

**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i> v. JULIO ALFONSO VALENZUELA- ESPINOZA, <i>Defendant-Appellant.</i>
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No. 10-10060  
D.C. No.  
4:08-cr-00431-  
CKJ-HCE-1

ORDER  
AMENDING  
OPINION AND  
DENYING  
REHEARING AND  
AMENDED  
OPINION

Appeal from the United States District Court  
for the District of Arizona  
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted  
October 11, 2011—San Francisco, California

Filed December 28, 2011  
Amended October 4, 2012

Before: Betty B. Fletcher, Stephen Reinhardt, and  
A. Wallace Tashima, Circuit Judges.

Opinion by Judge B. Fletcher

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**COUNSEL**

Francisco Leon, Tucson, Arizona, for appellant Julio Alfonso Valenzuela-Espinoza.

Dennis K. Burke, United States Attorney; Christina M. Cabanillas, appellate Chief; and Bruce M. Ferg, Assistant United States Attorney, Tucson, Arizona, for appellee United States of America.

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**ORDER**

This court's opinion, filed December 28, 2011, is amended by striking the words "*United States v.*" before "*Liera*" on page 21390 of the slip opinion, replacing "1237," with "at" in

the same line, and striking the words “(9th Cir. 2009)” in the following line. It is further amended by replacing the word “constitutional” with “longstanding” before the word “principle” on page 21392; by replacing the word “two” with “three” after the word “identified” on page 21392; and by striking “Here, the” on that page and inserting the following passage before the words “district court”:

<Finally, delays necessary to determine “whether [a suspect] should be criminally charged” are also reasonable. *Garcia-Hernandez*, 569 F.3d at 1106; *see also Gamez*, 301 F.3d at 1143 (explaining that delay was reasonable where it “was impossible to determine with what kind of offense Gamez would be charged” prior to questioning by Spanish-speaking agents).

The delay in presenting Valenzuela-Espinoza does not fall into any of these categories and was not reasonable. First, there is no suggestion that the delay was for humanitarian reasons.

Second, there were plenty of law enforcement personnel available to complete Valenzuela-Espinoza’s arraignment. The>

The opinion is further amended by striking the words “create a” on page 21393 and replacing them with “make the delay” and by striking the word “delay” in the same line, before the word “under.”

Following the words “under *McNabb-Mallory*” on that page, but before section C., the opinion is amended by inserting the following passage:

<Third, the record demonstrates that it was not necessary to conduct any further investigation to determine whether Valenzuela-Espinoza could be criminally charged. In its petition for rehearing, the government asserts that Valenzuela-

Espinoza was arrested only for being in the United States illegally, and that until the search warrant was executed it could not be determined if he would be charged with a criminal drug offense or merely turned over to immigration authorities.

As a preliminary matter, the government did not raise this argument in its initial briefing before this court, and its “failure to brief the issue results in waiver.” *United States v. Ewing*, 638 F.3d 1226, 1230 (9th Cir. 2011). But in any event, this argument is not supported by the record. The government consistently asserted in its pleadings before the district court that after Valenzuela-Espinoza exited the carport in “a cloud of marijuana smoke” and told the officers that there was more than ten pounds of marijuana inside the house, the government “had probable cause to detain the defendant for a criminal offense, possession of marijuana.” The government maintained that when Agent Van Holsbeke smelled and saw the marijuana smoke, he not only had probable cause to believe that there was marijuana inside the house “but was witnessing a crime being committed in his presence.” The district court accepted these arguments, expressly finding that “[a]lthough Defendant Valenzuela-Espinoza was initially arrested because of his presence in the United States illegally, probable cause also existed regarding his involvement in criminal activity.” There is simply nothing in the record to support the claim that the officers needed to execute the search warrant to determine whether they could charge Valenzuela-Espinoza with possession of marijuana.>

The opinion is also amended by striking section III.C. in its entirety. Finally, the first sentence in section IV., on page 21395, is struck as well. That section now begins with the words “Rule 5(a).”

With the opinion as amended, the Appellee’s petition for panel rehearing and petition for rehearing en banc, filed April 10, 2012, is denied. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has

requested a vote on whether to rehear the matter en banc. *See* Fed R. App. P. 35. No subsequent petitions for rehearing, rehearing en banc, or rehearing before the full court may be filed.

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## OPINION

B. FLETCHER, Circuit Judge:

Julio Alfonso Valenzuela-Espinoza appeals his conviction for possession of marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. Because the delay in presenting Valenzuela-Espinoza to a magistrate was unreasonable, his statements made more than six hours after his arrest must be suppressed under the rule announced in both *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957). We therefore REVERSE the district court's denial of Valenzuela-Espinoza's suppression motion, VACATE the conviction, and REMAND for further proceedings. Because his conviction must be vacated due to the *McNabb-Mallory* violation, we do not address Valenzuela-Espinoza's other challenges to his conviction raised on appeal.

### I.

Valenzuela-Espinoza was arrested on March 5, 2008, at a house in Tucson, Arizona. On March 3, Immigration and Customs Enforcement (ICE) Agent Leon Van Holsbeke received a tip from a confidential informant of "suspicious activity" taking place at the house. After intermittently observing the house on March 4 and the morning of March 5, Agent Van Holsbeke decided to conduct what he described as a "knock and talk." Agent Van Holsbeke, along with two other officers and a narcotics detection dog, approached the front door while

two officers positioned themselves around the back perimeter of the property. Four additional officers waited down the street.

Before Agent Van Holsbeke reached the front door, however, he heard someone shouting, “Stop, police, stop,” and he ran to the side of the residence to investigate. The two officers positioned behind the house had stopped two men attempting to leave the house through the back door. The officers told Agent Van Holsbeke that another man — who turned out to be the defendant, Valenzuela-Espinoza — had tried to run from the residence, but had run back inside when the police shouted.

Agent Van Holsbeke returned to the front of the residence and began walking toward the carport when he smelled burning marijuana. He approached a storage room at the back of the carport, knocked, and announced himself as police. Valenzuela-Espinoza opened the door and complied with Agent Van Holsbeke’s direction to step out of the room. Agent Van Holsbeke asked him if he lived at the residence; if he was a U.S. citizen (because Valenzuela-Espinoza apparently spoke no English); and if he was in the United States illegally. Valenzuela-Espinoza admitted that he was a Mexican national in the United States illegally. He was then arrested, at approximately 11:15 a.m. Despite failing to administer *Miranda* warnings, one of the other officers proceeded to ask him if there was contraband, weapons, or anyone else in the residence. Valenzuela-Espinoza said that there was “a lot” of marijuana in the residence, nodding affirmatively when asked if it was more than ten pounds.<sup>1</sup>

Agent Van Holsbeke then sought a search warrant, which was issued at 3:25 p.m. While Agent Van Holsbeke got the warrant, the other eight officers “sat on the house” to “make

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<sup>1</sup>The government later conceded that this statement was taken in violation of *Miranda* and did not introduce it at trial.

sure no one else would come or go.” The officers executed the search at 4:00 p.m. and seized 99.75 kilograms of marijuana (about 220 pounds), two handguns, a digital scale, and several cell phones. During this time, Valenzuela-Espinoza was detained at the residence. He was brought to an ICE station around 5:00 p.m. and questioned at 7:32 p.m. after being advised of his *Miranda* rights.

Valenzuela-Espinoza was given a *Miranda* waiver form written in Spanish, and Agent Van Holsbeke, who speaks Spanish, read the form to him as well. He refused to sign the form. Agent Van Holsbeke testified that Valenzuela-Espinoza explained that he had been told not to say anything and that he was concerned about his family’s safety. At some point, Valenzuela-Espinoza stated that he and the other suspects knew about the marijuana, that another man had helped him unload the marijuana into the house, and that he had agreed to keep the marijuana at the house in exchange for \$2500. According to Agent Van Holsbeke, Valenzuela-Espinoza then stated that perhaps he should speak to an attorney, and the interview was terminated, at 7:50 p.m.. Valenzuela-Espinoza was held in custody overnight and presented to a magistrate judge the next day, March 6, 2008, at 2:00 p.m.

## II.

A grand jury indicted Valenzuela-Espinoza on three counts: (1) conspiracy to possess with intent to distribute marijuana; (2) possession with intent to distribute marijuana; and (3) possession of a firearm by an illegal alien. Valenzuela-Espinoza filed a number of pre-trial motions, alleging among other things that his refusal to sign the waiver form was an invocation of his *Miranda* rights; that he had been illegally seized at the residence; that the affidavit in support of the search warrant contained false and misleading information; and that



























