UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**3:94-CR-012-T**
	)	
v.	)	
	)	
XXXX XXXX,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

F. CLINTON BRODEN

Attorney for Defendant
XXXX XXXX

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

CASES

STATUTES

MISCELLANEOUS

I. FACTS

On December 30, 1993 at approximately 8:00 p.m., Defendant XXXX XXXX was placed under arrest by Special Agent Joseph Taylor of the United States Immigration and Naturalization Service. See Memorandum of Joseph Taylor ("Taylor Memo") at pg 1 (attached hereto as Exhibit A). See also Declaration of XXXX XXXX ("XXXX XXXX Dec.") at ¶ 3. Agent Taylor was accompanied by a fellow special agent, several officers from the Dallas Police Department, and several United States Marshals (collectively "the Agents"). See Taylor Memo at pg. 1.

The arrest took place at the corner of the 600 block of Marsalis Avenue in Dallas, Texas. Id. Nevertheless, rather than removing Mr. XXXX from the scene and taking him to a detention facility, Mr. XXXX was taken from the corner of Marsalis Avenue, while handcuffed, to an area outside of his residence located at 629 Marsalis Avenue. See XXXX Dec. at ¶ 5. Mr. XXXX was asked to provide proof of his resident status in the United States by the Agents. Id. at ¶ 4. As a result of this request, Mr. XXXX asked his brother, who had been at the residence, to secure his green card from inside his mother's room located in the family home. Id. at ¶ 5. Thereafter, an agent followed Mr. XXXX's brother, Jamie XXXX, into the residence and XXXX XXXX remained handcuffed outside. Id. at ¶ 6. See also Declaration of Jamie XXXX ("Jamie XXXX Dec.") at ¶ 4. At no time did XXXX XXXX or Jamie XXXX consent to have an agent follow Jamie XXXX into the residence. See XXXX XXXX Dec. at ¶ 7; Jamie XXXX Dec. at ¶ 4.

Shortly after Jamie XXXX entered the home accompanied by the uninvited agent, several other agents entered the residence. See XXXX XXXX Dec. at ¶ 6; Jamie XXXX Dec. at ¶ 6. At some point in time, Jamie XXXX gave the one agent who originally accompanied him into the home permission to look in his mother's bedroom for XXXX XXXX 's immigration documents. See Jamie XXXX Dec. at ¶ 5. At the same time, however, the several other uninvited Agents began to search other rooms for items other than immigration documents. Id. at ¶ 6. Significantly, Jamie XXXX did not consent to have any of these other Agents engage in any type of search, and did not consent for any other room besides his mother's room to be searched, and did not consent for the

search of his mother's room to extend beyond places the immigration documents would likely be kept. Id. at ¶ 7.

One of the other Agents engaging in the non-consensual search of XXXX XXXX's room found the Intratec Model DEC-DC9, nine millimeter caliber semi-automatic pistol that is the focus of this case under the mattress of a crib located in that room. See Taylor Memo at pg 2. Significantly, this room was not Jamie XXXX's room and, even had he given the other Agents permission to search this room, he was without authority to allow those Agents entry into the room. See XXXX XXXX Z Dec. at ¶ 8; Jamie XXXX Dec. at ¶ 8.

Following Mr. XXXX 's arrest and the search of his residence, he was taken to the Lew Sterrett Jail facility. See Taylor Memo at pg 2. Although the federal agent had probable cause to believe that Mr. XXXX XXXX had violated 18 U.S.C. § 922(k), Mr. XXXX was not taken "without unnecessary delay" before the nearest available federal magistrate judge as required by Fed. R. Crim. P. 5(a). Eventually, on January 3, 1994, five days after Mr. XXXX's arrest, Mr. XXXX gave Agent Taylor a statement in which he allegedly admitted that he owned the firearm in question and was aware that the firearm's serial number had been obliterated. See Exhibit D. Only then, on January 4, 1994, was Mr. XXXX finally taken before a Magistrate Judge to have counsel appointed.

XXXX XXXX was born in Mexico and moved to the United States in 1980 or 1981. See XXXX XXXX Dec. at ¶ 2. Mr. XXXX dropped out of high school after the tenth grade. Id. at ¶ 2.

II. ARGUMENT

III. A. THE ITEMS SEIZED FROM 629 MARSALIS AVENUE MUST BE SUPPRESSED BECAUSE NO VALID CONSENT WAS GIVEN BY XXXX XXXX.

It is axiomatic that in the absence of a search warrant issued by a neutral and detached judicial officer, the Government has the burden of proving that a warrantless search is consensual and that such consent was freely and voluntarily given. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Moreover, courts must use "the most careful scrutiny" when reviewing claims by the Government that a defendant consented to a search. Id. at 229. Indeed, courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

1. XXXX XXXX did not give the Agents consent to enter his residence

In the instant case, Mr. XXXX expressly denies giving Agent Taylor or any other agent permission to search his home following his arrest.[1] While the Government now alleges that Mr. XXXX did consent to a search, it could easily have allowed this Court to fulfill its role as fact finder by simply tape recording the consent or having Mr. XXXX sign a consent form, yet it failed to do so. See United States v. Maragh, 756 F. Supp. 18, 22 (D.C. Cir. 1991). Therefore, the issue of whether Mr. XXXX gave consent to search is a factual dispute requiring a hearing.

2. Assuming arguendo that XXXX XXXX did give an agent consent to enter his residence to assist in the securing of his

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[1] The mere failure of Mr. XXXX to object when the agent accompanied his brother into the house is not consent. See United States v. Shaibu, 920 F.2d 1423, 1428 (9th Cir. 1990) ("We hold that in the absence of a specific request by police for permission to enter a home, a defendant's failure to object to such entry is not sufficient to establish free and voluntary consent."); Cf. United States v. Gonzales, 842 F.2d 748, 754 (5th Cir. 1988) ("[A]cquiescence cannot substitute for free consent....").

green card, the consent was not given knowingly and voluntarily.

Assuming arguendo that XXXX XXXX did give the agent permission to enter his residence while his brother was locating his immigration papers, the evidence seized must still be suppressed because such alleged consent would not have been freely and voluntarily given. The United States Court of Appeals for the Fifth Circuit has focused on six factors in determining whether a consent to search is voluntary.

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

United States v. Ponce, 8 F.3d 989, 997 (5th Cir. 1993). In this case, all the factors weigh against a determination that any alleged consent was voluntary. First, XXXX XXXX was undeniably under arrest and was in custody. Therefore, his custodial status was far from voluntary. Second, Mr. XXXX was in a coercive atmosphere on a dark street surrounded by numerous agents and officers from several law enforcement agencies and he was handcuffed. Third, there is no showing that Mr. XXXX was overly cooperative with the agents. Fourth, Mr. XXXX was never told that he could refuse to allow the agents to enter his residence. Fifth, Mr. XXXX was born in Mexico and has a limited education. Sixth, Mr. XXXX obviously knew that if the agents conducted a full scale search that they would likely locate the weapons they ultimately seized. Therefore, even assuming that Mr. XXXX consented to the search, it cannot seriously be argued that the alleged consent was voluntary.

3. Assuming arguendo that XXXX XXXX did give an agent consent to enter his residence and that the consent was, in fact, given knowingly and voluntarily, the search nevertheless exceeded the scope of that alleged consent.

The Government has taken the position that XXXX XXXX consented to allow an agent to enter his residence with his brother in order to secure his immigration papers. See Taylor Memo at pg 1. While Mr. XXXX, as set forth above, strenuously disputes the Government's allegations, the

search was illegal in any event. Indeed, Mr. XXXX 's alleged consent to enter, even if given and even if voluntary, would not have extended to a search and certainly not to a search of any rooms besides his mother's room in which his immigration documents were kept and, in absolutely no event, to areas beneath a mattress where it was not likely immigration papers would be kept.

The United States Court of Appeals for the Seventh Circuit just recently considered a case almost identical to the instant case. In United States v. Towns, 913 F.2d 434 (7th Cir. 1990), Mr. Towns had been arrested by police and was told he would not be released unless he produced identification. Id. at 438. Mr. Towns was taken, while handcuffed, to his girlfriend's apartment in order to produce identification which he kept in his luggage stored in that apartment. Id. at 439. While Mr. Towns was getting his identification, the officers, as did the agents in this case, searched the dwelling from top to bottom. Id. The Seventh Circuit held that the search was illegal and that the fruits of the search must be suppressed:

> In this case, there is a dearth of evidence, other than the government's bare suggestion, that the defendant consented to a search. The district court could readily find that the defendant allowed the police to enter the apartment so that he could provide them with some identification, but there is no evidence that he also invited them to search through his belongings and later conduct an exploratory search of the apartment for a seven-hour period. Even when a defendant consents to a search in response to a police inquiry, the scope of the search is limited by the breadth of the consent.

Id. at 442-43.

Similarly, the Supreme Court of New Hampshire, in State v. Diaz, 596 A.2d 725, 727 (N.H. 1991), considered a case in which a defendant was told by police to go to his motel room to get identification. The New Hampshire Court, like the Seventh Circuit, held that an ensuing search conducted by police when they accompanied the defendant back to the room to get his identification was unconstitutional and the fruits of the search must be suppressed. The Court wrote:

> Accepting an invitation to return to one's residence in order to produce identification sufficient to answer an officer's questions is significantly different from inviting the police to enter a private area and observe all subsequent activities. The response to the request conveyed that the defendant wished to return to the room, where he could then produce his identification. It implied that the defendant would produce

> identification, not that the defendant and the police would enter and search for the identification.

Id. at 727-728. The New Hampshire Court also noted that "[t]he fact that the defendant or his girlfriend did not prevent the entry of the three officers [did] not constitute consent. Id. at 728, citing, United States v. Most, 876 F.2d 191, 199 (D.C. Cir. 1989).[2]

In short, this case is almost indistinguishable from Towns and Diaz. Mr. XXXX was asked by the Agents to provide his alien identification. Like the defendants in Towns and Diaz, Mr. XXXX sought to comply with the Agents request. Since he himself was not permitted to enter his house, he asked that his brother get the identification. Mr. XXXX never gave the Agents carte blanc permission to search his entire house for evidence of any possible criminal history and even the Government does not attempt to argue this. Therefore, even assuming arguendo that Mr. XXXX gave an agent consent to accompany Jamie when Jamie secured his green card, the scope of this consent was limited to those steps necessary to return the green card to him while he was held handcuffed outside the home. Since the scope of any alleged consent by XXXX XXXX was certainly exceeded in this case, the evidence must be suppressed even if a limited consent was given.

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[2] A consent to allow an agent to accompany his brother into his residence is not a consent to search. In any event, even a consent to search for identification must be limited to places where identification is normally kept - not under a mattress. In United States v. Royster, 204 F. Supp. 760 (N.D. Ohio 1961), a defendant gave police his wallet in order for the police to review his identification. Rather than retrieve the identification, however, the police officer unzipped the closed pocket of the billfold and found three counterfeit bills. Id. The District Court suppressed the bills holding that the search of the closed pockets exceeded the scope of the defendant's consent to search for his identification. Id. See also United States v. Delgado, 797 F. Supp. 213, 1218 (W.D. N.Y. 1991) (Border patrol agent exceeded scope of consent to look in suspect's bag for identification when agent reached into pants pocket that had been removed from the bag and removed a package containing a controlled substance.).

B. THE ITEMS SEIZED FROM XXXX XXXX'S BEDROOM MUST BE SUPPRESSED BECAUSE NO VALID CONSENT WAS GIVEN BY JAMIE XXXX.

As set forth above, it is apparent that XXXX XXXX did not give the Agents valid consent to enter his residence and, to the extent the Agents argue that he did, the search of his bedroom exceeded the scope of the alleged consent. Therefore, the Government will also be forced to argue that Jamie XXXX gave the Agents consent to conduct a full scale search of 's bedroom. This argument, of course, is equally unavailing.

1. Jamie XXXX did not give Agents consent to enter 629 ZZZ Avenue or to search any room but his mother's bedroom or for any item other than XXXX XXXX's green card.

Jamie XXXX expressly denies giving any of the agents permission to enter the residence he shared with his brother XXXX XXXX. Jamie XXXX concedes that sometime after an uninvited agent accompanied him into the house, he gave that agent permission to help him look in his mother's bedroom for 's green card. Nevertheless, Jamie XXXX never gave any other police officers permission to search any other room in the house, and did not consent for the search of his mother's room to extend beyond places the immigration documents are likely to be kept.

As noted by the United States Court of Appeals for the Ninth Circuit, an "invitation to enter the house [does] not, without more, give officers permission to enter every room in the house." United States v. Mejia, 953 F.2d 461, 466 (9th Cir. 1991), cert. denied, 112 S.Ct. 1983 (1992). Moreover, as noted above, when law enforcement officials are given permission to search for an individuals identification, the scope of the search must be so confined. See Delgado, 797 F. Supp. at 218; Royster, 204 F. Supp. at 760. Therefore, if the Government claims that JAMIE XXXX consented to any type of search beyond a search of his mother's room for 's green card, a hearing must be conducted to resolve the factual dispute.[3]

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[3] Jamie's permission to allow the one agent to help him locate 's green card located in his mother's room is clearly fruit of the agent's illegal nonconsensual entry into the residence in the first

2. Assuming arguendo that Jamie XXXX did give Agents consent to conduct a full scale search of XXXX XXXX's bedroom, he was without authority to do so.

As noted above, the firearm in question was seized from XXXX XXXX 's bedroom. This is a bedroom that XXXX XXXX shares with his sister and her child; Jamie XXXX does not use or enter this bedroom and there was no reason to believe Jamie XXXX had authority to allow the agents to search the bedroom.

Very few cases have been found addressing the authority of one sibling to allow the search of another sibling's bedroom. Nevertheless, for an individual to be able to consent to a search of a particular room, the Government has the burden of proving that the alleged consentee had "joint access or control [over that room] for most purposes." See Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (citation omitted).

In People v. Petrie, 453 N.Y.S.2d 725 (N.Y. App. Div. 1982), the Court held that a nineteen year old sibling could not consent to a search of his brother's bedroom because the brother's bedroom was not a common area of the house. Id. at 727. Similarly, in People v. Mullaney, 306 N.W.2d 347 (Mich. Ct. App. 1991), a Court was faced with a case in which a sister gave police permission to search her brother's bedroom. The Court held that the sister lacked authority to do this. "Defendant's sister could only consent to a search of the common areas of the house and to a search of her own bedroom. She could not consent to a search of defendant's bedroom, a place where the defendant had a reasonable expectation of privacy." Id. at 349. See also, State v. Harris, 522 A.2d 323 (Conn. Ct. App. 1987); Scott v. State, 337 So.2d 1342 (Ala. Crim. App. 1976). Moreover, as if writing about this case, the Mullaney Court held that the consent was invalid in any event because it "came only after the police were already inside the house and not voluntarily." Mullaney, 306 N.W.2d at 349.

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instance. See Mullaney, infra., 306 N.W.2d at 349. Nevertheless, since the firearm in dispute was not found in the mother's room, this is an academic issue.

The law in this case might have been different had Jamie's alleged consent to search 's bedroom actually been given and had Jamie and shared this bedroom as cooccupants. See, e.g., United States v. Bethea, 598 F.2d 331, 334-35 (4th Cir.), cert. denied, 446 U.S. 860 (1979). Nevertheless, it is clear that Jamie XXXX did not have joint control over XXXX XXXX 's bedroom. JAMIE XXXX had his own bedroom at 629 ZZZ Avenue and did not use 's bedroom for any purpose. Therefore, even assuming that Jamie XXXX gave the Agents permission to conduct a full blown search of 's bedroom for evidence of any criminal activity, he was without authority to do so. That being the case, the Agents had no viable consent to search XXXX XXXX's bedroom.

C. THE STATEMENT GIVEN TO AGENTS ON JANUARY 3, 1994 BY XXXX XXXX WAS FRUIT OF THE ILLEGAL SEARCH OF MR. XXXX'S BEDROOM AND WAS ALSO OBTAINED IN VIOLATION OF XXXX XXXX' RIGHT TO BE TAKEN BEFORE A MAGISTRATE WITHOUT UNNECESSARY DELAY THEREFORE IT MUST BE SUPPRESSED.

As noted above, Mr. XXXX was arrested on December 30, 1993 and the firearm in question was illegally seized coincident with the arrest. Nevertheless, although the Agents were required to bring Mr. XXXX before the nearest federal magistrate judge "without unnecessary delay", this was not done. See Fed. R. Crim. P. 5(a). Instead, the Agents proceeded to question Mr. XXXX about the firearm and obtained an alleged confession from Mr. XXXX XXXX on January 4, 1994. See Exhibit D.

The confession must be suppressed for two independent reasons. First, the confession is clearly fruit of the illegal search discussed above. Second, it is fruit of the Agents' violation of Fed. R. Crim. P. 5(a).

1. Mr. XXXX's confession followed an illegal search and must be suppressed.

The United States Supreme Court dealt with the now familiar 'fruit of the poisonous tree' doctrine in Wong Sun v. United States, 371 U.S. 471 (1963). Wong Sun dealt with a confession

arising out of an illegal arrest, but it would be equally applicable to a confession arising out of an illegal search. Noted one commentator:

> Although the Supreme Court has never confronted, except obliquely, a situation in which...a confession was the fruit of a prior illegal search, in most such cases there is little doubt as to what the result should be. In the typical case in which the defendant was present when incriminating evidence was found in an illegal search or in which the defendant was confronted by the police with evidence they had illegally seized, it is apparent that there has been an "exploitation of that illegality" when the police subsequently question the defendant about that evidence or the crime to which it relates. This is because "the realization that the 'cat is out of the bag' plays a significant role in encouraging the suspect to speak."

Wayne R. LaFave, Search and Seizure § 11.4(c) (1987). In United States v. Parker, 722 F.2d 179, 185-86 (5th Cir. 1983), the United States Court of Appeals recognized the applicability of the 'fruit of the poisonous tree' analysis to confessions obtained as a result of an illegal search. In this case, there can be no doubt that Mr. XXXX's alleged confession came as a direct result of this illegal search of his bedroom and the illegal seizure of the firearm discussed above. It should be self evident that Mr. XXXX gave his statements once he realized the 'cat was out of the bag'. Indeed, had it not been for the illegal search, the Agents would have been unaware that 'the cat' even existed.

Therefore, upon ruling that the search of Mr. XXXX's bedroom was illegal, this Court must also suppress statements made by Mr. XXXX's in response to the illegally seized firearm.

2. Mr. XXXX was not taken before a magistrate judge without unnecessary delay as required by Fed. R. Crim. P. 5(a)following his arrest, therefore his subsequent confession occurring five days following his arrest should be suppressed on this basis as well.

Even assuming that this Court concludes that Mr. XXXX's confession was not fruit of this illegal search and seizure, it should be suppressed as a result of the Agents failure to comply with Fed. R. Crim. P. 5(a) requiring that they bring Mr. XXXX before a magistrate judge "without unnecessary delay" following his arrest. In a line of cases including United States v. McNabb, 318 U.S. 332 (1943), and culminating with Mallory v. United States, 354 U.S. 449 (1957), the United States Supreme Court held that the appropriate remedy for violations of Fed. R. Crim. P. 5(a) was

the suppression of confessions obtained during the unnecessary delay. This rule was relaxed somewhat with the adoption of 18 U.S.C. § 3501(c) which provides that voluntary confessions made within six hours of an arrest are not to be suppressed even in the face of a Rule 5(a) violation. Nevertheless, "a confession outside of the [18 U.S.C. § 3501(c) six hour] safe harbor is subject to the McNabb-Mallory rule, which mandates exclusion if the delay...is unreasonable." United States v. Alvarez-Sanchez, 975 F.2d 1396 (9th Cir. 1992), cert. denied, 114 S.Ct. 299 (1993), citing, 3 J. Wigmor, Evidence § 862(a) (1990); 8 J. Moore, Moore's Federal Practice § 5.02 [2] (1992).

Several courts in the recent past have, in fact, suppressed confessions in cases involving unnecessary delay in bringing a defendant before a magistrate judge. See, e.g., Alvarez-Sanchez, 975 F.2d at 1398 (four day delay); United States v. Wilson, 838 F.2d 1081, 1083 (9th Cir. 1988) (twenty hour delay); United States v. Fouche, 776 F.2d 1398, 1405-07 (9th Cir. 1985) (twenty hour delay); United States v. Rivera, 750 F. Supp. 614, 619-20 (S.D. N.Y. 1990) (twenty-one hour delay); United States v. Khan, 625 F. Supp. 868, 871-74 (S.D. N.Y. 1986) (forty-three hour delay). In the instant case, almost 120 hours elapsed between arrest and Mr. XXXX 's appearance before a magistrate judge. Indeed, far more time elapsed in this case than in these other cases in which courts suppressed statements as a remedy for a Rule 5(a) violation.

Mr. XXXX is only eighteen years old and has a limited education. Moreover, he made his statement without assistance of counsel. While Mr. XXXX was apparently given his Miranda warnings, this does not correct the taint of the Rule 5(a) violation. As the Ninth Circuit noted in Wilson:

> The Government's reliance on the waiver of Miranda rights becomes weaker as the period of pre-arraignment detention increases. If unreasonable delay in excess of six hours can itself form the basis for a finding of involuntariness, that same delay may also suggest involuntariness of the Miranda waiver. See Frazier v. United States, 419 F.2d 1161, 1167 (D.C. Cir. 1969) (noting that the government's "already 'heavy burden' of showing effective waiver" increases with the delay between arrest and confession).

Wilson, 838 F.2d at 1087. In Wilson, a defendant had confessed following a twenty hour delay. The Court considered the five factor test for voluntariness set forth at 18 U.S.C. § 3501(b).[4] It noted that it was making no finding as to whether Wilson knew of the charges against him, but also noted that Wilson had a limited education.[5] Id. at 1086. It found that Wilson was informed of his

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[4] The factors include: (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. 18 U.S.C. § 3501(b) (1982).

[5] It is unclear whether Mr. Hernanez knew that he would be charged with a weapons violation given the questioning at the scene of his arrest regarding his immigration status. It is also noted that Mr. XXXX has a limited

right to counsel, and the fact that statements he made could be used against him, and it also found that Wilson declined to have an attorney present when he was questioned. Id. Nevertheless, the Court found that the unnecessary twenty hour delay and the fact that Wilson was without the assistance of counsel when he made his confession mandated reversal of the district court and the suppression of the confession. Id. Here too, the lengthy delay - almost six times as long as in Wilson - and the absence of counsel, require suppression.

Finally, while the Government will likely argue that Mr. XXXX was arrested for deportation purposes and he 'just happened' to be questioned about the allegedly illegal firearm, such an argument is tellingly transparent. "[A]n alien who is detained on a criminal charge, or against whom criminal charges are going to be lodged, in addition to any deportation proceedings that may be conducted against him, [is not deprived] of his rights secured by Rule 5(a) of the Federal Rules of Criminal Procedure and the McNabb-Mallory rule." United States v. Sotoj-Lopez, 603 F.2d 789, 790-91 (9th Cir. 1979) (emphasis added) (Confession suppressed as a result of 18 hour delay before appearance before magistrate judge.).

The United States Court of Appeals for the Eighth Circuit considered an analogous case in United States v. Keeble, 459 F.2d 757 (8th Cir. 1972), 93 S.Ct. 1993 rev'd on other grounds, 412 U.S. 205 (1973), that should be instructive to this Court. In that case, Keeble was arrested by tribal police ("BIA") for a tribal offense. Id. at 754. While in custody for the tribal offense, he was questioned by FBI agents who were called by the BIA officer two hours following his arrest. Id. Following the questioning, the FBI swore out a criminal complaint. Id. In total, about ninety-nine hours elapsed between Keeble's arrest and his appearance before a magistrate. Id. The Government argued on appeal that since Keeble had only been arrested for a tribal offense Fed. R. Crim. P. 5(a) did not apply. Id. Nevertheless, the Eighth Circuit, in reversing the district court and suppressing Keeble's confession, noted that "[i]n spite of the arrest for the tribal offense, we believe that no later than [2 hours after defendant's arrest for the tribal offense], [the arresting BIA officer] had probable cause to arrest defendant for a violation of 18 U.S.C. § 1153, and [thus] at that time the arrest also became one for probable violation of that section." Id. at 760 (emphasis added). The

Keeble Court also noted that the BIA officer was a federal employee. Id. See also United States v. Bear Killer, 534 F.2d 1253, 1257 n.3 (8th Cir. 1976).

In another analogous case, a defendant who had been committed to a psychological hospital as a result of a not guilty by reason of insanity verdict in an unrelated case was questioned involving a homicide at the hospital. United States v. Robinson, 439 F.2d 553 (D.C. Cir. 1970). The District of Columbia suppressed the defendant's confession to the homicide because he was not taken before a magistrate "without delay" despite the fact that probable existed for his arrest and that he was in actual custody when questioned. Id. at 564. The Robinson Court noted:

> In a strict sense it may be said that appellant was not arrested or detained as envisaged by Rule 5 and Section 3501(c) before the confessions to Dr. Blum and Dr. Owens and that, therefore, Rule 5, and the Criminal Justice Act provision for counsel, do not apply in appellant's case. In all substance, however, even if not technically arrested, he was as though arrested. Probable cause for his continued confinement existed after the interviews with Officer Preston, aside from his patient status...The impact of Rule 5, Mallory, and the Criminal Justice Act accordingly are not avoided because of the possible absence of a formal arrest.

In the instant case, probable cause existed to charge Mr. XXXX with the firearm violation he was eventually charged with when he was arrested on December 30, 1993 and certainly by the time he was questioned on January 3, 1994. Agent Taylor, who is the cage agent on both the immigration matter and the instant firearms case, was a federal employee for all purposes like the BIA agent in Keeble. Like the defendants in Keeble and Robinson, Mr. XXXX was kept in actual custody and although the Government had probable cause to charge him with a federal criminal violation that would have required that he be brought before a magistrate judge, the Government simply ignored Rule 5(a) and proceeded to question him.

There can be no doubt that a 120 hour delay between arrest and arraignment in this case was an "unnecessary delay." Therefore, this Court, like so many other courts in so many other cases, should suppress the confession obtained in blatant violation of Rule 5(a).

III. CONCLUSION

This case is worthy of an issue spotting law school exam. While the Court can get to the correct answers taking several roads, these correct answers are clear. This Court must suppress all evidence seized from XXXX's bedroom at 629 Marsalis Avenue as well as his alleged confession made on January 3, 1994.

Respectfully submitted,

F. Clinton Broden

Attorney for Defendant
XXXX XXXX