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 OPENING BRIEF

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

HONORABLE ANDREW J. GUILFORD
United States District Judge

SEAN K. KENNEDY
Federal Public Defender
ALEXANDRA W. YATES
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5059
Facsimile: (213) 894-0081
E-mail: Alexandra_Yates@fd.org

Attorneys for Defendant-Appellant

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I. QUESTIONS PRESENTED

A. Is Mr. Rios entitled to dismissal of his indictment because he was charged by a grand jury improperly instructed that it could not consider punishment, and improperly stripped of its discretionary role, in violation of his Fifth Amendment rights?

B. Is Mr. Rios entitled to suppression of evidence obtained from a search of his home pursuant to a warrant that was insufficiently particular and overly broad, in violation of his Fourth Amendment rights?

C. Is Mr. Rios entitled to suppression of confessions he gave after police officers employed an "ask first, *Mirandize* later" interrogation technique, and after he was detained without presentation to a federal magistrate for four days?

II. STATEMENT OF JURISDICTION

This appeal is from a final judgment rendered by the Honorable Andrew J. Guilford, United States District Judge, on February 22, 2010, sentencing Defendant-Appellant Victor Manuel Rios-Barraza to time served followed by two years of supervised release for being an illegal alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5). (ER 148; CR 55.)[1] Judgment was entered on February 23, 2010. (ER 148-52; CR 56.) Mr. Rios filed a timely notice of appeal on February 25, 2010. (ER 147; CR 58.) *See* Fed. R. App. P. 4(b)(1)(A)(i).

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

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[1] "ER" refers to the Excerpts of Record filed concurrently with this brief. "CR" refers to the Clerk's Record and is followed by the applicable docket control number.

III. STATEMENT OF ADDENDUM

Pertinent constitutional provisions, treaties, statutes, ordinances, regulations, and rules are set forth in the addendum to this brief.

IV. STATEMENT OF THE CASE

A. Bail Status

Mr. Rios has completed the custodial portion of his sentence. He is serving his two-year term of supervised release.

B. Course of Proceedings

On November 5, 2008, the Government filed an indictment charging Mr. Rios with one count of being an illegal alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5). (ER 203-04; CR 8.) On October 26, 2009, Mr. Rios filed a motion to suppress evidence. (CR 23.) Specifically, he argued that evidence obtained from his home pursuant to an invalid search warrant must be suppressed, and statements he made to law enforcement on October 16, 20, and 23, 2008, should be suppressed. On November 9, 2009, Mr. Rios filed a motion to dismiss the indictment because of flawed grand jury instructions. (CR 27.)[2] Specifically, he challenged instructions that limited the grand jury's ability to exercise its discretion not to indict, even if it found probable cause. Although Mr. Rios focused in his briefing on the instruction that prohibited grand jurors from considering punishment in their deliberations, his challenge was to the instruction as a whole. (ER 132.) A response and reply were filed with respect to each motion (CR 33, 36, 39, 42), and the district court held a hearing on the motions on November 25, 2009. (ER 1-146; CR 46.) At the hearing, the Government

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[2] Additional motions, not relevant to the instant appeal, also were filed.

conceded the appropriateness of suppressing some of Mr. Rios's statements to law enforcement, specifically his statements at his home on October 16, and his pre-*Miranda* statements made at the La Habra police department that same day. (ER 8-9.)

At the conclusion of the hearing, the district court ruled on the motions as follows, with little elaboration. First, the court denied Mr. Rios's motion to dismiss evidence recovered from the search of his home, stating only, "I am going to deny the motion to suppress as to tangible evidence." (ER 116.)

Second, the court granted in part and denied in part Mr. Rios's motion to suppress his statements. The court granted his motion as to statements made at his home, without the benefit of *Miranda*[3] warnings, during the October 16 search; granted the motion as to Mr. Rios's pre-*Miranda* statement at the La Habra police department later that morning; denied the motion as to the post-*Miranda* statement that immediately followed; denied the motion as to Mr. Rios's statement to law enforcement while still in custody on October 20; and granted the motion as to a final, October 23 statement, given while still in custody. (ER 124-25.) The district court briefly explained, "I did not hear a sufficient statement of reasonableness [of the delay in presenting Mr. Rios to a magistrate judge], but I'm going to deny the motions to suppress as to all other matters. . . . It means I did not buy the *S[ei]bert* argument [that Mr. Rios's October 16 post-*Miranda* and October 20 statements were tainted by his earlier, unwarned statements]." (ER 125.)

Third, the district court denied Mr. Rios's motion to dismiss. The court explained: "I find that there was not error, and I find that had there been error it

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

would have been harmless, but most specifically I find that there was not error." (ER 132.)

On December 3, 2009, the Government filed a signed conditional plea agreement for Mr. Rios, which preserved his right to appeal the court's partial denial of his pretrial motions.[4] (ER 172; CR 44.) On December 7, 2009, Mr. Rios appeared before the district court and entered a conditional plea of guilty to Count One of the indictment. (ER 166; CR 47.) The district court accepted the plea. (ER 166.)

On February 22, 2010, the district court held a hearing and sentenced Mr. Rios to time served, to be followed by two years of supervised release. (ER 148; CR 55.)

Mr. Rios appeals the denial of his motions, as permitted by the terms of the conditional plea agreement.

C. Statement of Facts

1. The Search Warrant

In early October 2008, La Habra Police Detectives Baclit and Barnes

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[4] Specifically, the plea agreement states Mr. Rios may appeal: "(1) Defendant's Motion to Suppress Evidence in regards to suppressing statements obtained from defendant on October 20, 2008; (2) Defendant's Motion to Suppress Evidence due to an invalid search warrant; and (3) Defendant's Motion to Dismiss Indictment Due to Improper Grand Jury Instructions." (ER 172.) Although the agreement lists the October 20 statement, clearly the intent was to include the October 16 post-*Miranda* statement, as suppression of the October 20 statement would be of no value to Mr. Rios absent suppression of the earlier confession. The only logical reading of the conditional agreement is that it encompasses all statements not suppressed by the district court—namely, the October 16 post-*Miranda* statement and the October 20 statement.

conducted surveillance on Mr. Rios outside his home. (ER 15.) During the surveillance, they believed they saw Mr. Rios conduct two hand-to-hand drug sales. (ER 231-32.) However, from their vantage point they were unable to see what Mr. Rios actually handed the other individual, and specifically could not tell whether it was narcotics. (ER 16.) During the surveillance, the detectives did not see Mr. Rios with a firearm or any other weapon. (*Id.*)

On October 15, 2008, Detective Barnes applied for and obtained a warrant to search Mr. Rios's home, Mr. Rios's person, and "any vehicles connected to the [listed] residence or any vehicles connected to anyone at the [listed] location." (ER 228-34.) The warrant permitted the search and seizure of drug-related items, as well as "any firearms within the residence or under the control of the resident(s), including ammunition, storage cases, magazines, clips, and accessories"; "any evidence of street gang membership, or affiliation with any street gang, such as paraphernalia making any reference to the Monos street gang"; and "any paintings, drawings, film (developed and undeveloped), photographs and/or photograph albums depicting persons, vehicles, weapons, and/or locations to be relevant on the question of gang membership or association, which depict items sought in this Search Warrant, and/or which depict evidence of any criminal activity." (ER 229.)

The affidavit attached to the warrant stated that Detectives Baclit and Barnes had met with three confidential informants. The first indicated she or he had purchased drugs from Mr. Rios at some unspecified point in the past and that she or he had seen him in possession of a handgun while at his own home. (ER 230-31.) The second confidential informant told the officers she or he had seen

Mr. Rios with a blue-steel handgun in the last month. (ER 231.) Finally, the third informant advised the detectives 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. (*Id.*)

The affidavit further stated that Mr. Rios had no adult criminal record, was recently discharged from juvenile probation, and had lived at his address on and off for nine years. (ER 232.) The affidavit provided no evidence specific to Mr. Rios that linked any alleged drug dealing to his gang affiliation, indicated he kept contraband in a vehicle (or even owned a vehicle), or ever possessed a firearm while engaged in unlawful activity.

On October 16, 2008, Detectives Baclit and Barnes, and five other law enforcement officers, conducted a search of Mr. Rios's home in the early morning. (ER 17, 39, 226-27.) All officers were in uniform. (ER 17.) The officers "pounded on the door," shouted "La Habra Police, police officer, search warrant, demand entry," and when no one answered after fifteen seconds, broke down the door with a battering ram. (ER 17-20.) Upon breaking down the door, all seven officers entered the small apartment with guns drawn. (ER 20-21, 41-42, 45, 187, 190.) Several other residents, including women with their babies, were present in the apartment. (ER 22.) They were promptly rounded up and detained in the living room. (ER 23-24, 43.) Mr. Rios was handcuffed immediately and remained in handcuffs for the duration of the search. (ER 22, 43-44, 50.)

Mr. Rios, the apartment, and a 2003 Honda parked in the carport were searched. (ER 44-50, 191.) Ammunition was found in a hallway closet, and a .38

caliber handgun was found in the car. (ER 236-38.) No drugs were found. (ER 45, 236-38.)

2. Mr. Rios's Statements to Law Enforcement

During the search, Detective Barnes twice interrogated Mr. Rios without the benefit of *Miranda* warnings. The first time, he brought Mr. Rios outside, away from his family, and asked whether there was anything illegal in the house. (ER 190-91.) In response, Mr. Rios made an incriminating statement that he had ammunition in a hallway closet. (ER 191.) After Detective Barnes recovered the firearm from the car, he brought Mr. Rios outside to talk once again. (ER 192.) During that conversation, Mr. Rios made another incriminating statement, admitting to ownership of the firearm. (*Id.*) During the interrogations, Mr. Rios was handcuffed and was not free to leave. (ER 50-51.) He felt compelled to answer Detective Barnes's questions. (ER 199-200.)

After the search, the officers brought Mr. Rios to the La Habra police department. (ER 51.) Detective Barnes questioned Mr. Rios in a small interview room at the station. (ER 52.) The interrogation was video recorded. (ER 52, 225.) After first eliciting incriminating information about Mr. Rios's immigration status and gang ties, Detective Barnes read Mr. Rios his *Miranda* rights for the first time that day. (ER 224-25.) As part of this discussion, Detective Barnes stated that this was Mr. Rios's "opportunity" to talk. (ER 225.)

During the interrogation, Detective Barnes referenced the earlier search and discovery of the firearm ("You know what we found at the house."), and told Mr. Rios that he appreciated the information Mr. Rios had provided but wanted more information, in addition to what Mr. Rios already told him back at the house. (ER

53-55, 225.) Mr. Rios gave a full confession. (ER 193, 225.)

At the end of the interview, Detective Barnes informed Mr. Rios that he was being arrested for possessing the firearm. (ER 55, 225.) On the booking sheet Detective Barnes completed during the interview, he indicated that the crime of arrest was "18 U.S.C. § 922(g)(5)(A)," "illegal immigrant in possession of a firearm." (ER 55-57, 223.) Detective Barnes further wrote on the form, "federal offense." (ER 57, 223.)

After the interview, Detectives Baclit and Barnes called Immigration and Customs Enforcement ("ICE") Agent Monzon, and informed him they had Mr. Rios in custody and he was an illegal alien who had admitted to possessing a firearm. (ER 28-31, 58-59, 81-85.) The call took place before 12:00 p.m on October 16. (ER 82.) The detectives specifically provided Agent Monzon with the make, model, and serial number of the firearm recovered. (ER 83.) At that point, Agent Monzon had probable cause to believe that Mr. Rios was an illegal alien in possession of a firearm. (ER 86-87.) At Agent Monzon's behest, an immigration detainer was placed on Mr. Rios on October 16, 2008, pending the filing of federal firearm charges. (ER 63, 97, 222.)

The La Habra police department, where Mr. Rios was being held, is a twenty minute car ride from Agent Monzon's office; on October 17, 2008, Agent Monzon had access to a car. (ER 98.) Other ICE agents also were available at the time to interview or transport Mr. Rios. (ER 89-90, 98.) It was neither impossible nor impractical for Agent Monzon to pick up Mr. Rios on October 16 or 17, and ICE agents could have picked him up "anytime." (ER 100.) Nonetheless, no one from ICE picked up Mr. Rios on October 16 or 17, 2008. (ER 98.)

Moreover, a federal magistrate judge would have been available on October 17, 2008, which was a Friday, and Mr. Rios was not in the hospital on that date. (ER 101-02.) Mr. Rios, however, was not brought before a magistrate, and instead spent Thursday October 16 through Monday October 20 in custody at the La Habra police department. (ER 102-03.) It was not until October 20, that Agent Monzon picked up Mr. Rios. (ER 103.) At that point, a federal magistrate judge was available at the courthouse located two blocks from the ICE office. (*Id.*) However, instead of bringing Mr. Rios to court on October 20, Agent Monzon brought Mr. Rios to the Santa Ana County Jail and subjected him to further interrogation. (ER 92, 103, 216-19.)

Mr. Rios remained in jail through October 23, 2008, when Agent Monzon interrogated him a final time, for the purpose of obtaining yet another sworn statement. (ER 94, 105, 211-14.) During both interviews, Agent Monzon asked Mr. Rios questions that were not related to his immigration status, but instead were asked as part of an investigation into the criminal charges. (ER 93-95, 213, 218.) Agent Monzon made the determination to proceed with the criminal case first, and then the immigration case would come after the criminal case concluded. (ER 95-96.) It was only after the last confession that Agent Monzon brought Mr. Rios to his initial appearance—on October 23, seven days after he was arrested and placed in custody pending federal firearm charges. (ER 105, 197.)

3. The Grand Jury Instructions

The October 2008 grand jury that indicted Mr. Rios was instructed largely pursuant to the Model Grand Jury Charge, approved by the Judicial Conference of the United States in its revised form in March 2005. *See* Model Grand Jury

Charge (2005), http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx. However, one instruction differed in an important respect from the model charge. Specifically, the grand jury was instructed that "when deciding whether or not to indict, you *cannot* consider punishment in the event of conviction." (ER 247 (emphasis added).) The model instruction, by contrast, states that "when deciding whether or not to indict, you *should not* consider punishment in the event of conviction." Model Grand Jury Charge § 10 (emphasis added).

Additionally, the October 2008 grand jury was instructed as follows, per the Model Grand Jury Charge:

> You are not able to judge the wisdom of the criminal laws enacted by Congress; that is, whether there should or should not be a federal law designating criminal activity—designating activity as criminal. That's determined by Congress and not for the grand jury.

(ER 247.)

> Your task is to determine whether the government's evidence, as presented to you, is sufficient to cause you to conclude that there is probable cause to believe that the person being investigated committed the offense charged.
>
> To put it another way, you should vote to indict where the evidence presented to you is sufficiently

> strong to warrant a reasonable person's belief that the person being investigated is probably guilty of the offense charged.

(ER 254.)

> If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith in the matters presented by the government attorneys.

(ER 256.)

V. SUMMARY OF ARGUMENT

The district court erred in failing to dismiss Mr. Rios's indictment because the grand jury that charged him was misinstructed about its fundamental power to refuse to indict, even in the presence of probable cause. Although this Court has held that the model grand jury instructions are constitutional, that holding was narrow. Only because the model instructions leave room for the jury to consider punishment in its assessment of the need to indict are they valid. Here, the district court varied from the model instruction and told the grand jury it could not consider punishment. That charge violated Mr. Rios's right to be indicted by an independent grand jury and constituted structural error.

The district court also erred in denying Mr. Rios's motion to suppress evidence seized during the search of his house. The warrant authorizing the search lacked particularity, by authorizing a search of a broad range of items with no means for an officer to evaluate what she might seize, and what she might not. The warrant also was overly broad, because it permitted searches for evidence that

there was no probable cause to believe was contraband, or linked in some way to the suspected criminal activity, or located on the listed premises.

Finally, the district court erred in denying Mr. Rios's motion to suppress statements he made on October 16 and 20, 2008. Both statements were the product of law enforcement's "ask first, *Mirandize* later" approach, rendering Mr. Rios's purported *Miranda* waivers invalid. Additionally, the October 20 statement was in response to interrogation four days after his arrest on a federal charge. Statements made more than six hours after a federal arrest, where the suspect has not been brought before a magistrate judge, are inadmissible unless there was a reasonable or necessary basis for the delay. Here, there was none.

VI. ARGUMENT

A. Standard of Review

This Court reviews de novo a district court's ruling on a motion to suppress. *See United States v. Song Ja Cha*, 597 F.3d 995, 999 (9th Cir. 2010). This Court also reviews de novo a district court's denial of a motion to dismiss an indictment. *See United States v. Cortez-Rivera*, 454 F.3d 1038, 1040 (9th Cir. 2006).

B. The District Court Erred in Denying Mr. Rios's Motion To Dismiss Because He Was Indicted by an Improperly Instructed Grand Jury

"The institution of the grand jury is deeply rooted in Anglo-American history." *United States v. Calandra*, 414 U.S. 338, 342 (1974); *see Campbell v. Louisiana*, 523 U.S. 392, 398 (1998) ("[T]he grand jury is a central component of the criminal justice process."); *United States v. Mandujo*, 425 U.S. 564, 571 (1976) (plurality) (referring to the grand jury as "an integral part of our constitutional heritage"). As the Supreme Court has explained, the grand jury's

historical role not only as a charging body, but also as a check on executive power, was preserved in the Fifth Amendment to our Constitution:

> In England, the grand jury served for centuries *both* as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing *and* as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury."

Calandra, 414 U.S. at 342-43 (quoting U.S. Const. amend. V) (emphasis added).

A grand jury is not a tool of the executive or judiciary, but an independent body charged in part with protecting the people from an oppressive government. *See Mandujano*, 425 U.S. at 571 ("Its historic office has been to provide a shield against arbitrary or oppressive action . . . ."). "In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992); *see id.* at 48 (discussing "[t]he grand jury's functional independence from the Judicial Branch"); *id.* at 49 ("Recognizing this tradition of independence, we have said that the Fifth Amendment's constitutional guarantee presupposes an investigative body acting independently of either prosecuting attorney or judge." (emphasis and internal quotation marks omitted)); *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (discussing "[t]he necessity

to society of an independent and informed grand jury"); *Costello v. United States*, 350 U.S. 359, 362 (1956) (explaining that the grand jury "acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice."). Thus, the Supreme Court has recognized that the grand jury "serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood*, 370 U.S. at 390.

The Fifth Amendment to the United States Constitution incorporates the grand jury's traditional role into American criminal procedure by requiring that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V.[5] Through this amendment, "the grand jury's historic functions survive to this day."

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[5] The full text of the Amendment is:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V. "'Infamous' crimes refers to at least all felonies." *United States v. Marcucci*, 299 F.3d 1156, 1160 n.3 (9th Cir. 2002) (per curiam).

Calandra, 414 U.S. at 343.

As explained above, these functions are dual. Not only must grand juries determine whether probable cause exists to charge an accused, but "the grand jury continues to function as a barrier to reckless or unfounded charges." *Mandujano*, 425 U.S. at 571. "Its responsibilities continue to include *both* the determination whether there is probable cause to believe a crime has been committed *and* the protection of citizens against unfounded criminal prosecutions." *Calandra*, 414 U.S. at 343 (emphasis added). Put another way, the grand jury "determine[s] whether a crime has been committed *and* whether criminal proceedings should be instituted against any person." *Id*. at 343-44 (emphasis added).

This Court, too, has recognized that a grand jury possesses the power to refuse to charge, even when presented with probable cause of a federal crime. Sitting en banc, this Court explained in *United States v. Navarro-Vargas* that "the grand jury has no obligation to prepare a presentment or to return an indictment drafted by the prosecutor." *United States v. Navarro-Vargas*, 408 F.3d 1184, 1200 (9th Cir. 2005) (en banc). "[S]ignificantly, the grand jury may refuse to return an indictment even where a conviction can be obtained." *Id.* (internal quotation marks omitted); *see id.* at 1192-94 (describing instances where grand juries refused to indict); *id.* at 1206 (referring to the grand jury's "power to refuse to indict even when a conviction can be obtained"); *see also United States v. Marcucci*, 299 F.3d 1156, 1162 (9th Cir. 2002) (per curiam) (describing instances in England and the United States where grand juries exercised their independence and refused to indict for "political" and "principled" reasons).

This power to refuse to indict includes the grand jury's ability to consider

potential punishment. Even where there is probable cause to indict, the grand jury "controls . . . significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision to charge a capital crime." *Campbell*, 523 U.S. at 399. The Supreme Court has emphasized this point:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, the grand jury is not bound to indict in every case where a conviction can be obtained.

Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (internal quotation marks omitted). In this way, a grand jury functions much as a prosecutor might, considering not only whether a conviction might be had, but also whether justice would be served by such a result. *See Navarro-Vargas*, 408 F.3d at 1200.

1. The Instructions Were Improper

Mr. Rios was denied this traditional functioning of the grand jury, in violation of his Fifth Amendment rights, because the grand jury that indicted him was misinstructed that it lacked the powers this Court and the Supreme Court has recognized it has. Specifically, the grand jury was instructed that it "should" indict if it found probable cause, that it "cannot" consider the wisdom of the law

Mr. Rios was accused of violating, and that it "cannot" consider punishment in making its decision. Moreover, the grand jury was instructed that it could "expect candor, honesty, and good faith in the matters presented by the government attorneys." (ER 256.). These instructions were error and stripped the grand jury of its protective function. Dismissal of the indictment is the appropriate remedy.[6]

a. The Instruction Regarding Punishment Is Unconstitutional

In *United States v. Navarro-Vargas*, this Court sitting en banc considered the constitutionality of three of the model grand jury instructions, but did not address the model instruction that "when deciding whether or not to indict, you should not consider punishment in the event of conviction," Model Grand Jury Charge § 10. *See Navarro-Vargas*, 408 F.3d at 1186-87.[7] The five dissenting judges, however, expressed concern that this model instruction unconstitutionally "erod[ed] the powers" of the grand jury by "improperly limit[ing] the jurors' discretion regarding . . . matters of sentencing." *Id.* at 1212 (Hawkins, J., dissenting). As these five judges explained:

> As to the severity of punishment, the Supreme Court in *Vasquez* stated that the grand jury has "the

[6] In *Navarro-Vargas*, this Court held in a six-to-five en banc opinion that three of these instructions survived a constitutional challenge, although the Court expressed concern about the language of the instructions. *Navarro-Vargas*, 408 F.3d at 1202-08. Mr. Rios raises the constitutionality of these three instructions on appeal to preserve the issue for further review. The majority in *Navarro-Vargas* did not address the instruction regarding punishment.

[7] The *Navarro-Vargas* Court considered the 1986 version of the Model Grand Jury Charge. *See Navarro-Vargas*, 408 F.3d at 1196-97. For purposes relevant to this appeal, that charge is substantially the same as the 2005 version.

> power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense, all on the basis of the same facts." *Vasquez*, 474 U.S. at 263 . . . . If grand jurors can choose, per *Vasquez*, between capital and non-capital offenses, how could they not be influencing the determination of punishment? They are exerting such influence, and they should be able to continue to do so, not boxed in by jury instructions that seek to eradicate this important function.

Id. at 1214.

One year later, in *United States v. Cortez-Rivera*, this Court squarely addressed the model charge regarding punishment, holding:

> The model charge given to the grand jury did not violate Cortez-Rivera's Fifth Amendment right to indictment by a grand jury. 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 clear implication of this holding is that, had the model charge used a mandatory term, rather than "should," the instruction

would violate the Fifth Amendment by invading the grand jury's independence.

Cortez-Rivera found this Court's analysis in an earlier decision, *United States v. Marcucci*, controlling. *See id.* at 1040. In that case, this Court "seized upon the distinction between 'should' and 'shall,'" in considering another grand jury instruction. The *Marcucci* Court explained that "the language of the standard grand jury charge does not state that the jury 'shall' or 'must' indict, but merely that it 'should' indict, in the event that it finds probable cause. The language does not eliminate discretion on the part of the grand jurors." *Marcucci*, 299 F.3d at 1159. In other words:

> 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 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.

Id. at 1164; *see Cortez-Rivera*, 454 F.3d at 1040.

As the *Cortez-Rivera* Court also recognized, the en banc *Navarro-Vargas* Court adopted similar reasoning regarding the same model grand jury instruction at issue in *Marcucci*. *See Cortez-Rivera*, 454 F.3d at 1041 (citing *Navarro-Vargas*). In *Navarro-Vargas*, this Court wrote:

> 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).

After reviewing these precedents, the *Cortez-Rivera* Court found that "[t]he distinction between 'should' and 'shall' is dispositive of Cortez-Rivera's contention" that the instruction regarding punishment is unconstitutional. *Cortez-Rivera*, 454 F.3d at 1041. "[B]y using 'should,' the challenged instruction does not place an absolute bar on considering punishment, but 'leaves room—albeit limited room—for a grand jury to' consider punishment. Thus, the instruction does not preclude the grand jury from considering punishment and is therefore constitutional." *Id.*

By contrast, the instruction in Mr. Rios's case deviated from the model charge and *did* place an absolute bar on the grand jury's ability to consider punishment. Mr. Rios's grand jurors were misinstructed that "when deciding whether or not to indict, you *cannot* consider punishment in the event of conviction." (ER 247 (emphasis added).) As opposed to the model instruction,

this instruction "precluded the grand jury from considering punishment" and is therefore *un*constitutional. This distinction is "dispositive." *Cortez-Rivera*, 454 F.3d at 1041.

The "slight" room for consideration of punishment left by the model charge was eliminated completely from the charge given to the October 2008 grand jury. *Id.* at 1039. Under this Court's precedent, the grand jury charge is unconstitutional and requires dismissal of the indictment in this case.

b. Three Additional Instructions Are Unconstitutional

Mr. Rios's grand jury was instructed with the following additional charges:

> You are not able to judge the wisdom of the criminal laws enacted by Congress; that is, whether there should or should not be a federal law designating criminal activity—designating activity as criminal. That's determined by Congress and not for the grand jury.

(ER 247.)

> Your task is to determine whether the government's evidence, as presented to you, is sufficient to cause you to conclude that there is probable cause to believe that the person being investigated committed the offense charged.
>
> To put it another way, you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the

> person being investigated is probably guilty of the offense charged.

(ER 254.)

> If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith in the matters presented by the government attorneys.

(ER 256.)

These instructions are unconstitutional for the reasons set forth by the en banc dissent in *Navarro-Vargas* and Judge Hawkins's dissent in *Marcucci*. *See Navarro-Vargas*, 408 F.3d at 1209-17 (Hawkins, J., dissenting); *Marcucci*, 299 F.3d at 1166-73 (Hawkins, J., dissenting); *see also United States v. Navarro-Vargas*, 367 F.3d 896, 899-03 (9th Cir.) (Kozinski, J., dissenting), *vacated*, 382 F.3d 920 (9th Cir. 2004).

c. The Giving of the Instructions Was an Unlawful Exercise of Supervisory Power Over the Grand Jury

"In the exercise of its supervisory authority, a federal court may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (internal quotation marks omitted). "Nevertheless, it is well established that even a sensible and efficient use of the supervisory power is invalid if it conflicts with constitutional or statutory provisions." *Id.* (internal quotation marks and alterations omitted).

Thus, although federal courts may exercise supervisory power "to control

their *own* procedures," *Williams*, 504 U.S. at 45, they may not infringe on the grand jury's traditional, constitutional role and independence. "Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, [] it [is] clear that, as a general matter at least, no such 'supervisory' judicial authority exists." *Id.* at 47. Instead, "[j]udges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office." *Id.* "[A]ny power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one." *Id.* at 50. "It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Id.*

For the reasons discussed above, the Model Grand Jury Charge issued by the Judicial Conference of the United States, and the district court's modification of that charge, reshape and substantially alter the grand jury's role in the criminal charging process. The instructions "run counter to the whole history of the grand jury institution," and thus represent an invalid exercise of federal courts' supervisory powers over grand juries. *Costello*, 350 U.S. at 364. For this separate but related reason, they are invalid.

2. The Errors Require Dismissal of the Indictment

The error in instructing the October 2008 grand jury is structural error that requires dismissal of the indictment. Structural errors "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds and are not simply an error of the trial process itself." *United States v. Gonzalez-*

Lopez, 548 U.S. 140, 148 (2006) (internal quotation marks and alterations omitted). A structural error is therefore often defined by "the difficulty of assessing" it." *Id*. at 149 n.4. For example, in *Vasquez v. Hillery*, the Supreme Court held that racial discrimination in selecting a grand jury was 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." *Hillery*, 474 U.S. at 264; *cf. Campbell*, 523 U.S. at 399 ("The integrity of these decisions depends on the integrity of the process used to select the grand jurors. If that process is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions.").

In the case of a grand jury improperly instructed that it cannot exercise its discretion, "[i]t is impossible to know" what the body might have done had it been properly instructed. *Gonzalez-Lopez*, 548 U.S. at 150. "Since it has the power to refuse to indict even where a clear violation of law is shown, the grand jury can reflect the conscience of the community in providing relief where strict application of the law would prove unduly harsh." *Gaither v. United States*, 413 F.3d 1061, 1066 n.6 (D.C. Cir. 1969); *see also Marcucci*, 299 F.3d at 1169 (Hawkins, J., dissenting) ("[A grand jury] has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty."). The error in the overarching instruction to the grand jury is thus like a defective "beyond a reasonable doubt" instruction, which "vitiate[s] *all* the [petit] jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Mr. Rios's indictment, issued by the October 2008 grand jury, must be dismissed.

C. The District Court Erred in Denying Mr. Rios's Motion To Suppress Because the Evidence Was Obtained Pursuant to an Invalid Search Warrant

Under the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "[A] search or seizure pursuant to an invalid warrant constitutes an invasion of the constitutional rights of the subject of that search." *Millender v. County of Los Angeles*, __ F.3d __, No. 07-55518, slip op. at 12722 (9th Cir. Aug. 24, 2010) (en banc).

A warrant may be invalid for lack of "specificity, which has two aspects, particularity and breadth." *Id.* (internal quotation marks omitted). "Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Id.* (internal quotation marks omitted). "Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (internal quotation marks omitted). If there is not "probable cause for *every* item described in the warrant," the warrant is invalid. *Id.* at 12728 (emphasis added).

In *United States v. Spilotro*, this Court outlined three areas of focus when considering the specificity of a search warrant:

> (1) whether probable cause exists to seize all the items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986) (citations omitted).

1. The Warrant Does Not State the Locations To Be Searched and the Items To Be Seized with Sufficient Particularity

"General warrants of course, are prohibited by the Fourth Amendment. The problem posed by the general warrant is not that of intrusion Per se, but of a general, exploratory rummaging in a person's belongings." *Andresen v. Maryland*, 427 U.S. 463, 479 (1976) (internal quotation marks and alterations omitted).

"The particularity requirement . . . guards the right to be free from unbounded general searches. The central protection has been stated as insuring that 'nothing is left to the discretion of the officer executing the warrant.'" *United States v. Hillyard*, 677 F.2d 1336, 1339 (9th Cir. 1982) (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)). A search is therefore "unlawfully general where the accompanying warrant left to the executing officers, rather than to the

magistrate upon issuance, the task of determining what items fell within broad categories stated in the warrant and where there were no clear guidelines distinguishing between property which was contraband and that which was not." *Id.* "The description [in the warrant] must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized." *Spilotro*, 800 F.2d at 963. In addition to "prevent[ing] general, exploratory searches and indiscriminate rummaging through a person's belongings," 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." *Id.*

The warrant in this case fails to comply with the Fourth Amendment's particularity requirement in three ways. First, it authorizes the search of "any vehicles connected to the [listed] residence or any vehicles connected to anyone at the [listed] location." (ER 228.) As opposed to a warrant authorizing the search of vehicles belonging to residents that are physically located on the property, for example, the warrant in this case authorizes the search of any vehicles "connected" in some way to the residence or to anyone who happens to be at the residence, without defining what "connected" means. If, upon execution of the warrant, officers found a guest who had stopped by for a few moments, and whose car was several blocks away, would the search of that vehicle be permitted? The warrant does not answer that question, but leaves the decision to the discretion of law enforcement. It fails to set forth objective standards for officers to apply, and is invalid.

Second, the warrant permits a search for "any firearms within the residence

or under control of the resident(s), including ammunition, storage cases, magazines, clips, and accessories." (ER 229.) Although not all firearms are unlawful, and although the affidavit presents no evidence of any potentially unlawful firearm save for the blue-steel handgun Mr. Rios was suspected of possessing, firearms or accessories belonging to other residents of the premises are included in the terms of the warrant. The warrant does not describe the blue-steel handgun, instead authorizing a general search for any and all firearms.

The warrant thus "fail[s] to provide standards for the officers to distinguish between those [firearms and accessories] the officers could seize and those they could not." *United States v. Hayes*, 794 F.2d 1348, 1356 (9th Cir. 1986). Although examination of lawful items "at least cursorily, in order to determine whether they are, in fact, among those [items] to be seized" is permissible, *id.* (internal quotation marks omitted), here there were no standards that might guide the executing officers in deciding which firearms and accessories might be seized and which might not. *See Millender*, slip op. at 12725 ("[A] warrant based on an affidavit describing 'a few stolen diamonds' could not validly authorize a search for a broad category of 'gemstones and other items of jewelry' because such a warrant would provide no basis for distinguishing the stolen diamonds from others the government could expect to find on the premises." (internal quotation marks and alterations omitted)).

Third, the warrant permits law enforcement to conduct an unfettered search for visual evidence of any crime whatsoever—without limitation to the evidence's relevance to the suspected crimes discussed in the affidavit. Specifically, the warrant allows the search and seizure of "any paintings, drawings, film . . . ,

photographs and/or photograph albums . . . which depict any evidence of any criminal activity." (ER 229.) A clearer example of a general warrant is difficult to envision.

In *United States v. Cardwell*, this Court confronted a warrant permitting search and seizure of evidence of the violation of a specified statute. *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982). The *Cardwell* Court held that such a warrant was not valid: "'[L]imiting' the search to only records that are evidence of the violation of a certain statute is generally not enough." *Id.* at 78. In Mr. Rios's case, the warrant is even less particular than the one at issue in *Cardwell*, because the warrant authorizes more than evidence of the violation of a specific statute, but instead "any paintings, drawings, film . . . , photographs and/or photograph albums . . . which depict any evidence of *any criminal activity*." (ER 229 (emphasis added).) *See Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 750 (9th Cir. 1989), *superseded by statute as stated in J.B. Manning Corp. v. United States*, 86 F.3d 926 (9th Cir. 1996) ("The warrants' provision for the almost unrestricted seizure of items which are 'evidence of violations of federal criminal law' without describing the specific crimes suspected is constitutionally inadequate."); *Spilotro*, 800 F.2d at 965 (finding warrant invalid where "the only limit on the search and seizure was the requirement that the items seized be evidence of a violation of any one of thirteen statutes, some of exceptional scope").

"Put simply, the Fourth Amendment does not authorize the issuance of warrants to conduct fishing expeditions to find evidence that could assist officers in prosecuting suspects." *Millender*, slip op. at 12732. "If items that are illegal,

fraudulent, or evidence of illegality are sought, the warrant must contain some guidelines to aid the determination of what may or may not be seized." *Cardwell*, 680 F.2d at 78. The warrant in this case does not satisfy this particularity requirement and is invalid.

2. The Warrant Is Overbroad

The scope of a warrant is limited by the existence of probable cause. "[I]t must be no broader than the probable cause on which it is based." *United States v. Weber*, 923 F.2d 1338, 1342 (9th Cir. 1990). If the affidavit in support of the warrant does not establish probable cause for a reasonable person to believe that the evidence sought will be found in the specific locations described, the warrant is overly broad and invalid. There must also be reasonable cause to believe that the items sought are contraband or evidence of unlawful activity. *See Millender*, slip op. at 12739.

a. The Warrant Does Not Establish Probable Cause To Search the Vehicles Listed

The warrant at issue in this case is overly broad because it permits search of any vehicles "connected" to Mr. Rios's residence or "connected" to persons at the residence, but does not establish probable cause that contraband will be discovered in these vehicles. "The affidavit contains no facts making it likely that anything the officers sought was present in the" vehicles, as opposed to in the home itself. *Ramos*, 923 F.2d at 1352.

"Probable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect's home. There must exist reasonable cause to believe that the things listed as the objects of the search are

located in the place to be searched." *United States v. Ramos*, 923 F.2d 1336, 1352 (9th Cir. 1991), *overruled on other grounds by United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001) (citation omitted). This Circuit "has recognized that in the case of drug dealers, evidence is likely to be found where the dealers live." *United States v. Terry*, 911 F.2d 272, 275 (9th Cir. 1990) (internal quotation marks omitted). That presumption, however, does not automatically extend to any vehicles associated with a suspect or a suspect's home.

In *United States v. Perez*, 67 F.3d 1371 (9th Cir. 1995), *withdrawn in part on other grounds on reh'g*, 116 F.3d 840 (9th Cir. 1997), this Court considered whether officers had probable cause to search a defendant's vehicle. The defendant in *Perez* sold rare coins to a coin dealer, who later realized that the coins were stolen. Four days later, after the dealer stopped payment on his check to defendant, she returned to the shop. As she was leaving the shop to go to her car, she was arrested and her car searched without a warrant. *See id.* at 1374-75. The question was whether officers had probable cause to believe that additional unrecovered coins or receipts from their sale were in the car. *See id.* at 1375.

This Court held:

> Finding probable cause in this instance would create an unwarranted extension of the law by allowing a search of a vehicle *four* days after alleged criminal activity occurred *with only a speculative connection* between the vehicle and the alleged criminal activity. The only connection between the alleged criminal activity and Louise Perez's vehicle was that she *might*

> have driven it four days earlier to the mall where the coin shop was located, because on Guam, vehicles are frequently the only readily available mode of transportation. This logic is insufficient to provide an officer with a reasonable belief that contraband or evidence would be found it the place to be searched.

Id. at 1375-76 (internal quotation marks omitted). According to the *Perez* Court, "It was unreasonable for the officers to believe that evidence of a four day old crime would be found in a vehicle which never had been connected with the alleged criminal activity." *Id.* at 1376. As such, the district court should have granted the motion to suppress, and this Court reversed the defendant's conviction. *See id.*; *see also United States v. Wanless*, 882 F.2d 1459, 1464-66 (9th Cir. 1989) (holding officers did not have probable cause to search vehicle despite evidence of drug activity of one if its passengers).

The evidence in *Perez* provided a stronger link between the suspected criminal activity and the vehicle searched than in Mr. Rios's case. The most recent evidence that officers had of Mr. Rios's alleged narcotics dealing was a week old. (ER 231.) More important, the officers did not have a shred of evidence connecting any alleged unlawful conduct with any vehicles at Mr. Rios's residence, and the affidavit did not even state that there *were* vehicles associated with Mr. Rios's residence, or that Mr. Rios was the registered owner of a vehicle, or that he had ever been seen driving in or accessing any vehicle whatsoever. Whereas Perez was suspected of having transported stolen goods in her car, there was no indication Mr. Rios transported narcotics or any other contraband in any

vehicle. *Perez* controls, and this Court should hold that there was not probable cause to believe a vehicle at Mr. Rios's residence contained contraband. The warrant permitting a search of "any vehicles connected to the . . . residence or any vehicles connected to anyone at the . . . location" was therefore invalid, and the evidence recovered pursuant to its execution should have been suppressed.

Detective Barnes's conclusory statement in the warrant affidavit 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), is not enough to provide the probable cause required. The Sixth Circuit's decision in *United States v. Haynes*, 301 F.3d 669 (6th Cir. 2002), is instructive. There, officers "had been informed that Haynes was suspected of stealing firearms and jewelry, but none of the officers had been given any information that would lead to any more than a mere suspicion that Haynes stored those articles in his car." *Id.* at 678. A "mere suspicion" was not enough to establish probable cause that contraband would be found in the vehicle, and the court held the search invalid. *See id.* at 679.

In *United States v. Hogan*, the Eighth Circuit held that a law enforcement "hunch" that a suspected drug dealer possessed contraband in his car was not enough to establish the probable cause necessary to search the car. *United States v. Hogan*, 25 F.3d 690, 693 (8th Cir. 1994). In *Hogan*, officers had information much more suggestive of the presence of contraband in the vehicle than in Mr. Rios's case:

> All the information the agents possessed indicated that Hogan transported the drugs to work in his truck and that

> the truck was the sole vehicle he drove to and from work. Although the agents believed that Hogan intended to bring drugs to work that day, they also knew that Hogan's shift began at 3:00 p.m. and that it was only 12:40 p.m. when he left the house in the Oldsmobile. At most, the agents had a hunch that the drugs from the house or truck might be in the Oldsmobile.

Id. The Eighth Circuit held this evidence insufficient to establish probable cause for a search of the Oldsmobile. *See id*. at 693-94. As the court explained, "[t]he prerequisite to a valid search . . . is probable cause, not a hunch." *Id.* at 693; *see also Nathanson v. United States*, 290 U.S. 41, 47 (1933) ("Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.").

In cases where this Court has found that probable cause existed to search a vehicle, there has been some evidence of a direct link between the vehicle and suspected contraband or criminal activity. *See, e.g.*, *United States v. Vasquez*, 858 F.2d 1387, 1391 (1988) (finding that officer "had fresh, direct, uncontradicted evidence that Vasquez was distributing a controlled substance from the vehicle" (alteration and internal quotation marks omitted)); *Hillyard*, 677 F.2d at 1338-41 (upholding search warrant's inclusion of vehicles on premises where defendant suspected of running stolen vehicle operation); *United States v. Spearman*, 532 F.2d 132, 133 (9th Cir. 1976) (per curiam) (finding probable cause to search

vehicle where defendant and his accomplice in a narcotics operation were seen together in the vehicle on multiple occasions).

United States v. Duque, 62 F.3d 1146 (9th Cir. 1995), does not compel a different result. In that case, this Court held, "Although search warrants ideally state their full scope with particularity, a search warrant authorizing a search of a particularly described premises *may* permit the search of vehicles *owned or controlled by the owner of, and found on, the premises*." *Id.* at 1151 (internal quotation marks omitted) (emphasis added). The unlawful conduct at issue in *Duque* was directly linked to use of a vehicle. Specifically, the defendant's coconspirators drove a trailer truck containing narcotics from Mexico into the United States, and the defendant was arrested while unloading narcotics from the trailer truck into his own truck. *See id.* at 1148. *Duque* is thus like those cases where this Court has found a link between the defendant's suspected unlawful activities and a vehicle, and unlike Mr. Rios's case, where no such link existed. Moreover, even assuming the holding in *Duque* applies to Mr. Rios's case, the warrant at issue was still invalid because it was broader than that authorized in *Duque* because it permitted the search of "any vehicles connected to the . . . residence or any vehicles connected to anyone at the . . . location" (ER 228), not simply those owned or controlled by the owner of, and found on, the premises.

b. The Warrant Does Not Establish Probable Cause To Search for the Firearms Listed

The warrant is further overbroad because it permits a search of "any and all firearms within the residence or under control of the resident(s), including ammunition, storage cases, magazines, clips, and accessories" (ER 229), but does

not provide probable cause to believe that any firearms that might be found constitute evidence of a crime. Firearms are not contraband by nature. A firearm possessed by a felon would be contraband, as would a firearm possessed by an illegal alien. However, the affidavit sets forth no facts upon which the magistrate could determine that Mr. Rios was either a felon or an illegal alien. *See Millender*, slip op. at 12731 (holding that, where officer "did not inform the magistrate of [the suspect's] prior felonies, his criminal history is not relevant to [the probable cause] analysis"). To the contrary, the affidavit states that Mr. Rios has no adult criminal record and has lived at the same United States residence for nine years. The warrant "authorize[d] wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide[d] no guidelines to distinguish items used lawfully from those the government had probable cause to seize. *Spilotro*, 800 F.2d at 964.

Moreover, to the extent that a firearm used in furtherance of a narcotics offense is contraband, the affidavit set forth no facts that Mr. Rios used a firearm in such a way. The affidavit contains no indication that law enforcement observed a firearm while surveilling Mr. Rios and allegedly observing drug transactions.

This case is analogous to *Millender v. County of Los Angeles*, where this Court recently held that a search warrant was invalid because it permitted the search and seizure of more firearms than the one for which probable cause existed. *Millender*, slip op. at 12724. In that case, "deputies had probable cause to search for and seize the 'black sawed off shotgun with a pistol grip' used in the crime. But the affidavit [did] not set forth any evidence indicating [the suspect] owned or used other firearms, that such firearms were contraband or evidence of a crime, or

that such firearms were likely to be present" in the residence searched. *Id.*

The warrant in this case was overbroad because there was no evidence in the affidavit to support a conclusion that firearms or accessories belong to other individuals at the residence were contraband or evidence of a crime. As in *Millender*, officers in this case had "information more specifically describing the evidence or contraband," the blue-steel handgun, but sought "a warrant authorizing search and seizure of a broader class of items," firearms and accessories generally. *Id.* at 12726-27. "Because the government knew exactly what it needed and wanted, this . . . consideration also cuts against the validity of the warrant." *Id.* at 12727 (internal quotation marks omitted).

Mr. Rios's case is on all fours with *Millender*. Officers in this case had no evidence Mr. Rios ever used a firearm in connection with a crime, and the affidavit presents no evidence that his possession of a firearm constituted a crime. To the extent that the blue-steel handgun discussed in the affidavit might permissibly be included in the search, there was no evidence indicating Mr. Rios owned additional firearms or that any other firearms were likely to be present at his residence. "In short, [even if] the deputies had probable cause to search for a single, identified weapon, . . . [t]hey had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant." *Id.* at 12728. As in *Millender*, because "probable cause did not exist to seize all items of those particular types," the warrant was invalid. *Id.* at 12724 (internal quotation marks omitted).

c. The Warrant Does Not Establish Probable Cause To Search for Gang Evidence

Finally, the search warrant is invalid because of its broad permit to search for and seize evidence of gang membership or affiliation, in the absence of probable cause to believe Mr. Rios's suspected drug dealing had any relation to a gang. "Merely being a gang member or having gang ties is not a crime in California." *Id.* at 12733-34. Rather, there are increased penalties for committing a crime "for the benefit of, at the direction of, or in association with" a gang, where the crime is committed with the "specific intent to promote, further, or assist in any criminal conduct by gang members." *Id.* at 12734 (internal quotation marks omitted). As this Court recently held in *Millender*, "[b]ecause the deputies failed to establish any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence is likewise invalid." *Id.*

Specifically, the affidavit in support of the warrant in Mr. Rios's case includes evidence that he is a member of the Monos street gang (ER 230-32), but does not contain any evidence that the few hand-to-hand drug deals in which he was suspected of participating were "for the benefit of, at the direction of, or in association with" the Monos gang, or that Mr. Rios intended to assist the Monos gang by selling drugs. Detective Barnes's conclusory statement that "gang members often sell narcotics not only for their personal gain but also to promote the gang as a whole" (ER 233), does not cure this problem.

D. The District Court Erred in Denying Mr. Rios's Motion To Suppress His October 16 Post-*Miranda* and October 20 Statements Because They Were Obtained in Violation of His Fifth Amendment and Statutory Rights

1. The Statements Were Obtained in Violation of the Fifth Amendment

"'In order to combat the pressures inherent in custodial interrogation and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights.'" *United States v. Williams*, 435 F.3d 1148, 1151 (9th Cir. 2006) (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (alteration omitted). "A *Miranda* warning functions both to reduce the risk that an involuntary or coerced statement will be admitted at trial and to implement the Fifth Amendment's self-incrimination clause." *Id.* at 1152. "Thus, if a suspect in custody does not receive an adequate warning effectively apprising him of his rights before he incriminates himself, his statements may not be admitted as evidence against him." *Id.*

In Mr. Rios's case, the Government conceded, and the district court agreed, that his statements given to law enforcement, while in custody and without the benefit of *Miranda* warnings, were inadmissible at trial. These included Mr. Rios's two inculpatory statements at his home to Detective Barnes, and his pre-*Miranda* statement to Detective Barnes at the police station.

Mr. Rios argued that his *Mirandized* statement at the police department on October 16, which immediately followed the inadmissible un-*Mirandized* statement, and his statement to Agent Monzon on October 20, should be

suppressed as well, because law enforcement used the "question first, *Mirandize* later" technique. The district court denied this motion.

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court held that when a law enforcement agent questions an individual first and administers *Miranda* warnings later, the *Miranda* warnings may not effectively apprise the suspect of his rights. The Court explained:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warning could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who had just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogations as distinct from the first, unwarned and inadmissible segment.

Id. at 611-12 (plurality). In *United States v. Williams*, this Court clarified that the plurality's holding in *Seibert*, coupled with a concurrence by Justice Kennedy, means 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." *Williams*, 435 F.3d at 1157.

The initial question is thus whether Detective Barnes deliberately employed the ask-first-*Mirandize*-later technique in interrogating Mr. Rios. "[I]n determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." *Id.* at 1158. Objective factors include: (1) "the timing, setting and completeness of the prewarning interrogation," (2) "the continuity of police personnel," and (3) "the overlapping content of the pre- and post-warning statements." *Id.* at 1159. All three factors support a finding of deliberateness in Mr. Rios's case.

The first factor supports this finding because the pre- and post-*Miranda* questioning occurred only hours apart (regarding the statements at the house) or only seconds apart (regarding the pre-*Miranda* statements at the station), the setting was the same with respect to the statements at the station, and Mr. Rios provided a complete confession to being an illegal alien in possession of a firearm before the *Miranda* warning was even read. Second, there was complete continuity of police personnel between the statements at the house, the pre-*Miranda* statement at the station, and the post-*Miranda* statement at the station—all questioning was done by Detective Barnes. Finally, the content of the statements overlapped. Detective Barnes indicated to Mr. Rios that he wanted more information on the topics they had already discussed, and each interrogation focused on Mr. Rios's unlawful status, possession of a firearm, or both.

Moreover, Detective Barnes was well aware that Mr. Rios could be subject to criminal prosecution, as he had obtained a search warrant seeking evidence of criminal wrongdoing at Mr. Rios's home. Despite this fact, he chose not to administer *Miranda* warnings before interrogating Mr. Rios at his home and at the police department. In such a situation, the intent to deliberately evade *Miranda* is presumed:

> Once a law enforcement officer has detained a suspect *and subjects him to interrogation* . . . there is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed. Instead, the most plausible reason for the delay is an *illegitimate* one, which is the interrogator's desire to weaken the warning's effectiveness.

Williams, 435 F.3d at 1159 (internal footnote omitted). As this Court explained,

> [b]ecause law enforcement officers generally retain control over the timing of a *Miranda* warning and giving the warning to a custodial suspect imposes only a minimal burden, the officer's deferral of the warning until after a suspect's incriminating response further supports an inference of deliberateness.

Id. at 1160. Thus, the two-step tactic was deliberate.

Where the interrogating officer deliberately withholds *Miranda* warnings until after a suspect has given a confession, the question then becomes whether it is "likely" that "the warnings will be ineffective in preparing the suspect for

successive interrogation, close in time and similar in content." *Seibert*, 542 U.S. at 613 (plurality). Here, the *Miranda* warnings given to Mr. Rios halfway through the October 16 interrogation at the police station were ineffective because he had already confessed twice at his home earlier that morning, and had just finished supplying Detective Barnes with a host of incriminating information, without the benefit of *Miranda* warnings. There was no explanatory statement by Detective Barnes that Mr. Rios's earlier, unadvised statements could not be used against him. *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)). As the Supreme Court explained in *Seibert*, "telling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail." *Seibert*, 542 U.S. at 613 (plurality).

Specifically, this Court has outlined several factors that are relevant to the question whether a midstream *Miranda* warning was effective, including

> (1) the completeness and detail of the prewarning interrogation, (2) the overlapping content of the two rounds of interrogation, (3) the timing and circumstances of both interrogations, (4) the continuity of police personnel, (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first and (6) whether any curative

measures were taken.

Williams, 435 F.3d at 1160. Every one of these factors supports a finding that the midstream warning was insufficient in this case.

First, the pre-*Miranda* interrogations were complete and detailed, eliciting a full confession of Mr. Rios's unlawful status and possession of the firearm. When the pre-*Miranda* interrogation was complete, there was little if any need for further questioning . . . except the need to obtain the very same answers after reading Mr. Rios his *Miranda* rights.

Second, there was significant overlap between the pre- and post-warning interrogations, and Detective Barnes referenced the earlier inculpatory statements several times during the later questioning. "[R]eference to the prewarning statement [during the postwarning questioning] was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating." *Id.* at 1161 (internal quotation marks omitted).

Third, fourth, and fifth, the interrogations took place only hours and then minutes apart (and with respect to the October 20 interrogation, a few days apart), and the October 16 interrogations exclusively were conducted by Detective Barnes. There was no "break in time and circumstances" that would allow Mr. Rios "to distinguish between the two contexts and appreciate that the interrogation had taken a new turn." *Id.* (internal quotation marks and alterations omitted). Detective Barnes effectively treated the post-*Miranda* interrogation as a continuation of his earlier questioning of Mr. Rios.

And finally, no curative measures were taken. Mr. Rios never was informed that his earlier, unadvised statements could not be used against him. This factor is

"significant." *Id.* at 1160.

By contrast, in *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court held that officers could be forgiven for failing to administer *Miranda* warnings, as the questioning occurred during a "brief stop in the living room before proceeding to the station house [and the purpose of the stop] was not to interrogate the suspect but to notify his mother of the reason for his arrest." *Id.* at 315. There was no indication that the failure to advise Elstad of his *Miranda* rights was deliberate. Indeed, Elstad's incriminating statements were not made pursuant to questioning likely to elicit an inculpatory response, as Detective Barnes's questions were, but instead in response to a statement by an officer. *See id.* at 301. This case is thus like *Seibert* and unlike *Elstad*. *See Williams*, 435 F.3d at 162 n.16 ("The objective inquiries into deliberateness and effectiveness function practically as an analysis of whether the facts of a particular case more closely resemble those in *Seibert* or *Elstad*.").[8] Mr. Rios's October 16 and 20 statements should be suppressed.

2. The October 20 Statement Was Obtained in Violation of Mr. Rios's Right To Prompt Presentment

Federal Rule of Criminal Procedure 5(a) requires that "[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer . . . , unless a statute provides otherwise." Fed. R. Crim. P. 5(a)(1)(A). This presentment requirement derives from the common law. *Corley v. United States*, __ U.S. __,

[8] *See also Williams*, 435 F.3d at 1152 n.3 (explaining that the Supreme "Court's belief that Elstad's prewarning statements were voluntary played a decisive role in its analysis"). In Mr. Rios's case, the district court suppressed his prewarning statements.

129 S. Ct. 1558, 1562 (2009).

> The right to a speedy arraignment codified in Rule 5(a) has been recognized to serve at least three important interests; it: (1) protects the citizen from a deprivation of liberty as a result of an unlawful arrest by requiring that the Government establish probable cause, (2) effectuates and implements the citizen's constitutional rights by insuring that a person arrested is informed by a judicial officer of those rights, and (3) minimizes the temptation and opportunity to obtain confessions as a result of coercion, threats, or unlawful inducements.

United States v. Alvarez-Sanchez, 975 F.2d 1396, 1398 (9th Cir. 1992), *overruled on other grounds*, 511 U.S. 350, 358 (1994) (internal quotation marks and alterations omitted).

> Today presentment is the point at which the judge is required to take several key steps to foreclose Government overreaching: informing the defendant of the charges against him, his right to remain silent, his right to counsel, the availability of bail, and any right to a preliminary hearing; giving the defendant the chance to consult with counsel; and deciding between detention or release.

Corley, 129 S. Ct. at 1570. "[E]ven voluntary confessions are inadmissible if given after an unreasonable delay in presentment." *Id.* at 1563.

18 U.S.C. § 3501 creates a "safe harbor" of six hours after arrest, where voluntary confessions are immunized from a challenge for presentment delay. *See United States v. Garcia-Hernandez*, 569 F.3d 1100, 1105 (9th Cir. 2009).

> Under the [common law] rule as revised by § 3501(c), a district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was "reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate"). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was "made voluntarily and the weight to be given it is left to the jury." If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under [prior Supreme Court] cases, and if it was, the confession is to be suppressed.

Corley, 129 S. Ct. at 1571 (quoting 18 U.S.C. § 3501(c)) (citation and alterations omitted).

a. Mr. Rios Was Interrogated Outside of 18 U.S.C. § 3501(c)'s Six-Hour Safe Harbor Period

Section 3501(c)'s six-hour window was triggered on Mr. Rios's arrest, even though that arrest was by state officials, because he was arrested and detained for violation of a federal statute. "Plainly, a duty to present a person to a federal

magistrate does not arise until the person has been arrested for a *federal* offense. Until a person is arrested or detained for a federal crime, there is no duty, obligation, or reason to bring him before a judicial officer." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994) (citation and footnote omitted). In Mr. Rios's case, the suspect report Detective Barnes completed on October 16 clearly states that he was arrested for a violation of 18 U.S.C. § 922(g)(5)(A), a federal law. (ER 223.) "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 § 3501(c) and its 6-hour safe harbor period." *Alvarez-Sanchez*, 511 U.S. at 358. Mr. Rios was arrested and held by state law enforcement on a federal charge on the morning of October 16, 2008. Section 3501(c) was triggered upon his arrest. Far more than six hours thus passed between Mr. Rios's arrest and the October 20 interrogation.[9]

b. There Is No Reasonable and Necessary Explanation for the Delay

Although Mr. Rios was interrogated outside of the six-hour safe harbor,

> [s]ection 3501(c) also provides that the six-hour time limitation shall not apply in any case in which the delay in bringing the defendant before a magistrate judge beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available

[9] The district court determined that Mr. Rios's October 23 statement violated his right to prompt presentment and suppressed that statement.

such magistrate judge.

United States v. Liera, 585 F.3d 1237, 1242 (9th Cir. 2009) (internal quotation marks and alterations omitted). In Mr. Rios's case, the delay in presenting him to a magistrate had nothing to do with transportation or availability of a magistrate judge. The question thus becomes whether the delay was otherwise reasonable or necessary. *See Liera*, 585 F.3d at 1242.

As this Court explained in a related context, examples of reasonable delays include "unavoidable delays in transportation, late-night bookings where no magistrate is readily available, lack of availability of arresting officer, and other practical realities" such as the need "to give priority to more urgent cases." *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1479 & n.12 (9th Cir. 1993) (internal quotation marks, alteration, and footnotes omitted). "Examples of unreasonable delays include delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.* at 1479-80 (internal quotation marks and footnote omitted).

"[D]elay for the purpose of interrogation is the epitome of unnecessary delay." *Corley*, 129 S. Ct. at 1563 (internal quotation marks omitted); *see Liera*, 585 F.3d at 1242. "The desire of the officers to complete the interrogation is, perhaps, the most unreasonable excuse possible under § 3501(c)." *United States v. Wilson*, 838 F.2d 1081, 1085 (9th Cir. 1988). "[A]llowing police officers to interrogate an arrestee rather than to arraign him would encourage violations of Rule 5(a)—because it would permit the prosecution to profit by its willful violations." *Alvarez-Sanchez*, 975 F.2d at 1406; *see also Liera*, 585 F.3d at 1243

(holding that "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"). Yet that is precisely what occurred in this case.

As of the completion of Mr. Rios's October 16 interrogation, law enforcement had all the information it needed to charge him with a violation of 18 U.S.C. § 922(g)(5). *See Liera*, 585 F.3d at 1243 ("After interrogating Liera and both material witnesses the first time, the government had more than enough information to determine whether Liera should be criminally charged . . . .). Mr. Rios could have been presented to a magistrate judge that day or the following day, a Friday. (*See* ER 205.) *See Liera*, 585 F.3d at 1243; *Wilson*, 838 F.2d 1081 at 1085. The record presents no valid reason why he was not.

The delay was not caused by "administrative delays due to the unavailability of government personnel and judges necessary to completing the arraignment process." *Garcia-Hernandez*, 569 F.3d at 1106. It was not due to medical necessity. *See Liera*, 585 F.3d at 1242-43.

Further, although this Court has upheld weekend delays where magistrates are unavailable, there is no evidence in the record that a magistrate was unavailable to arraign Mr. Rios on October 18 or 19. *See United States v. Van Polck*, 77 F.3d 285, 289 (9th Cir. 1996). On Monday, October 20, rather than transport Mr. Rios to magistrate court, officers moved him from the La Habra police department to the Santa Ana County Jail, where he was formally interrogated a second time. *Compare Van Poyck*, 77 F.3d at 290 (approving of officers' actions where, after weekend delay, "officers transported Van Poyck to a

magistrate early Monday morning). He was then held three more days, formally interrogated a third time, and eventually brought before a judge on October 23, one week after his arrest on federal charges.

As this Court has explained:

> The purposes embedded in § 3501—to prevent confessions extracted due to prolonged pre-arraignment detention and interrogation, and to supervise the processing of defendants from as early a point in the criminal process as is practicable—are frustrated when the arraignment of a defendant who has been in custody for more than six hours is further delayed for no purpose other than to allow further interrogation of the defendant.

Wilson, 838 F.2d at 1087. That is precisely what happened in Mr. Rios's case. The October 20 statement, taken four days after his arrest, should be suppressed.

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VII. CONCLUSION

For the foregoing reasons, 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: August 25, 2010

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

CERTIFICATE OF RELATED CASES

Counsel for appellant certifies that she is unaware of any pending case presenting an issue related to those raised in this brief.

DATED: August 25, 2010

/S Alexandra W. Yates
ALEXANDRA W. YATES

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 13,500 words.

DATED: August 25, 2010

/S Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/S Alexandra W. Yates
ALEXANDRA W. YATES

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United States Code Annotated Currentness
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Amendment IV. Searches and Seizures (Refs & Annos)
→ **Amendment IV. Search and Seizure**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend. IV-Search and Seizure, USCA CONST Amend. IV-Search and Seizure

Current through P.L. 111-202 approved 7-13-10

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United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property (Refs & Annos)
→ **Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<This amendment is further displayed in five separate documents according to subject matter,>

<see USCA Const Amend. V-Capital Crimes>

<see USCA Const Amend. V-Double Jeopardy>

<see USCA Const Amend. V-Self Incrimination>

<see USCA Const Amend. V-Due Process>

<see USCA Const Amend. V-Just Compensation>

U.S.C.A. Const. Amend. V-Full Text, USCA CONST Amend. V-Full Text

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Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 223. Witnesses and Evidence (Refs & Annos)
→ **§ 3501. Admissibility of confessions**

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

A3

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(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

CREDIT(S)

(Added Pub.L. 90-351, Title II, § 701(a), June 19, 1968, 82 Stat. 210, and amended Pub.L. 90-578, Title III, § 301(a)(3), Oct. 17, 1968, 82 Stat. 1115; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

UNCONSTITUTIONALITY OF SECTION

<The United States Supreme Court, in Dickerson v. United States, 120 S.Ct. 2326, 530 U.S. 428, 147 L.Ed. 2d 405 (2000), held that *Miranda* announced a constitutional rule that Congress could not supersede legislatively by enacting this section.>

18 U.S.C.A. § 3501, 18 USCA § 3501

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United States Code Annotated Currentness
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
II. Preliminary Proceedings
→ **Rule 5. Initial Appearance**

(a) In General.

(1) Appearance Upon an Arrest.

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

(2) Exceptions.

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:

(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) Appearance Upon a Summons. When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.

(b) Arrest Without a Warrant. If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly commit-

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ted.

(c) Place of Initial Appearance; Transfer to Another District.

(1) Arrest in the District Where the Offense Was Allegedly Committed. If the defendant is arrested in the district where the offense was allegedly committed:

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) Arrest in a District Other Than Where the Offense Was Allegedly Committed. If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:

(A) in the district of arrest; or

(B) in an adjacent district if:

(i) the appearance can occur more promptly there; or

(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

(3) Procedures in a District Other Than Where the Offense Was Allegedly Committed. If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the magistrate judge must inform the defendant about the provisions of Rule 20;

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1;

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of

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either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

(d) Procedure in a Felony Case.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) Consulting with Counsel. The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) Detention or Release. The judge must detain or release the defendant as provided by statute or these rules.

(4) Plea.A defendant may be asked to plead only under Rule 10.

(e) Procedure in a Misdemeanor Case. If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(f) Video Teleconferencing. Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

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CREDIT(S)

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Fed. Rules Cr. Proc. Rule 5, 18 U.S.C.A., FRCRP Rule 5

Amendments received to 05-01-10

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MODEL GRAND JURY CHARGE

Back

Approved by the Judicial Conference of the United States, March 2005

Ladies and Gentlemen:

1. Now that you have been empaneled and sworn as a Grand Jury, it is the Court's responsibility to instruct you as to the law which should govern your actions and your deliberations as Grand Jurors.

2. The framers of our Federal Constitution deemed the Grand Jury so important for the administration of justice, they included it in the Bill of Rights. The Fifth Amendment to the United States Constitution provides in part that no person shall be held to answer for a capital or otherwise infamous crime without action by a Grand Jury. An infamous crime is a serious crime which may be punished by imprisonment for more than one year. The purpose of the Grand Jury is to determine whether there is sufficient evidence to justify a formal accusation against a person—that is, to determine if there is "probable cause" to believe the person committed a crime. If law enforcement officials were not required to submit to an impartial grand jury proof of guilt as to a proposed charge against a person suspected of having committed a crime, they would be free to arrest a suspect and bring that suspect to trial no matter how little evidence existed to support the charge.

3. The Grand Jury is an independent body and does not belong to any branch of the government. As members of the Grand Jury, you, in a very real sense, stand between the government and the person being investigated by the government. A federal grand jury must never be made an instrument of private prejudice, vengeance, or malice. It is your duty to see to it that indictments are returned only against those who you find probable cause to believe are guilty and to see to it that the innocent are not compelled to go to trial.

4. A member of the Grand Jury who is related by blood or marriage to a person under investigation, or who knows that person well enough to have a biased state of mind as to that person, or is biased for any reason, should not participate in the investigation of that person or in the return of the indictment. This does not mean that if you have an opinion you should not participate in the investigation. However, it does mean that if you have a fixed opinion before you hear any evidence, either on a basis of friendship or ill will or some other similar motivation, you should not participate in that investigation and in voting on the indictment.

5. Sixteen of the twenty-three members of the Grand Jury constitute a quorum and must be present for the transaction of any business. If fewer than this number are present, even for a moment, the proceedings of the Grand Jury must stop.

Limitation on the Power of the Grand Jury

6. Although as Grand Jurors you have extensive powers, they are limited in several important respects.

7. You can only investigate conduct which violates federal criminal laws. Criminal activity which violates state law is outside your inquiry. Sometimes, though, the same conduct violates both federal and state law, and this you may properly consider.

8. There is also a geographic limitation on the scope of your inquiries in the exercise of your power. You may inquire only to federal offenses committed in this district.

9. You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you.

10. Furthermore, when deciding whether or not to indict, you should not consider punishment in the event of conviction.

The Grand Jury Procedures

11. The cases which you will hear will come before you in various ways. Frequently, suspects are arrested during or shortly after the commission of an alleged crime, and they are taken before a Magistrate Judge, who then holds a preliminary hearing to determine whether there is probable cause to believe that the person has committed a crime. If the Magistrate Judge finds such probable cause, he or she will direct that the person be held for the action of the Grand Jury so that you can independently consider whether there should be an indictment.

12. Other cases will be brought before you by a government attorney—the U.S. Attorney or an Assistant U.S. Attorney before an arrest but after an investigation has been conducted by a governmental agency such as the Federal Bureau of Investigation, the Treasury Department, the Drug Enforcement Administration, Postal Authorities, or other federal law enforcement officials.

13. Since the government attorney has the duty of prosecuting persons charged with the commission of federal crimes, the government attorney will present the matters which the government desires to have you consider. The government will point out to you the laws which it believes have been violated, and will subpoena for testimony before you such witnesses as the government attorney may consider important and necessary and also any other witnesses that you may request or direct be called before you.

14. If during the course of your hearings, a different crime other than the one you are investigating surfaces, you have the right to pursue this new crime. Although you can subpoena new witnesses and documents, you have no power to employ investigators or to expend federal funds for investigative purposes. If the government attorney refuses to assist you or if you believe he or she is not acting impartially, you may take it up with me or any Judge of this Court. You may use this power even over the active opposition of the government's attorneys, if you believe it is necessary to do so in the interest of justice.

Evidence

15. The evidence you will consider will normally consist of oral testimony of witnesses and written documents. Each witness will appear before you separately. When the witness first appears before you, the Grand Jury foreperson will administer the witness an oath or affirmation, to testify truthfully. After this has been accomplished, the witness may be questioned. Ordinarily, the government attorney questions the witness first. Next, the foreperson may question the witness, and then any other members of the Grand Jury may ask questions. In the event a witness does not speak or understand the English language, an interpreter may be brought into the Grand Jury room to assist in the questioning.

16. Witnesses should be treated courteously and questions put to them in an orderly fashion. If you have any doubt whether it is proper to ask a particular question, ask the government attorney for advice. If necessary, a ruling may be obtained from the court.

17. You alone decide how many witnesses you want to hear. You can subpoena witnesses from anywhere in the country, directing the government attorney to issue necessary subpoenas. However, persons should not ordinarily be subjected to disruption of their daily lives, harassed, annoyed, or inconvenienced, nor should public funds be expended to bring in witnesses unless you believe they can provide meaningful evidence which will assist you in your investigation.

18. Every witness has certain rights when appearing before a Grand Jury. Witnesses have the right to refuse to answer any question if the answer would tend to incriminate them and the right to know that anything they say may be used against them. The Grand Jury should hold no prejudice against a witness who exercises the right against compulsory self-incrimination, and this can play no part in the return of any indictment.

19. Although witnesses are not permitted to have a lawyer present with them in the Grand Jury room, the law permits witnesses to confer with their lawyer outside of the Grand Jury room. Since an appearance before a Grand Jury may present complex legal problems requiring the assistance of a lawyer, you also can not hold it against a witness if a witness chooses to exercise this right and leaves the Grand Jury room to confer with an attorney.

20. Ordinarily, neither the person being investigated by the government nor any witnesses on behalf of that person will testify before the Grand Jury. Upon his or her request, preferably in writing, you may afford that person an opportunity to appear before you. Because the appearance of the person being investigated before you may raise complicated legal problems, you should seek the government attorney's advice and, if necessary, the Court's ruling before his or her appearance is permitted. Before that person testifies, he or she must be advised of his or her rights and required to sign a formal waiver. You should be completely satisfied that the person being investigated understands what he or she is doing. You are not required to summon witnesses which that person may wish to have examined unless probable cause for an indictment may be explained away by their testimony.

21. The determination of whether a witness is telling the truth is something that you must decide. Neither the Court nor the prosecutors or any officers of the Court may make this determination for you. As you listen to witnesses presented to you in the Grand Jury room and hear their testimony, remember that you are the judge of each witness's credibility. You may believe the witness's testimony, or you may not believe it, in whole or in part. Determining the credibility of a witness involves a question of fact, not a question of law. It is for you to decide whether you believe the person's testimony. You may consider in that regard whether the witnesses are personally interested in the outcome of the investigation, whether their testimony has been corroborated or supported by other witnesses or circumstances, what opportunity they have had for observing or acquiring knowledge concerning the matters about which they testify, the reasonableness or probability of the testimony they relate to you, and their manner and demeanor in testifying before you.

22. Hearsay is testimony as to facts not known by the witness of the witness' own personal knowledge but which have been told or related to the witness by persons other than the person being investigated. Hearsay testimony, if deemed by you to be persuasive, may in itself provide a basis for returning an indictment. You must be satisfied only that there is evidence against the accused showing probable cause, even if such evidence is composed of hearsay testimony that might or might not be admissible in evidence at a trial.

23. Frequently, charges are made against more than one person. It will be your duty to examine the evidence as it relates to each person, and to make your finding as to each person. In other words, where charges are made against more than one person, you may indict all of the persons or only those persons who you believe properly deserve indictment.

Deliberation and Vote

24. After you have heard all the evidence you wish to hear in a particular matter, you will then proceed to deliberate as to whether the person being investigated should be indicted. No one other than your own members or an interpreter necessary to assist a juror who is hearing or speech impaired is to be present while you are deliberating or voting.

25. To return an indictment charging an individual with an offense, it is not necessary that you find that individual guilty beyond a reasonable doubt. You are not a trial jury and your task is not to decide the guilt or innocence of the person charged. Your task is to determine whether the government's evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the person being investigated committed the

offense charged. To put it another way, you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the person being investigated is probably guilty of the offense charged.

26. Each juror has the right to express his or her view of the matter under consideration. Only after all Grand Jurors have been given full opportunity to be heard will a vote be taken. You may decide after deliberation among yourselves that further evidence should be considered before a vote is taken. In such case you may direct to subpoena the additional documents or witnesses you desire to consider.

27. When you have decided to vote, the foreperson shall designate a juror as secretary who will keep a record of the vote, which shall be filed with the Clerk of Court. The record does not include the names of the jurors but only the number of those voting for the indictment. Remember, at least sixteen jurors must be present at all times, and at least twelve members must vote in favor of an indictment before one may be returned.

28. If twelve or more members of the Grand Jury, after deliberation, believe that an indictment is warranted, then you will request the government attorney to prepare the formal written indictment if one has not already been prepared and presented to you. The indictment will set forth the date and place of the alleged offense, will assert the circumstances making the alleged conduct criminal, and will identify the criminal statute violated. The foreperson will sign the indictment as a true bill, in the space followed by the word "foreperson." It is the duty of the foreperson to sign every indictment, whether the foreperson voted for or against. If less than twelve members of the Grand Jury vote in favor of an indictment which has been submitted to you for your consideration, the foreperson will endorse the indictment "Not a True Bill" and return it to the Court and the Court will impound it.

29. Indictments which have been signed as a true bill will be presented to a Judge [or a Magistrate Judge] in open court by your foreperson at the conclusion of each deliberative session of the Grand Jury. In the absence of the foreperson, a deputy foreperson may act in place of the foreperson and perform all functions and duties of the foreperson.

Independence of the Grand Jury

30. It is extremely important for you to realize that under the United States Constitution, the Grand Jury is independent of the United States Attorney and is not an arm or agent of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, or any governmental agency charged with prosecuting a crime. Simply put, as I have already told you, the Grand Jury is an independent body and does not belong to any branch of the government.

31. However, as a practical matter you must work closely with the government attorneys. They will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should receive this assistance. If past experience is any indication of what to expect in the future, then you can expect candor, honesty and good faith in matters presented by the government attorneys. However, ultimately, you must depend on your own independent judgment, never becoming an arm of the United States Attorney's office. The government attorneys are prosecutors. You are not. If the facts suggest that you should not indict, then you should not do so, even in the face of the opposition or statements of the government attorney. You would violate your oath if you merely "rubber-stamped" indictments brought before you by the government representatives.

32. Just as you must maintain your independence in your dealings with the government attorneys, so should your dealings with the Court be on a formal basis. If you should have a question for the Court or desire to make a presentment or return an indictment to the Court, you will assemble in the courtroom for these purposes. Moreover, each juror is directed to report immediately to the Court any attempt by any person who under any pretense whatsoever addresses or contacts him or her for the purpose of or with the intent to gain any information of any kind concerning the proceedings of the Grand Jury, or to influence a juror in any manner or for any purpose.

The Obligation of Secrecy

33. Your proceedings are secret and must remain secret permanently unless and until the Court decrees otherwise. You cannot relate to your family, to the news or television reporters, or to anyone that which transpired in the Grand Jury room. There are several important reasons for this requirement. A premature disclosure of Grand Jury action may frustrate the ends of justice by giving an opportunity to the person being investigated to escape and become a fugitive or to destroy evidence. Also, if the testimony of a witness is disclosed, the witness may be subject to intimidation, retaliation, bodily injury, or other tampering before testifying at trial. Thirdly, the requirement of secrecy protects an innocent person who may have come under investigation but has been cleared by the actions of the Grand Jury. In the eyes of some, investigation by a Grand Jury alone carries with it a suggestion of guilt. Thus great injury can be done to a person's good name even though the person is not indicted. And fourth, the secrecy requirement helps to protect the members of the grand jury themselves from improper contacts by those under investigation. For all these reasons, therefore, the secrecy requirement is of the utmost importance and must be regarded by you as an absolute duty. If you violate your oath of secrecy, you may be subject to punishment.

34. To insure the secrecy of Grand Jury proceedings, the law provides that only authorized persons may be in the Grand Jury room while evidence is being presented. Only the members of the Grand Jury, the government attorney, the witness under examination, the court reporter, and an interpreter, if required, may be present.

35. If an indictment should ultimately be voted, the presence of unauthorized persons in the Grand Jury room could invalidate it. Particularly remember that no person other than the Grand Jury members themselves or an interpreter necessary to assist a juror who is hearing or speech impaired may be present in the Grand Jury room while the jurors are deliberating and voting. Although you may disclose matters which occur before the Grand Jury to attorneys for the government for use by such attorneys in the performance of their duties, you may not disclose the contents of your deliberations and the vote of any juror even to government attorneys.

Conclusion

36. The importance of the service you will perform is demonstrated by the very comprehensive and important oath which you took a short while ago. It is an oath rooted in history and thousands of your forebears have taken similar oaths. Therefore, as good citizens, you should be proud to have been selected to assist in the administration of the American system of justice.

37. The government attorney will now accompany you and will assist you in getting organized, after which you may proceed with the business to come before you.

38. The United States Marshal and Deputy United States Marshals will attend you and be subject to your appropriate orders.

39. You may now retire.

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United States Court of Appeals for the Ninth Circuit

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Case Name:	USA v. Victor Rios-Barraza
Case Number:	10-50091
Document(s):	Document(s)

Docket Text:
Submitted (ECF) Opening brief for review. Submitted by Appellant Victor Manuel Rios-Barraza. Date of service: 08/25/2010. [7452691] (AWY)

The following document(s) are associated with this transaction:
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[STAMP acecfStamp_ID=1106763461 [Date=08/25/2010] [FileNumber=7452691-0]
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Notice will be electronically mailed to:

Mr. Raphael, Michael J., Assistant U.S. Attorney
Yates, Alexandra Wallace, Federal Public Defender
Biesheuvel, Mieke, Assistant U.S. Attorney

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