularity requirement "ensures that *the magistrate issuing the warrant* is fully apprised of the scope of the search and can thus accurately determine whether the entire search is supported by probable cause" (emphasis added)). That the officers happened to find only the blue-steel handgun does not mean that the warrant provided sufficient guidance for the officers had they recovered another firearm at the residence. *See id.* at 965 (finding warrant insufficiently particular where officers "knew exactly what [they] needed and wanted" (internal quotation marks omitted)).

The Government fails to offer any argument in support of the language authorizing a general search for visual evidence *of any crime at all*, and fails to respond to Mr. Rios's citation to *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982), *United States v. Spilotro*, and *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989), *superseded by statute as stated in J.B. Manning Corp. v. United States*, 86 F.3d 926 (9th Cir. 1996), which control. In *Cardwell*, this Court held that a warrant authorizing a general search for any evidence of even a specific statutory crime is not sufficiently particular. *See Cardwell*, 680 F.2d at 78. In *Spilotro*, this Court rejected a warrant permitting a search for evidence of thirteen broadly worded statutes. *See Spilotro*, 800 F.2d at 965. In *Center Art*, this Court held that a warrant could not permit a search for items that were evidence of federal criminal violations generally. *See Center Art*

Galleries-Hawaii, Inc., 875 F.2d at 750. Under this precedent, a warrant authorizing a general search for any visual evidence of any crime whatsoever is by definition invalid.

Regarding the lack of particularity in authorizing a search for any vehicle in any way "connected" to the residence or to anyone found at the residence, the Government again argues that the officers' search of only the vehicle parked in the carport of the residence *post hoc* demonstrates that the language of the warrant was sufficiently particular. (GAB 43-44.) But the warrant authorized a broader search than this, and a reasonable officer certainly could have believed he had authority to search a vehicle parked across the street that was driven to the residence by an overnight guest, for example. The warrant therefore lacked particularity.

Finally, the Government argues that any deficiency in the particularity of the warrant requires suppression only of evidence outside the scope of the warrant. (GAB 44-45.) But that is not the case where, as here, the invalid portions of the warrant are so extensive that the officers' reliance on the warrant is unreasonable. *See Millender*, 620 F.3d at 1034 n.9.

Even if severance is appropriate, the defective language regarding the firearm merits suppression of the firearm and ammunition, and the defective language regarding vehicles separately supports suppression of the firearm, which was found in a car. There is no evidence in the record that the carport located below the apartment complex was in some way specifically attached to Mr. Rios's unit, and nothing in the affidavit indicated that the Honda in the carport was directly linked to the residence or Mr. Rios. To the extent the record is unclear, a

remand to the district court to ascertain what evidence need be suppressed is appropriate. *See United States v. Clark*, 31 F.3d 831, 836 (9th Cir. 1994).

3. The Officers Cannot Rely on the Good Faith Exception

Finally, the Government responds that even if the warrant is invalid, the district court properly denied Mr. Rios's motion to suppress because the officers relied on the warrant in good faith. (GAB 45-46.) In *United States v. Leon*, the Supreme Court set forth a good faith exception to the exclusionary rule that applies when officers obtain evidence "in objectively reasonable reliance on a subsequently invalidated search warrant." *United States v. Leon*, 468 U.S. 897, 922 (1984). However, the Supreme Court explained that an officer would not manifest "objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 923 (internal quotation marks omitted). Because this test is objective, the good faith exception "does not extend . . . to allow the consideration of facts known only to an officer and not presented to a magistrate." *United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988).

Here, the officers could not objectively rely on the warrant in good faith. "*Leon* clearly and unequivocally states that when the affidavit itself is entirely lacking in indicia of probable cause, it cannot be said that the officer[s] acted in good faith in relying on a warrant that issues." *United States v. Luong*, 470 F.3d 898, 904 (9th Cir. 2006). On its face, the warrant mentioned only a blue-steel handgun and did not indicate it was ever used in the commission of a crime, or that Mr. Rios was an illegal alien or felon, which would make his possession of a firearm illegal. *See Millender*, 620 F.3d at 1030 ("[H]ere we are unable to identify

any basis, let alone a 'substantial basis,' *see Leon*, 468 U.S. at 915, for probable cause to search and seize the broad category of firearm and firearm-related materials set forth in the warrant."); *see also id.* at 1033 (rejecting good faith argument where the warrant and affidavit did not "establish[] probable cause that the broad categories of firearms, [and] firearm-related material . . . were contraband or evidence of a crime"). On its face, the warrant did not indicate Mr. Rios participated in any gang-related crimes. *See id.* at 1033 (rejecting good faith argument in "the absence of any evidence that the crime at issue was gang-related"). On its face, the warrant gave no reasonable officer a reason to believe that contraband would be found in any vehicles, particularly any vehicles that happened to be "connected" to any persons found on the premises. *See Hove*, 848 F.2d at 139 (rejecting good faith argument because "the affidavit submitted to obtain the warrant did not explain the significance or relevance of searching" a particular location). And, perhaps most obviously, on its face the warrant authorized a general search for visual evidence of *any crime at all*. *See Spilotro*, 800 F.2d at 968 (rejecting good faith argument "where the warrant authorized a search for evidence of violation of thirteen broad criminal statutes").

C. The District Court Erred in Denying Mr. Rios's Motion to Suppress the October 16 and 20 Statements

In his opening brief, Mr. Rios argued that the district court erred when it denied in part his motion to suppress statements made to law enforcement in violation of his Fifth Amendment and statutory rights. (AOB 39-51.) Specifically, Mr. Rios challenges a *Mirandized* statement made to Detective Barnes on October 16, after Barnes already had elicited several un-*Mirandized*

confessions, and a statement made on October 20, also subsequent to the unwarned confessions and after an unreasonable and unnecessary delay in presenting him to a federal magistrate.

1. Mr. Rios Did Not Knowingly and Intelligently Waive His Right To Appeal the October 16th Statement

The Government argues that Mr. Rios waived his right to challenge the October 16 statement because the plea agreement lists only the October 20 statement. (GAB 47-49.) A waiver of appeal rights must be knowing and voluntary. *See United States v. Garcia-Lopez*, 309 F.3d 1121, 1122 (9th Cir. 2002). Moreover, "[i]n construing the agreement, [this Court] must determine what [Mr. Rios] reasonably believed to be the terms of the plea agreement at the time of the plea." *United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir. 2002).

Mr. Rios gave separate full confessions on October 16 and October 20. Thus, an agreement that preserved his right to appeal the October 20 statement while waiving his right to appeal the October 16 statement would be of little, if any, value to him. Any purported waiver could not have been knowing and voluntary and is invalid. To the extent there is ambiguity, that is construed in Mr. Rios's favor. *See United States v. Bynum*, 362 F.3d 574, 583 (9th Cir. 2004).

2. The October 16th and 20th Statements Must Be Suppressed Under the Holding of *Missouri v. Seibert*

The Supreme Court's holding in *Missouri v. Seibert*, 542 U.S. 600 (2004) (plurality), as interpreted by this Court, requires that "a trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where

the midstream *Miranda* warning—in light of the objective facts and circumstances—did not effectively apprise the suspect of his rights." *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006). There is no dispute that Mr. Rios was interrogated without *Miranda* warnings twice at his house on the morning of his arrest, and then later at the La Habra police station that same day, October 16. In district court, everyone agreed that those prewarning statements should be suppressed. (ER 8-9, 124-25.) Mr. Rios's challenges to his post-*Miranda* statement that immediately followed on October 16, and his *Mirandized* statement on October 20, as violations of his Fifth Amendment rights under *Seibert*, were denied. (ER 125.) Mr. Rios appealed. (AOB 39-45.)

The Government's attempts to distinguish this case from *Seibert* are unpersuasive. First, regarding the October 16 statement, the Government argues that the objective factors do not support a *Seibert* violation because "the statements were made after a car ride from defendant's residence to the police station, after booking, and in a different setting," apparently comparing the prewarning statements at Mr. Rios's house to the postwarning statements at the station. (GAB 49.) The Government further argues that, "Even if the Court were to consider defendant's statements in comparison to his pre-*Miranda* statements made shortly before the interview during booking"—without any explanation how this Court could *not* consider those statements in the analysis—there is no *Seibert* violation because the earlier statements "were very limited in nature and barely overlapped with the content of the subsequent *Mirandized* interview." (*Id.*)

As an initial matter, the Government's attempt to compartmentalize the various prewarning interrogations is misguided. All of the prewarning statements

must be considered together in the analysis. Even when considered independently, the statements at Mr. Rios's house and the post-*Miranda* questioning at the police station were all conducted by Detective Barnes and occurred the same morning. There was no break in Mr. Rios's custody between the two—he was taken by officers directly from his home to the station. The pre-*Miranda* questioning at the station also was conducted by Detective Barnes and flowed directly into the postwarning questioning—neither Detective Barnes nor Mr. Rios left the room or took any break between the two phases. Perhaps most important, the content of all of the statements overlapped because in each Mr. Rios was asked to incriminate himself with respect to the firearm and ammunition found during the search, or his unlawful status, or both. By the time *Miranda* warnings were given, Detective Barnes had a complete confession to the charge of being an illegal alien in possession of a firearm, several times over. Indeed, Detective Barnes referred back to Mr. Rios's earlier confessions multiple times during the post-*Miranda* interrogation. (ER 225.)

Second, regarding the October 20 statement, the Government argues that there was no deliberate two-step process because the statement came four days after the prewarning interrogation on October 16, and was conducted by a different law enforcement officer (ICE Agent Monzon) at a different location (Santa Ana County Jail). (GAB 53.)

Although a few days elapsed between the pre-*Miranda* statements and the October 20 confession, "this issue is not dispositive" in analyzing whether the October 20 warnings sufficiently informed Mr. Rios of his rights. *United States v. San Juan-Cruz*, 314 F.3d 384, 389 (9th Cir. 2002). "More important than the

timing of the Government's warnings is whether the substance, content, and clarity of the warnings conveyed to [defendant] his rights under *Miranda*." *Id*. And although the October 20 questioning was conducted by Agent Monzon at a new facility, from Mr. Rios's perspective there was continuity because he was taken by Agent Monzon straight from the La Habra police department, where he had been held for several days, without any break in custody.

The Government further errs in arguing that *Agent Monzon* did not employ a deliberate two-step process. (GAB 53.) Of course he did not—Agent Monzon did not enter the case until after Mr. Rios's un-*Mirandized* confessions. But the question is whether Detective Barnes, the officer who interrogated Mr. Rios multiple times without *Miranda* warnings before eventually extracting a *Mirandized* confession, did so deliberately. Agent Monzon's actions are relevant only so far as he took no steps to clarify for Mr. Rios that his earlier prewarning statements could not be used against him. Were Agent Monzon's intent the relevant question on deliberateness, a *Seibert* violation would never occur where one officer violates a defendant's rights and then turns him over to another officer for *Mirandized* questioning.

The Government attempts to contrast *Seibert*, suggesting the questioning of Mr. Rios prior to his October 20 statement was not exhaustive and that he was not reminded of his earlier inculpatory statements. (GAB 51.) Again, officers obtained a complete and detailed confession from Mr. Rios several times over prior to the October 20 questioning. Although the record is silent as to whether Agent Monzon specifically referenced Mr. Rios's earlier confessions during the October 20 questioning, there is no evidence that he took steps to cure the earlier

violation by advising Mr. Rios that his unwarned statements would not be admissible. *See Williams*, 435 F.3d at 1160 ("Notably, both the plurality and Justice Kennedy found significant that in giving Seibert her *Miranda* warning, the police did not advise that her prior statement could not be used." (internal quotation marks omitted)). In light of Mr. Rios's prior confessions and the lack of any curative statement by Agent Monzon, the October 20 *Miranda* warnings failed to adequately apprise Mr. Rios of his rights. *See Thompson v. Runnel*, __ F.3d __, 2010 WL 3489837, at *7 (9th Cir. 2010) ("The failure of law enforcement to take any curative measures may be dispositive of the inquiry into the effectiveness of delayed warnings.").

Finally, even if the Government is correct that *Oregon v. Elstad*, 470 U.S. 298 (1985), not *Seibert*, applies (GAB 53), here the Government conceded and the district court found that Mr. Rios's prewarning statements were not admissible. Unless the taint of those involuntary confessions is dissipated, the later *Mirandized* statements must still be suppressed. *See Elstad*, 470 U.S. at 1293; *Williams*, 435 F.3d at 1152-54 & n.3, 1158, 1161.[7] For the reasons already discussed, the continuity of the custody, overlap in topics, and lack of any curative measures failed to dissipate the taint.

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[7] The officers' conduct during the search at Mr. Rios's home was far from exemplary. (ER 198-200.) Thus, even if a deliberate two-step tactic was not used, the questioning was coercive and improper. *See United States v. Brobst*, 558 F.3d 982, 998 (9th Cir. 2009).

3. The October 20th Statement Also Must Be Suppressed Under the Holding of *Corley v. United States*

Once a person has been arrested on a federal charge, law enforcement must promptly bring him before a neutral judicial officer who can advise him of his rights and determine whether to set bail. This requirement derives from the common law, the Supreme Court's supervisory power over federal courts, and statutory authority. *See* Fed. R. Crim. P. 5(a); *Corley v. United States*, __ U.S. __, 129 S. Ct. 1558, 1562 (2009).

18 U.S.C. § 3501 sets forth a safe harbor of six hours after arrest for law enforcement to question a defendant before presentment. Any voluntary statement made during this six hour period is admissible, but any statement made beyond the six-hour period and before presentment is inadmissible unless the delay was reasonable and necessary. 18 U.S.C. § 3501(c); *see Corley*, 129 S. Ct. at 1571.

Mr. Rios was arrested at his home on the morning of October 16, 2008, but he was not brought before a judicial officer until October 23, 2008, a full week later. In district court, Mr. Rios argued that his October 20 and 23 pre-presentment statements should be suppressed because of the unreasonable delay in presenting him to a magistrate. The district court granted his motion with respect to the latter statement, but denied it with respect to the former. (ER 125.) On appeal, Mr. Rios challenged the denial of the motion to suppress the October 20 statement. (AOB 47-51.)

The Government's response is twofold. First, because ICE Agent Monzon lodged an immigration detainer against Mr. Rios, the Government argues that there was no obligation to promptly present Mr. Rios to a judicial officer. (GAB

55-57.) This, despite the undisputed evidence that Mr. Rios was arrested on October 16 for a violation of federal criminal law (ER 223), and despite the Government's own acknowledgment that Mr. Rios was held pending federal criminal charges (GAB 9). Second, the Government's fallback position is that, even if section 3501(c) applies, it was reasonable to delay presentment while Agent Monzon conducted further investigation. (GAB 59.) Both arguments fail as a matter of the plain text of the relevant statutes and federal case law.

a. The Prompt Presentment Rule Protects Defendants Such as Mr. Rios Who Are Arrested and Held Pending Federal Criminal Charges

The plain language of the relevant statutes demonstrates that the triggering event for prompt presentment is an arrest by law enforcement for a violation of a federal criminal statute, not the decision by a prosecutor to file formal charges. Federal Rule of Criminal Procedure 5 states, "A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge . . . ." Fed. R. Crim. P. 5(a)(1)(A). Section 3501 starts the safe harbor clock once a person is "under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency." 18 U.S.C. § 3501(c). The prosecutor or the decision to bring formal charges is nowhere mentioned.

Federal cases considering the prompt presentment requirement also define the triggering event as the *arrest* of a suspect for a violation of federal criminal law and refer to law enforcement's—not the prosecutor's—obligation to present such person to a magistrate. In *Mallory v. United States*, the Supreme Court explained that "[t]he scheme for initiating a federal prosecution is plainly

defined." *Mallory v. United States*, 354 U.S. 449, 454 (1957). Once police arrest a suspect, "[t]he next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined." *Id.*; *see also Corley*, 129 S. Ct. at 1570 ("stating that the right to prompt presentment is "one of the most important protections against unlawful arrest" (internal quotation marks omitted)); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 358-59 (1994) (describing triggering event as arrest on a federal charge); *Mallory*, 354 U.S. at 455 (referring to the duty placed on "arresting officers" to promptly arraign); *McNabb v. United States*, 318 U.S. 332, 342 (1943) (referring to the obligation of officers to bring a defendant before a judicial officer upon his *arrest*); *United States v. Redlightning*, __ F.3d __, 2010 WL 4158583, at *10 (9th Cir. Oct. 25, 2010) ("The standard under the *McNabb-Mallory* rule requires, subject to the statutory safe harbor . . . , that there be no unreasonable delay in presenting a person accused of a crime before a neutral magistrate after his or her *arrest*." (emphasis added)); *United States v. Liera*, 585 F.3d 1237, 1240 & n.4 (9th Cir. 2009) (analyzing prompt presentment violation from time of arrest by immigration officers); *United States v. Garcia-Hernandez*, 569 F.3d 1100, 1105 (9th Cir. 2009) (same). There is no dispute that Mr. Rios was arrested on the morning of October 16 for a violation of 18 U.S.C. § 922(g)(5).

The Government carves out an exception to this clear rule for suspects arrested on criminal charges who are also detained under the immigration laws. Such an exception finds no support in the statutory text and has been rejected by this Court. In *United States v. Sotoj-Lopez*, the defendant was arrested by

immigration officers for both a civil immigration violation and a federal criminal offense, although no criminal charges had been brought. *See United States v. Sotoj-Lopez*, 603 F.2d 789, 790 (9th Cir. 1979) (per curiam). The Government argued that the prompt presentment "rule does not apply because a person who has been arrested and is being held in custody pending a determination of his deportability does not have the right to be brought promptly before a magistrate." *Id.* This Court held that there is nothing that

> purports to deprive an alien who is detained on a criminal charge, or against whom criminal charges are going to be lodged, in addition to any deportation proceedings that may be conducted against him, of his rights secured by Rule 5(a) of the Federal Rules of Criminal Procedure and the [prompt presentment] rule.

Id. at 790-91; *see also United States v. Melendez*, 55 F. Supp. 2d 104, 107 (D.P.R. 1999) (holding Rule 5(a) applicable where alien arrested for federal criminal violation); *United States v. Superville*, 40 F. Supp. 2d 672, 683-84 (D.V.I. 1999) (similar); *United States v. Cabral*, 1998 WL 1543567, at *8 (D. Mass. June 10, 1998) (unpub.) (same); *United States v. Osunde*, 638 F. Supp. 171, 176 (N.D. Cal. 1986) (same); *United States v. Valente*, 155 F. Supp. 577, 578-79 (D. Mass. 1957) (similar).

In an analogous context, federal courts have recognized that a defendant's speedy trial rights are triggered upon a federal criminal arrest even where he is simultaneously detained for civil immigration violations. *See, e.g.*, *United States v. Vasquez*, 30 F. Supp. 2d 1364, 1367 (M.D. Fla. 1998); *cf. United States v.*

Cepeda-Luna, 989 F.2d 353, 355-57 (9th Cir. 1993) (holding speedy trial clock not triggered by administrative detention where defendant not arrested on federal criminal charges); *United States v. Orbino*, 981 F.2d 1035, 1036-37 (9th Cir. 1992) (same); *United States v. Pinto-Roman*, 337 F. Supp. 2d 781, 784-85 (E.D. Va. 2004) (same).

Although it is Mr. Rios's position, uncontested by the Government, that Mr. Rios was arrested for a federal criminal violation on October 16, to the extent that this Court believes the immigration detainer subsequently placed on him alters the nature of his detention, suppression is still warranted. Where immigration detention is "used as a substitute for criminal arrest," a defendant's federal rights are triggered. *Cepeda-Luna*, 989 F.2d at 357; *see Alvarez-Sanchez*, 511 U.S. at 359. Here, Agent Monzon placed a detainer on Mr. Rios "pending federal firearm charges." (ER 63, 97.) "[U]se of the I.N.S. as a substitute for criminal arrest is improper." *United States v. Okuda*, 675 F. Supp. 1552, 1555 (D. Haw. 1987) (cited favorably by this Court in *Cepeda-Luna*, 989 F.2d at 357); *see United States v. Ramirez*, 696 F. Supp. 2d 246, 261 (E.D.N.Y. 2010) (finding Rule 5(a) violation where immigration officer "understood this to be an administrative charge" but "also testified that [the defendant's actions] may result in a criminal prosecution" (internal quotation marks omitted)); *cf. United States v. Restrepo*, 59 F. Supp. 2d 133, 137-38 (D. Mass. 1999) (applying *Cepeda-Luna* in speedy trial context).

In a footnote, the Government claims that "[t]he Supreme Court has also suggested that there can be no delay triggering section 3501(c) unless the federal criminal arrest is made by a *federal* officer," citing *Alvarez-Sanchez*, 511 U.S. at 357, and *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 n.4 (2008). (GAB 56

n.4.) This is a gross misreading of the relevant cases. In *Alvarez-Sanchez*, the Court held that state officers had no duty to bring a defendant before a federal magistrate while he was held on state charges. The Court explicitly recognized that state officers would be subject to the prompt presentment requirement if they arrested a suspect for a violation of federal law or alternatively if state officers colluded with federal officers in holding a suspect on state charges. *See Alvarez-Sanchez*, 511 U.S. at 358-59. To the extent *Ali* suggests otherwise, it construed a wholly different statute and that suggestion is both erroneous and dicta. The Supreme Court could not have been clearer in *Alvarez-Sanchez*: "If a person is arrested and held on a federal charge by 'any' law enforcement officer—federal, state, or local—that person is under 'arrest or other detention' for purposes of section 3501(c) and its 6-hour safe harbor period." *Alvarez-Sanchez*, 511 U.S. at 358.[8]

Detective Barnes arrested Mr. Rios at his home for a federal criminal violation, and Mr. Rios was detained pending federal criminal charges. Agent Monzon's subsequent decision to place an immigration detainer on Mr. Rios did not deprive him of his right to prompt presentment on the federal charge for which he was arrested.

Moreover, the district court, in suppressing Mr. Rios's October 23 confession under *Corley*, clearly found that officers had a duty to promptly present

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[8] Where an immigration officer arrests a suspected alien for a violation of federal criminal law, the officer is required by statute to promptly present the suspect to a federal judicial officer. *See* 8 U.S.C. § 1357(a)(4). In Mr. Rios's case, however, it was Detective Barnes, not Agent Monzon, who made the arrest, and thus this provision is not implicated.

Mr. Rios. Apparently, the court simply believed that the delay from October 16 to 20 was reasonable. (ER 125.) Given Detective Barnes's statement to Mr. Rios that he was being arrested for possessing a firearm (ER 55, 224), his statement on the booking form that he was arresting Mr. Rios for a violation of "18 U.S.C. § 922(g)(5)(A) . . . illegal immigrant in possession of a firearm" (ER 55-57, 223), and the evidence that Mr. Rios was detained pending federal criminal charges, the court's implicit finding that Mr. Rios was arrested and detained for a federal criminal violation is not clearly erroneous and must be upheld.

b. The Delay in Presenting Mr. Rios to a Judicial Officer Was Not Reasonable or Necessary

The Government argues that the delay between October 16 and 20 was reasonable because it was for the purpose of determining whether Mr. Rios should be charged. (GAB 58-59.) First, it is not reasonable or necessary to delay presentment in order to verify with prosecutors that they wish to press charges. As explained above, the relevant statutes and case law discuss a defendant's arrest, not the decision to file formal charges, as the triggering event for prompt presentment. The statutes refer to the duty of law enforcement officers, not prosecutors, to promptly present. As this Court has explained, "delay in presenting a defendant to a magistrate judge may be independently unreasonable regardless whether additional information is necessary for the government to determine whether to file criminal charges." *Liera*, 585 F.3d at 1243 n.6. Mr. Rios is unaware of any federal case that permits presentment delay—in this case, of a full week—so that law enforcement officers who have already arrested a defendant on federal charges may discuss with prosecutors whether they wish to

file formal charges. *See Ramirez*, 696 F. Supp. 2d at 261-62 (rejecting Government's argument that delay to allow immigration officer to determine whether suspect should be criminally charged is reasonable or necessary).

Second, in *Mallory*, the Supreme Court specifically rejected the argument that delay is reasonable to verify a confession given by a suspect who has already been arrested. As the Court explained,

> In every case where the police resort to interrogation of an arrested person and secure a confession, they may well claim, and quite sincerely, that they were merely trying to check on the information given by him. Against such a claim and the evil potentialities of the practice for which it is urged stands Rule 5(a) as a barrier. . . . Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

Mallory, 354 U.S. at 456.

Agent Monzon's desire to gather more evidence is the classic form of unreasonable delay. The Supreme Court has held that "delay for the purpose of interrogation is the epitome of unnecessary delay." *Corley*, 129 S. Ct. at 1563 (internal quotation marks omitted). Instead, "the only element bearing upon the reasonableness of delay was not such circumstances as the pressing need to

conduct further investigation, but the arresting officer's ability, once the prisoner has been secured, to reach a magistrate." *Id.* (internal quotation marks omitted); *see Mallory*, 354 U.S. at 454 (holding that an arrested suspect "is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt"); *see also Hallstrom v. City of Garden City*, 991 F.2d 1473, 1479-80 (9th Cir. 1993) ("Examples of unreasonable delays include delays for the purpose of gathering additional evidence to justify the arrest . . . ." (internal quotation marks omitted)); *United States v. Alvarez-Sanchez*, 975 F.2d 1396, 1398 (9th Cir. 1992) ("The rule [of prompt presentment] was clear, however, with regard to delays deliberately incurred in order to allow investigating officers time to interrogate the accused—any confession obtained would have to be suppressed."), *overruled on other grounds*, 511 U.S. 350, 358 (1994); *id.* at 1405 (referring to delay for the purpose of interrogation as "one of the most patent violations of Rule 5(a)"); *United States v. Wilson*, 838 F.2d 1081, 1085 (9th Cir. 1988) ("The desire of the officers to complete the interrogation is, perhaps, the most unreasonable excuse possible under § 3501(c).").

The delay for the purpose of further investigation—specifically, to interrogate Mr. Rios even after his full confession on October 16—was not reasonable. It requires suppression of Mr. Rios's October 20 statement to Agent Monzon. *Cf. Redlightning*, 2010 WL 4158583, at *12-13 (holding confession did not violate prompt presentment rule where officers brought defendant before magistrate at first available calendar one day after confession, but recognizing suppression might be appropriate if arraignment had been delayed any further).

III. CONCLUSION

For the foregoing reasons, as well as those stated in the opening brief, Mr. Rios respectfully requests that this Court reverse the district court's denial of his motion to dismiss and remand to the district court with instructions to dismiss the indictment. Alternatively, Mr. Rios asks this Court to reverse the district court's denial of his motion to suppress and remand to the district court for further proceedings.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: November 9, 2010

By */S Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this opening brief is proportionally spaced, has a typeface of 14 points or more, and contains 9483 words. I am concurrently filing a motion to file an oversized brief.

DATED: November 9, 2010

/S Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Notice will be electronically mailed to:

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