No. _____

_____

IN THE

SUPREME COURT OF UNITED STATES

_____

TACY JONES - PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

_____

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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JUSTIN L. BELL
May, Adam, Gerdes and Thompson, LLP
PO Box 160
Pierre, SD 57501-0160
(605) 224-8803
jlb@mayadam.net
Attorney for Petitioner

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United States Court of Appeals
For the Eighth Circuit

No. 22-2776

United States of America

Plaintiff - Appellee

v.

Tracy Jones, also known as Tracy Wilcox

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Western

Submitted: May 9, 2023
Filed: June 15, 2023

Before COLLOTON, WOLLMAN, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

On November 10, 2020, a grand jury indicted Tracy Jones for conspiracy to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). Arrested on November 17, she was detained for 37 days before appearing before a magistrate judge on December 23. Jones moved to dismiss the indictment and suppress her statements from a post-arrest interview. The

district court denied both motions. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

On November 17, 2020, police arrested Jones pursuant to a federal warrant. She agreed to waive her *Miranda* rights. Within two hours after her arrest, she confessed to the conspiracy. The interrogation lasted about 44 minutes. The next day, she was transported to the Pennington County Jail in Rapid City.

That day, law enforcement notified the United States Marshal that Jones was in custody. No one notified the United States magistrate judge. On December 23, the government realized Jones was still detained without an initial appearance. That day, she was presented before the magistrate judge. Jones moved to dismiss the indictment, claiming the 37-day delay violated Fed. R. Crim. P. 5(a)(1)(A) and the Due Process clause of the Fifth Amendment. Jones also moved to suppress her statements from the post-arrest interview.

The district court[1] denied both motions. She pled guilty to conspiracy to distribute 500 grams or more of meth in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). The district court[2] sentenced her to 120 months in prison. Jones appeals the denials of the motions.

This court reviews *de novo* the district court's denial of a motion to dismiss. ***United States v. Cooke***, 853 F.3d 464, 470 (8th Cir. 2017). "This court reviews a district court's factual determinations in support of its denial of a motion to suppress

[1]The Honorable Jeffrey L. Viken, United States District Judge for the District of South Dakota, adopting the report and recommendations of the Honorable Mark A. Moreno, United States Magistrate Judge for the District of South Dakota.

[2]The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

for clear error and its legal conclusions de novo." ***United States v. Ingram***, 594 F.3d 972, 976 (8th Cir. 2010).

II.

No doubt, the 37-day delay between Jones's arrest and her initial appearance before a magistrate judge violated Rule 5(a). *See* ***United States v. Chavez***, 705 F.3d 381, 385 (8th Cir. 2013) (ruling that the 24-day delay between the suspect's arrest and initial appearance before a magistrate judge violated Rule 5(a)). But, dismissal of an indictment is not a proper remedy for a Rule 5(a) violation. *See* ***id.*** at 386 ("Despite the district court's error in finding no Rule 5(a) or Fourth Amendment violation, dismissal is not the appropriate remedy.").

Jones argues that the indictment should be dismissed because the delay in presentment violated her substantive due process rights.

To determine whether a delay in presentment violates substantive due process, this court determines whether, based on the totality of the circumstances, the government's conduct "offends the standards of substantive due process" and "shocks the conscience." ***Hayes v. Faulkner Cnty.***, 388 F.3d 669, 674 (8th Cir. 2004). "The level of outrageousness needed to prove a due process violation is 'quite high,' and the government's conduct must 'shock the conscience of the court.'" ***United States v. Pardue***, 983 F.2d 843, 847 (8th Cir. 1993), *quoting* ***United States v. Jacobson***, 916 F.2d 467, 469 (8th Cir. 1990). *See* ***United States v. Boone***, 437 F.3d 829, 841 (8th Cir. 2006) ("Outrageous government conduct that shocks the conscience can require dismissal of a criminal charge, but only if it falls within the 'narrow band' of the 'most intolerable government conduct.'"), *quoting* ***Pardue***, 983 F.2d at 847. "Deliberate indifference to prisoner welfare may sufficiently shock the conscience to amount to a substantive due process violation." ***Hayes***, 388 F.3d at 674. "Whether particular government conduct was sufficiently outrageous to meet this standard is a question of law which we review de novo." ***Boone***, 437 F.3d at 841.

Jones claims the 37-day delay violated her substantive due process rights, relying on *Hayes v. Faulkner County*, 388 F.3d 669 (8th Cir. 2004). Hayes was arrested based on an outstanding warrant on April 3, 1998. ***Hayes***, 388 F.3d at 672. He did not appear before a magistrate judge until May 11. ***Id.*** During this period, Hayes wrote four grievances to the jail administrator. One grievance stated:

> I've been here for 23 days and have not been to court. According Prompt First Appearance Rule 8.1[3] I should seen a judge within 72 hrs. I have yet to be told when I will go to court. I also know that the arresting told booking to hold me back. I want to know when you plan to obay the law and allow me to go to court?

Id. The jail administrator responded: "I don't set people up for court. I hope you go to court & are able to get out. Write the booking officer to find out about your court date." ***Id.***

Hayes sued Faulkner County, its sheriff, and the jail administrator under 42 U.S.C. § 1983. ***Id.*** This court held that the jail administrator violated his due process rights, emphasizing that after "receiving Hayes's specific appearance grievance, [the jail administrator] made a conscious decision to do nothing." ***Id.*** at 674. This court noted that the jail administrator showed no remorse, testifying "he would have followed the same conduct even if Hayes were held for 99 days." ***Id.*** at 672. This court held that the jail administrator's "conscious disregard is deliberate indifference violating the standards of due process." ***Id.*** at 674.

The *Hayes* decision is different than the present case. The delay here resulted, as the district court found, from law enforcement's "nonfeasance in notifying the magistrate judge of Jones's arrest," and this failure was not "outrageous" or

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[3] *See* **Ark. R. Crim. P. 8.1** ("An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.").

intentionally done "to further investigation efforts." This conduct, while inexcusable neglect, is not the "quite high" level of "outrageousness" to "shock the conscience" and amount to a substantive due process violation. *See* ***Pardue***, 983 F.2d at 847.

Jones asserts that law enforcement officers in South Dakota have a "pattern" of delaying defendants' initial appearances, citing two cases where defendants moved to dismiss indictments based on delays in their initial appearance. One defendant experienced a 15-day delay in presentment to the magistrate judge. ***United States v. Theus, II***, CR-20-10045 (D.S.D. March 19, 2021) (recommending a denial of the motion to dismiss because the delay was not "egregiously lengthy as to require a dismissal of the case"; district court ultimately dismissed the case due to the defendant's death). In a second case, the district court denied the motion to dismiss the indictment because, like here, the seven-day delay in presentment was "not purposeful, but due to personnel, training, and communication issues, slip ups, and poor policies." ***United States v. Bobtail Bear***, CR-14-10011 (D.S.D. May 19, 2021 & Oct. 15, 2021) (discussing a delay occurring in 2021). Two mistakes do not establish a pattern of outrageousness sufficient to show deliberate indifference and support a due process violation.

The district court properly denied the motion to dismiss the indictment.

III.

Jones seeks to suppress the statements from her post-arrest interview. She argues that her *Miranda* waiver was involuntary because the agent's pre-warning statements were an unlawful two-step interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004) and that her confession was involuntary under *United States v. Aguilar*, 384 F.3d 520 (8th Cir. 2004). "We review the district court's factual determinations in support of its denial of a motion to suppress for clear error and its legal conclusions de novo." ***United States v. Harper***, 466 F.3d 634, 643 (8th Cir. 2006).

"[W]hen an individual is taken into custody . . . he must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966). "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." ***Id.*** at 444. "A waiver is voluntary if it 'was the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" ***Harper***, 466 F.3d at 643, *citing* ***Moran v. Burbine***, 475 U.S. 412, 421 (1986).

In the *Seibert* case, the police, as trained, questioned Seibert for 30 to 40 minutes about an incident before giving *Miranda* warnings. ***Missouri v. Seibert***, 542 U.S. 600, 604-05 (2004). The police then gave Seibert a 20-minute break, bringing her back to the interview room where she agreed to waive her *Miranda* rights. ***Id.*** at 605. After the police immediately referenced her earlier statements, she confessed. ***Id.*** The Supreme Court held that "when an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps." ***Id.*** at 621 (Kennedy, J., concurring in the judgment). The Court reasoned: "the [two-step] technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of 'knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" ***Id.***, *quoting* ***Moran***, 475 U.S. at 423-24.

In the *Aguilar* case, police conducted a "lengthy interview," questioning Aguilar for about 90 minutes before giving the *Miranda* warnings. ***United States v. Aguilar***, 384 F.3d 520, 522 (8th Cir. 2004). Aguilar agreed to waive his *Miranda* rights and confessed. ***Id.*** Applying *Seibert*, this court determined that Aguilar's confession was involuntary because the duration of pre-warned questioning was "not

brief." ***Id.*** at 527. The scope of the pre-warned questioning was also broad—prompting Aguilar to clearly recall events from three months earlier. ***Id.*** at 525.

Jones emphasizes specific pre-warning statements by the agent:

- **SPECIAL AGENT:** The charge that you're charged with is a federal meth conspiracy. And it's a ten-year mandatory minimum, okay? What that means, unless you already know what that means --
- **JONES:** Not really.
- **SPECIAL AGENT:** Okay. What that means is, if you were convicted of the charge that you're charged with right now, okay, a federal judge has to sentence you to ten years or more --

  . . . .
- **JONES:** Okay.
- **SPECIAL AGENT:** There is only a few ways to alleviate that, to clear that up.
- **JONES:** Okay.
- **SPECIAL AGENT:** And that's strictly Tracy Jones Wilcox's decision --
- **JONES:** Uh-huh.

  . . . .
- **SPECIAL AGENT:** -- okay? If we go that route, because you decide to go that route, we talk truthfully, then we can do things on the federal side in front of the judge at some point that says, Okay, Judge, you can go below that ten year, okay? And I can explain any of that to you if you want.
- **JONES:** Okay.

  . . . .

These statements are different than those in *Seibert* and *Aguilar*. Here, the pre-warning conversation was brief and narrow in scope—the entire pre-warning conversation took about two minutes. In the pre-warning statements, the agent did not question Jones about her involvement in the conspiracy. The agent informed her about the charges against her and the statutory mandatory minimum sentence for the charges. The district court specifically found that the interview was polite and conversational and "what agents said and did (both before and after the *Miranda*

waiver) had little or no effect on Jones." The district court properly concluded that these brief, narrow-scope pre-warning statements were not a two-step interrogation in violation of *Seibert*, and that Jones's statements were voluntary.

The district court properly denied the motion to suppress.

* * * * * * *

The judgment is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. TRACY JONES, a/k/a TRACY WILCOX, Defendant.	CR. 20-50141-03-JLV ORDER

INTRODUCTION

Pending before the court is defendant's amended motion to dismiss the indictment as it relates to her or, in the alternative, to suppress all evidence garnered by her statement to law enforcement.[1] (Docket 113). The United States opposes defendant's motion. (Dockets 122 & 152). Defendant's motion was referred to Magistrate Judge Mark A. Moreno for a report and recommendations pursuant to 28 U.S.C. § 636(b)(1)(B) and the court's June 8, 2016, and May 10, 2021, standing orders. An evidentiary hearing was held. (Dockets 142 & 147). Magistrate Judge Moreno issued a report and recommendations ("R&R"). (Docket 157). The magistrate judge recommended the defendant's motion to dismiss the indictment as it relates to Ms. Jones and her motion to suppress be denied. Id. at pp. 1 & 21. Defendant timely filed objections to the R&R. (Docket 161). For the reasons stated below, the

[1]Defendant's earlier motion to dismiss and alternative motion to suppress (Docket 95) are deemed moot by the filing of the amended motion.

defendant's objections are overruled and the R&R is adopted consistent with this order.

DEFENDANT'S OBJECTIONS

The defendant submitted ten objections to the R&R. Id. Defendant's objections are summarized and presented in the following order for resolution purposes:

1. Defendant objects to the finding she never asserted her right to remain silent. Id. at p. 2;

2. Defendant objects to the finding that the only basis upon which she moved for dismissal was under the Due Process Clause of the Fifth Amendment. Id.;

3. Defendant objects to the conclusion that by waiving her Miranda[2] rights she waived her right to timely presentation to a magistrate judge for arraignment. Id. at pp. 2-3;

4. Defendant objects to the failure of the R&R to acknowledge the ruling of Corley.[3] Id. at p. 3;

5. Defendant objects to the conclusion that suppression is the only remedy available under Rule 5(a).[4] Id. at p. 4;

6. Defendant objects to the conclusion that the court cannot invoke its supervisory power to deter future illegal conduct of law enforcement. Id. at p. 6;

7. Defendant objects to the conclusion she may have a civil remedy available. Id. at p. 7;

8. Defendant objects to the conclusion that law enforcement is on notice. Id.;

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

[3]Corley v. United States, 556 U.S. 303 (2009).

[4]Fed. R. Crim. P. 5(a).

9. Defendant objects to the R&R's conclusion because of systemic Rule 5(a) violations in the Northern Division of the District of South Dakota. Id.;

10. Defendant objects to the conclusion that her alternative motion to suppress should be denied. Id. at p. 8.

ANALYSIS

Under the Federal Magistrate Act, 28 U.S.C. § 636(b)(1), if a party files written objections to the magistrate judge's proposed findings and recommendations, the district court is required to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Id. The court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id. See also Fed. R. Crim. P. 59(b)(3). The court completed a *de novo* review of those portions of the R&R to which objections were filed and a *de novo* review of the transcript of the suppression hearing and the exhibits admitted at the hearing.

FINDINGS OF FACT

The defendant filed only two objections to the magistrate judge's statement of facts developed during the suppression hearing. (Docket 162 at p. 2). Both of those objections focus on information the defendant asserts the magistrate judge failed to include in the findings of fact. Id. Otherwise, the defendant did not object to the statement of facts in the R&R. Id.

Except as affected by the court's rulings on defendant's objections, the court adopts the findings of fact made by the magistrate judge. Before

addressing defendant's factual objections, the court finds it appropriate to present a brief summary of the R&R's findings of fact.

On November 17, 2020, Ms. Jones was arrested by three law enforcement officers in the Martin, South Dakota, area on a federal warrant. Within approximately two hours of her arrest, Ms. Jones was interviewed by FBI Agent Cooper in the presence of two other law enforcement officers at the Bennett County State's Attorney's Office in Martin. Near the beginning of the interview, Ms. Jones read and signed a Miranda advisement form acknowledging she understood her rights and consented to waive those rights and answer questions without the presence of an attorney. Suppression Hearing Exhibit C. During the ensuing approximately 45-minute interview, Ms. Jones provided information regarding her own methamphetamine distribution, supply sources and other people in the Martin and Rapid City areas engaged in drug activities. Later that day, Ms. Jones was transported to the Pine Ridge Adult Offender Facility in Pine Ridge, South Dakota, to be jailed there overnight.

The next day, on November 18, Ms. Jones was transported to the FBI Office in Rapid City, South Dakota, for processing or booking and then was delivered to the Pennington County Jail in Rapid City. The government concedes law enforcement did not provide notice of Ms. Jones' arrest to the chambers of United States Magistrate Judge Daneta Wollmann. It was not until 37 days later, on December 23, 2020, that Ms. Jones appeared before and was

arraigned by Magistrate Judge Wollmann. Ms. Jones was granted pretrial release on that date.

1. DEFENDANT OBJECTS TO THE FINDING SHE NEVER ASSERTED HER RIGHT TO REMAIN SILENT.

Magistrate Judge Moreno found that within a couple hours of her arrest, Agent Cooper read each of the Miranda rights on the form to Ms. Jones, who acknowledged she understood her rights and agreed to speak to law enforcement without an attorney present. (Docket 157 at p. 6) (referencing Suppression Hearing Exhibits 1, B & C; citations to the suppression hearing transcript omitted). Contrary to the magistrate judge's finding, the defendant contends that approximately 24 hours later, on November 18, 2020, she invoked her right to remain silent. (Docket 161 at p. 2) (referencing Docket 147 at pp. 63:13-64:10 & 101:13-102:1). Ms. Jones acknowledges that based upon exercising her right to remain silent, she was not questioned further. Id.

It is unclear from the defendant's citations to the suppression hearing transcript whether Ms. Jones was asked if she wanted to give a further statement on November 18, or whether she invoked her right to remain silent. Criminal Investigator Jonathan Archambeau with the Oglala Sioux Tribal Department of Public Safety and a task force officer with the Badlands Safe Trails Task Force transported Ms. Jones from Martin, South Dakota, to the Pine Ridge Facility and then to the United States Marshals Service ("USMS") in Rapid City. (Docket 147 at p. 151:16-25). Before leaving for Pine Ridge, Investigator Archambeau did not ask Ms. Jones to speak further with him. Id. at pp. 156:23-157:6.

It is clear, however, the government does not claim Ms. Jones provided any information or made a statement to law enforcement immediately before or during the time between her transfer to the Pine Ridge Adult Offender Facility, the USMS Office in Rapid City and ultimately to the Pennington County Jail. See id. at p. 152:1-3.

Defendant's first objection to the R&R is overruled.

2. DEFENDANT OBJECTS TO THE FINDING THAT THE ONLY BASIS UPON WHICH SHE MOVED FOR DISMISSAL WAS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The R&R states Ms. Jones "moved to dismiss the drug charge against her, under the Due Process Clause of the Fifth Amendment[.]" (Docket 157 at p. 3). Ms. Jones objects to this finding because she also moved for dismissal pursuant to Fed. R. Crim. P. 5(a). (Docket 161 at p. 2) (referencing Docket 153 at p. 1). Defendant's brief asked the court to dismiss the indictment against her with prejudice "under the due process clause of the Fifth [Amendment] to the United States' Constitution, and the Federal Rule of Criminal Procedure 5(a)." (Docket 153 at p. 1). However, the defendant only argued "due process" in the introduction and the conclusion of her brief. Id. at pp. 1 & 15. The entirety of defendant's brief focused on the alleged violation of Rule 5(a). Id. at pp. 1-10.

The magistrate judge focused on both Rule 5(a) and Ms. Jones' due process claims. (Docket 157 at pp. 4-11). The magistrate judge concluded that "[h]aving waived her *Miranda* rights and given voluntary statements to agents two to three hours after her arrest, Jones cannot now seek the protection of Rule 5(a)." Id. at

p. 8 (references omitted). "[T]he appropriate remedy for a violation of Rule 5(a)(1)(A) is not dismissal of the indictment, but suppression of evidence illegally obtained as a result of the violation." Id. (references omitted). "[S]ince the provisions of Rule 5(a) are procedural, not substantive," the magistrate judge concluded "the sanction for failure to comply with the Rule is exclusion of those statements taken during the period of unnecessary delay." Id. at pp. 8-9 (references omitted). Defendant's "contention that she is entitled to dismissal of the charge against her under the Due Process Clause of the Fifth Amendment cannot be reconciled with federal precedents[,]" as the magistrate judge found those cases "consistently refer to the application of evidentiary sanctions (e.g., the exclusion of evidence), not dismissal of criminal charges, as the proper remedy for the violation of the prompt presentment rule." Id. at pp. 9-10 (references omitted).

Defendant's second objection to the R&R is overruled.

CONCLUSIONS OF LAW

3. DEFENDANT OBJECTS TO THE CONCLUSION THAT BY WAIVING HER MIRANDA RIGHTS SHE WAIVED HER RIGHT TO TIMELY PRESENTATION TO A MAGISTRATE JUDGE FOR ARRAIGNMENT.

Rule 5 governing initial appearances provides that following an arrest, the "person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge[.]" Fed. R. Crim. P. 5(a)(1)(A). Because Ms. Jones was arrested in Bennett County, South Dakota, "where the offense was allegedly committed . . . [her] initial appearance must be in that district[,]" that is, the District of South Dakota. Fed. R. Crim. P. 5(c)(1)(A). As a practical matter, that means appearance before a magistrate judge at the federal

courthouse for the Western Division of the District of South Dakota in Rapid City, South Dakota.

Although Ms. Jones was not presented to a magistrate judge for 37 days, Magistrate Judge Moreno found this procedural right could be waived. "Although the Eighth Circuit has not previously addressed the matter, courts have concluded that a defendant can indeed waive Rule 5's procedural safeguards." (Docket 157 at p. 4) (reference to collected cases omitted). Particularly "when the defendant has been given Miranda warnings," the magistrate judge found "courts have been accepting of a presentment waiver." Id. at p. 5 (references omitted).

Ms. Jones opposes this finding. (Docket 161 at p. 3).

> What is irrefutable is that no one, ever, at any point advised Ms. Jones that if she signed the Advice of Rights document she would be waving presentment rights and could be held for 37 days in jail before seeing a judge. It is not contained in the Advice of Rights document presented to Ms. Jones, it was not discussed by Special Agent Cooper or any other law enforcement officer during the interrogation or at any other time, and it is not part of the advice of rights given to Ms. Jones by the court at her initial appearance.

Id. (references to the suppression hearing record omitted). Because "the Eighth Circuit has not previously addressed this issue," Ms. Jones submits "the only authority [cited in the R&R] to support [waiver] is not binding on this Court." Id. "Without being advised of these rights[,]" defendant argues "it is not possible that a person untrained in the law, such as Ms. Jones, could knowingly, intelligently and voluntarily waive her presentment rights." Id.

Other than her general argument, Ms. Jones points to no case authority which supports her position. Although the Eighth Circuit never directly addressed this issue, a number of circuit courts have.

"[B]y validly waiving his Miranda right to silence and an attorney, and by agreeing to speak with the police, [the defendant] has thereby also waived any Mallory right to be brought before a magistrate 'as quickly as possible.' " Pettyjohn v. United States, 419 F.2d 651, 656 (D.C. Cir. 1969) (underlining provided; citing Mallory v. United States, 354 U.S. 449, 454 (1957), cert. denied, 397 U.S. 1058 (1970)). The D.C. Circuit acknowledged this principal in an earlier decision. "[W]e had occasion recently to articulate this limitation that Miranda has effected upon the earlier Mallory decision. In short, we held that [a] valid Miranda waiver is necessarily . . . also a waiver of an immediate judicial warning of constitutional rights[.]" Id. (underlining provided; referencing Frazier v. United States, 419 F.2d 1161, 1166 n.8 (D.C. App. 1969)). See also United States v. Barlow, 693 F.2d 954, 959 (6th Cir. 1982) ("In the instant case appellant . . . waived his Miranda rights before giving his statement to the FBI. He now cannot seek the protection of Rule 5(a). A valid Miranda waiver also waives the prompt judicial warning of one's constitutional rights.") (underling provided); United States v. Binder, 769 F.2d 595, 599 (9th Cir. 1985), overruled on other grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) ("A waiver of Miranda rights constitutes a waiver of the rights under Rule 5."); United States v. Indian Boy X, 565 F.2d 585, 592 (9th Cir. 1977) ("Since the Miranda waiver was valid, there was a valid waiver of the McNabb-Mallory prompt arraignment right [Fed. R. Crim. P. 5(a) & 18 U.S.C. § 5033]."") (underlying provided); United States v. Ostrander, 411 F.3d 684, 696-97 (6th Cir. 2005) (finding that because the defendant "was not intimidated or physically abused, that he understood what was going on and what his rights were,

and that he began to discuss the crime well within the six-hour safe harbor," the defendant's Miranda waiver also waived prompt presentment before the magistrate judge) (citations omitted; underlying provided).

District courts in other circuits have adopted the same rule. "Even assuming arguendo that the delay [in presentment to the magistrate judge] was unnecessary, suppression of the statements would nonetheless be inappropriate in view of his valid Miranda waiver[.]" United States v. Lukens, 735 F. Supp. 387, 391 n.1 (D. Wyo. 1990) (referencing Barlow, 693 F.2d at 959; other references omitted).

"Delays [in presentment pursuant to Rule 5(a)] effected for the purpose of interrogation are considered to be unnecessary." United States v. Thompson, No. 10-cr-20410, 2011 WL 4072506, at *3 (S.D. Fla. Feb. 28, 2011) (referencing Corley, 556 U.S. at 308), report and recommendation adopted, No. 10-20410-CR, 2011 WL 4055400 (S.D. Fla. Sept. 13, 2011), aff'd sub nom., United States v. Gray, 544 Fed. Appx. 870 (11th Cir. 2013). In Thompson, the court found that "upon being advised of his Miranda rights, Defendant made a voluntary statement and then proceeded to invoke his right to terminate the questioning. These actions are consistent with Defendant's awareness and understanding of his rights and are indicative that the statement made by Defendant was voluntary and knowing." Id., 2011 WL 4072506, at *5. For this reason, the Florida district court concluded the defendant waived his Rule 5(a) right to a prompt presentation before a magistrate judge. "[T]he Miranda waiver was knowing and voluntary, and any statements made by Defendant thereafter should not be suppressed." Id.

"Applying O'Neal,[5] the Court sees no choice other than to find that Defendant's multiple Miranda waivers vitiated any prompt presentment problem. . . . [T]he bottom line of O'Neal is that a defendant who is made aware of and willingly waives his rights to remain silent and to consult with an attorney before speaking necessarily suffers no prejudice from a delay in hearing those same rights repeated in court." United States v. Hector, No. 1:12-CR-183, 2013 WL 2898078, at *13 (N.D. Ga. Jan. 29, 2013), report and recommendation adopted in part, rejected in part, No. 12-CR-183, 2013 WL 2898099 (N.D. Ga. June 11, 2013).

"[A] valid Miranda waiver may also waive the prompt judicial warning of one's constitutional rights. Particularly where the delay between arrest and presentment was not for the purposes of coercion or intimidation, courts in this circuit will find defendants to have waived their prompt presentment rights." United States v. Mora-Pizarro, No. 13-CR-00082, 2016 WL 6871271, at *7 (W.D. Ky. Nov. 21, 2016) (referencing Barlow, 693 F.2d at 959). See also United States v. Ramirez, No. 3:13-CR-82, 2016 WL 11214627, at *10 (W.D. Ky. Dec. 9, 2016) (same), report and recommendation adopted, No. 13CR-82, 2017 WL 384276 (W.D. Ky. Jan. 27, 2017).

One district court in the Eighth Circuit has specifically adopted the same rule. "[C]ourts have been particularly permissive of a defendant's waiver of his presentment rights when he has previously been given his Miranda warnings[.]"

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[5]United States v. O'Neal, 411 F.2d 131, 136-137 (5th Cir. 1969) (considering the McNabb-Mallory suppression rule (codified at 18 U.S.C. § 3501). Justice Alito expressly cited O'Neal as standing for the proposition that "a waiver of Miranda rights also constitutes a waiver under McNabb-Mallory." Corley, 556 U.S. at 329 (Alito, J., dissenting) (underlining provided).

United States v. McConnell, No. 13-CR-273 2017 WL 396538, at *6 (D. Minn. Jan. 30, 2017) (referencing Barlow, 693 F.2d at 959; Binder, 769 F.2d at 599).

While these decisions may not be binding legal precedent, they provide persuasive authority which the court cannot overlook. The court finds by waiving her Miranda rights, Ms. Jones waived her right to prompt presentment before a magistrate judge pursuant to Rule 5(a).

Defendant's third objection to the R&R is overruled.

4. DEFENDANT OBJECTS TO THE FAILURE OF THE R&R TO ACKNOWLEDGE THE RULING OF CORLEY.

The magistrate judge observed "if the confession came within the six-hour 'safe harbor' of [18 U.S.C. § 3501(c)], it is admissible if voluntary, subject to the rules of evidence and whatever weight the jury decides to give to it." (Docket 157 at p. 12) (referencing Corley, 556 U.S. at 322). "It is only when the confession occurred before presentment and beyond six hours that a court must decide whether delaying that long was unreasonable or unnecessary and the confession should be suppressed." Id. (referencing Corley, 556 U.S. at 322).

Defendant objects to the magistrate judge's apparent limited consideration of Corley because the R&R "does not address the defendant's contention that Rule 5(a) is designed to prevent secret detention." (Docket 161 at p. 3). Ms. Jones argues if it is "contended that Rule 5(a) is designed only to prevent secret detention aimed at procuring self-incriminating statements. This cannot be the law." Id. at p. 4.

Contrary to defendant's objection, that is exactly the purpose of § 3501 when read in conjunction with Rule 5(a). That section provides in part:

> In any criminal prosecution by the United States . . . a confession made or given by a person who is a defendant . . . while . . . under arrest . . . 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 . . . 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 [her] arrest or other detention . . . .

18 U.S.C. § 3501(c).

Ms. Jones offers no evidence that she was detained in order to extract a confession. The magistrate judge found Ms. Jones' confession came within the 6-hour safe harbor period permitted by § 3501(c) and that her statement was voluntary. (Docket 157 at pp. 12-13).

Defendant's fourth objection to the R&R is overruled.

5. DEFENDANT OBJECTS TO THE CONCLUSION THAT SUPPRESSION IS THE ONLY REMEDY AVAILABLE UNDER RULE 5(a).

The magistrate judge concluded "the appropriate remedy for a violation of Rule 5(a)(1)(A) is not dismissal of the indictment, but suppression of evidence illegally obtained as a result of the violation." (Docket 157 at p. 8) (referencing United States v. Cooke, 853 F.3d 464, 471 (8th Cir. 2017); United States v. Chavez, 705 F.3d 381, 385-86 (8th Cir. 2013); other references omitted).

Defendant argues "[t]he cases cited in support of the conclusion that 'prejudice results only when the government uses the delay to subject the

defendant to unwarranted interrogations' are not persuasive and the Eighth Circuit case cited is materially distinguishable." (Docket 161 at p. 5). Ms. Jones contends "[n]one of the . . . cited cases offer guidance directly on the issue of prejudice to a defendant for in ability [sic] to exercise rights—including right to a detention hearing—due to unnecessary delay." Id. at p. 6. "Conversely," defendant submits "the Corley case . . . directs that the protections provided by Rule 5(a) expand beyond only prejudice to the trial defense." Id. For this reason, Ms. Jones argues the magistrate judge's "conclusion is contrary to law." Id.

Defendant's objection is without merit. "[T]he appropriate remedy for a violation of Rule 5(a)(1)(A) is not dismissal of an indictment, but suppression of evidence illegally obtained as a result of the violation." Cooke, 853 F.3d at 471 (referencing Chavez, 705 F.3d at 385-86. In Cooke, the defendant "argu[ed] . . . that the period in state custody prejudiced him by delaying appointment of counsel, which deprived counsel of adequate time to prepare for trial." Id. Finding no authority to support defendant's argument for dismissal, the court stated "[w]e have not been directed to any authority suggesting that this is a sort of prejudice addressed by Rule 5(a)[.]" Id. "Cooke was not prejudiced by the period of delay and so he has not identified any available remedy for a supposed violation of Rule 5." Id.

In Chavez, the defendant, as an alleged illegal alien, was taken into criminal custody without a warrant. Chavez, 705 F.3d at 384-85. The court

found Mr. Chavez's Rule 5(a) rights and his Fourth Amendment right to a "probable-cause determination" were violated. Id. at 385. "Even so," the court ruled "the appropriate remedy is not dismissal of the indictment." Id. Recognizing the defendant's frustration, the court observed "Chavez claims that there must be some remedy for the violation of these rights. Remedies may exist for violations like those here, but dismissal is not one of them." Id. "In this case, there is no showing of prejudice to Chavez from the delay between arrest and appearance. Even if there were, the appropriate remedy would be suppression of the statements made during that period, not dismissal of the indictment." Id. at 385-86.

While Ms. Jones argues she was forced to remain in custody for 37 days before being arraigned and then allowed pretrial release, that does not constitute the type of prejudice contemplated by Corley, Cooke, Chavez or the other cases referenced in the R&R. See Docket 157 at p. 8 n.26. The court adopts the conclusion of the R&R that the only remedy under the facts of this case is the suppression of an ill-gotten confession, which did not occur.

Defendant's fifth objection to the R&R is overruled.

6. DEFENDANT OBJECTS TO THE CONCLUSION THAT THE COURT CANNOT INVOKE ITS SUPERVISORY POWER TO DETER FUTURE ILLEGAL CONDUCT OF LAW ENFORCEMENT.

The magistrate judge evaluated whether the conduct of law enforcement in Ms. Jones's case constituted "outrageous conduct." (Docket 157 at p. 10). "[T]o warrant dismissal of an indictment, the outrageousness of such conduct

must rise to the level of 'violating that "fundamental fairness" shocking to the universal sense of justice.' " Id. (citing United States v. Russell, 411 U.S. 423, 432 (1973) (internal citation omitted)). The magistrate judge found "Jones never faced extreme and overwhelming coercion, much less physical, or psychological harm. Nor can it be said that the Task Force agents' nonfeasance—in notifying [Magistrate Judge Wollman] of Jones's arrest—was outrageous or that they purposefully perverted a constitutionally protected right to further their investigation efforts." Id. at p. 11. With this finding, the R&R recommends "dismissal is not the rightful course of action." Id.

Ms. Jones submits "the Court could use its supervisory power to dismiss this case and send an unmistakable message to deter further unlawful behavior by law enforcement officers." (Docket 161 at p. 6). She offers "[t]he Court is not impotent to protect the rights of the citizens against unlawful executive branch overreach." Id. (referencing United State v. Osunde, 638 F. Supp. 171, 176-77 (N.D. Cal. 1986)).

The problem with the defendant's argument is that the magistrate judge found law enforcement was guilty of "nonfeasance" and that their conduct was neither "outrageous" nor done with the intent to "purposefully pervert[] a constitutionally protected right to further their investigation efforts." (Docket 157 at p. 11). Osunde presented an entirely different set of facts. After his arrest, Mr. Osunde was not brought before a magistrate judge on the complaint for an initial appearance until 106 days later and then was not indicted until 12

days after his appearance. Osunde, 638 F. Supp. at 173. The Osunde court was particularly focused on the 118 days between arrest and indictment, a speedy trial act violation of 18 U.S.C. § 3161(b), which requires an information or indictment be filed within 30 days from the date of arrest. Id. Contrary to the decisions of later courts, Osunde concluded Rule 5(a) provided a defendant "a specific substantive right." Id. at 176. In light of the statutory right and substantive right, the court found the conduct of the government's "serious and flagrant violations[,]" warrant dismissal with prejudice. Id. at 177.

While the court retains the supervisory authority to dismiss an indictment under egregious circumstances or where clearly reprehensible conduct shocks the court's conscience and its sense of justice, this is not that case. While it is unfortunate Ms. Jones lingered for 36 days in jail before appearing before the magistrate judge, the facts of this case do not warrant dismissal of the indictment. Unlike Osunde, probable cause existed in Ms. Jones' case as an indictment had been filed and a federal arrest warrant was issued by Magistrate Judge Wollmann. (Dockets 21 & 22).

Defendant's sixth objection to the R&R is overruled.

7. DEFENDANT OBJECTS TO THE CONCLUSION SHE MAY HAVE A CIVIL REMEDY AVAILABLE.

After concluding dismissal of the indictment was not a proper remedy, the magistrate judge offered that Ms. Jones may be able to "pursue a civil action and seek to hold those responsible for her delay liable." (Docket 157 at p. 19).

Defendant argues the civil resource option may violate Heck v. Humphrey, 512 U.S. 477 (1994), as a "finding or an implied finding . . . that Ms. Jones' unnecessarily long detention was not unlawful could preclude Ms. Jones' ability to have the matter decided civilly under the *Res Judicata* or collateral attack theory." (Docket 161 at p. 7).

The cases cited by the magistrate judge demonstrate 42 U.S.C. § 1983 claims may be pursued for pre-appearance detention which violates due process. See Docket 157 at p. 19 n.60.

Defendant's seventh objection to the R&R is overruled.

8. DEFENDANT OBJECTS TO THE CONCLUSION THAT LAW ENFORCEMENT IS ON NOTICE.

Based on the facts of this case, the R&R concludes "[l]aw enforcement officers are now on notice of what they must do. A delay like Jones experienced must not happen again . . . . If it does, a different remedy (than admonishment) may be called for." Id. at p. 20.

Defendant objects to the magistrate judge's conclusion. She argues "[i]gnorance of the law excuses no man," and "[d]oes this Court really intend to hold law enforcement officers who swear to know, uphold, and enforce the law to a lower standard than it holds its lay citizens?" (Docket 161 at p. 7 & 7 n.26). Ms. Jones submits if law enforcement is not punished for their conduct in this case, the court's action "could be construed as a grant[] of qualified immunity." Id. at p. 7.

The court is not going to engage in a pre-filing determination of a civil complaint pursuant to 42 U.S.C. § 1983 about whether law enforcement in this case may be entitled to qualified immunity to Ms. Jones' potential civil rights claim. The court is confident the FBI and Magistrate Judge Wollmann, and her staff, have put into place checks to assure that unfortunate events like what happened to Ms. Jones do not happen again.

Defendant's eighth objection to the R&R is overruled.

9. DEFENDANT OBJECTS TO THE R&R'S CONCLUSION BECAUSE OF SYSTEMIC RULE 5(A) VIOLATIONS IN THE NORTHERN DIVISION OF THE DISTRICT OF SOUTH DAKOTA.

Defendant objects to the conclusion in the R&R that dismissal is not appropriate because the defendant provided evidence of "systemic disregard for Rule 5 were in the Northern Division of the District of South Dakota. Id. at p. 7 (referencing Docket 153 at p. 5).

In United States v. Theus, II, CR. 20-10045 (D.S.D. 2020), when considering a motion to dismiss the indictment based on a 16-day delay in presentment of the defendant to the magistrate judge, that court soundly criticized an Assistant United States Attorney and members of the United States Marshals Service for the District of South Dakota for their lack of candor and false statements in court. Id., Docket 34. District Court Judge Charles B. Kornmann adopted the magistrate's judge report and dismissed the case because of the defendant's death. Id., Docket 41 at p. 2.

In United States v. Bobtail Bear, CR-14-10011 (D.S.D. 2014), the magistrate judge found a seven-day delay in presentment "was not purposeful, but due to personnel, training, and communication issues, slip ups, and poor policies." Id., Docket 73 at p. 3. The district court has not ruled on the report of the magistrate as of the date of this order.

In United States v. Rodlund, CR-20-10041 (D.S.D. 2020) there is no order or report of a magistrate judge which makes reference to a failure of prompt presentation for an initial appearance and arraignment before the magistrate judge. At the time of the issuance of the indictment on October 6, 2020, the defendant was a prisoner in the Big Sandy Federal Prison in Inez, Kentucky. (Dockets 1 & 7). Because the defendant was serving a custodial sentence, by the writ of habeas corpus ad prosequendum the magistrate judge set Mr. Rodlund's initial appearance in Aberdeen, South Dakota, for December 14, 2020. (Docket 7). During the COVID-19 pandemic and in light of the defendant's federal custody in another case, an extended date for arraignment appears logical. This case is wholly unrelated to the facts presently before the court in Ms. Jones' case.

The court finds the isolated events in the Northern Division of the District of South Dakota do not compel the court to reject the magistrate judge's conclusion or recommendation in this case. The court adopts the magistrate judge's conclusion that law enforcement "did not . . . try and dupe anyone, have a hidden agenda, engage in bad faith, or intend to delay the presentiment

process." (Docket 157 at p. 19). "By no means" should the 37-day delay in presentment in Ms. Jones' case "be[] brushed aside. It was though an inadvertent error and is not part of a systemic problem in the District's Western Division." Id. at p. 20.

Defendant's ninth objection to the R&R is denied.

10. DEFENDANT OBJECTS TO THE CONCLUSION THAT HER ALTERNATIVE MOTION TO SUPPRESS SHOULD BE DENIED.

Ms. Jones objects to denial of her alternative motion to suppress her statement to law enforcement contending the R&R "refuses to acknowledge the statements were not made voluntarily." (Docket 161 at p. 8). She asserts the magistrate judge "did not apply the factors . . . set forth under 18 U.S.C. § 3501(b)," but reached the conclusion "only after analysis of various case law." Id. (referencing Docket 157 at pp. 4-8). Defendant argues "[s]ince the proper rule was not analyzed the conclusion is contrary to law." Id.

Section 3501(b) provides:

> 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 [she] was charged or of which [she] was suspected at the time of making the confession,

> (3) whether or not such defendant was advised or knew that [she] was not required to make any statement and that any such statement could be used against [her],
>
> (4) whether or not such defendant had been advised prior to questioning of [her] 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.

18 U.S.C. § 3501(b).

The R&R references the entirety of § 3501 and then specifically cites the six-hour "safe harbor" period between arrest and the defendant's statement identified in § 3501(c). (Docket 157 at p. 12) (referencing United States v. Casillas, 792 F.3d 929, 930 (8th Cir. 2015) (citing Corley, 556 U.S. at 309-10 & 322) (referencing 18 U.S.C. § 3501(c)). Citing to the motion hearing transcript, the magistrate judge found Ms. Jones' statement was made "voluntarily, less than six hours of being arrested." Id. at pp. 12-13 (reference omitted). This finding satisfies subsection (1) of § 3501(b).

In the factual background section of the R&R, the magistrate judge found Ms. Jones

> signed a Miranda advisement form, acknowledging she understood her rights, agreed to speak with agents and did so. During her conversation with them, Jones provided information on several other persons, in and around Martin and Rapid City, and their drug

> activities. Jones also spoke about her own methamphetamine distribution and her supply sources.

Id. at p. 2 (emphasis added). The magistrate judge found the defendant's

> written [Miranda] waiver is a telling manifestation that she understood her rights and was disposed to give them up. Her willingness to engage in an almost 45-minute colloquy without the benefit of counsel and to make statements was a "course of conduct indicating waiver" of her rights.

Id. at p. 6. Finally, the magistrate judge found Ms. Jones' "interview . . . was polite and conversational." Id. at p. 14. When addressing voluntariness, the magistrate judge found "[t]he same analysis applies when considering the voluntariness of statements in the context of a Miranda waiver and under the Fifth Amendment." Id. These findings satisfy factors (2), (3), (4) and (5) of § 3501(b).

That the magistrate judge addressed each of the § 3501(b) and (c) factors in the context of the controlling case authority as opposed to directly addressing the § 3501 factors does not minimize the analysis. The R&R provides a thorough analysis of the facts and the application of the § 3501 factors to those facts in arriving at the conclusions and recommendations made.

Defendant's tenth objection to the R&R is overruled.

ORDER

Based on the above analysis, it is

ORDERED that defendant's objections (Docket 161) are overruled.

IT IS FURTHER ORDERED that the report and recommendation (Docket 157) is adopted consistent with this order.

IT IS FURTHER ORDERED that defendant's amended motion to dismiss (Docket 113) is denied.

IT IS FURTHER ORDERED that defendant's alternative amended motion to suppress (Docket 113) is denied.

IT IS FURTHER ORDERED that defendant's motion to suppress and alternative motion to suppress (Docket 95) are denied as moot.

Dated October 12, 2021.

BY THE COURT:

/s/ *Jeffrey L. Viken*
JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **TRACY JONES,** **a/k/a Tracy Wilcox,** **Defendant.**	**5:20-CR-50141(03)-JLV** **REPORT AND RECOMMENDATION FOR DISPOSITION OF MOTION TO DISMISS OR, ALTERNATIVELY, TO SUPPRESS**

Drug Task Force agents arrested Tracy Jones, a/k/a Tracy Wilcox (Jones), on a federal warrant for conspiracy to distribute methamphetamine and questioned her after she waived her *Miranda* rights. Agents then took her to jail where, for some inexplicable reason, she sat for 37 days before a magistrate judge finally saw her. She moves to dismiss the case against her or, in the alternative, to suppress her statements to agents, on several grounds. Because Jones is not entitled to a dismissal or suppression, the Court recommends that her motion (including the amendment to it) be denied.

BACKGROUND

On November 17, 2020, FBI Special Agent Dan Cooper and Oglala Sioux Tribe Criminal Investigators Derek Puckett and Jon Archambeau, all agents of the Badlands Safe Trails Drug Task Force, arrested Jones and others on federal warrants as part of a "sweep" conducted of the Martin, South Dakota area. Within two hours or so of her

arrest, agents interviewed Jones at the Bennett County State's Attorney's Office in Martin. Cooper explained to her that she would be transported the next day to the Pennington County Jail in Rapid City, to be booked and housed, and then would see a judge on the federal charge. While in the company of arresting agents, Jones signed a *Miranda* advisement form, acknowledging she understood her rights, agreed to speak with agents and did so. During her conversation with them, Jones provided information on several other persons, in and around Martin and Rapid City, and their drug activities. Jones also spoke about her own methamphetamine distribution and her supply sources.

Task Force agents did not elicit any statements from Jones after Investigator Archambeau handed her over to jail officers on November 18. Nor did agents conduct any follow-up interviews with Jones, or attempt to get her to talk, while she was in jail or at any later time.

The Government originally maintained a Task Force agent provided phone notification on November 18 to the magistrate judge's chambers and to the United States Marshals Service (USMS) that Jones had been arrested on the federal offense and was in custody at the Pennington County Jail. After receiving the call, the Government says, the USMS picked Jones up, drove her to the USMS office for processing, and returned her to the Jail. Jones asserts no one ever advised the magistrate judge that she was in custody and needed to be seen until just before her December 23 initial appearance. In support of her assertion, Jones points to the judge's on-the-record

statement during the hearing that day: "For some reason we were not notified-- our office wasn't -- that she was taken into custody."[1]

Because of the COVID-19 pandemic in November and December 2020 (and for much of that year), most federal criminal defendants appeared for their hearings by video from the Jail. Because of this arrangement and the corresponding lack of any need to bring defendants to court, arresting agents typically were not informed of when a particular defendant was scheduled to make his/her first court appearance before the judge.

Jones secured released on December 23 after spending 37 days in jail. She later moved to dismiss the drug charge against her, under the Due Process Clause of the Fifth Amendment or to suppress her statements because they were obtained in violation of 18 U.S.C. §3501 and the McNabb-Mallory rule.[2]

At the motion hearing, Jones presented evidence that a Task Force agent did indeed contact the magistrate judge's chambers on November 18. But that evidence showed the agent said nothing about Jones in the voice message he left. By contrast, the Government offered no evidence (other than a "belief") to back up its contention that law enforcement notified the judge or her staff of Jones's arrest on, or shortly after, November 18. Faced with proof problems, the Government conceded, to decide Jones's

[1]*See* Mot. Hr'g Ex. F at 10 (Apr. 26, 2021).

[2]*See McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

motion, that no notice had been given to chambers and that the Court could determine what the remedy should be for Jones's five plus week delay in presentment.[3]

DISCUSSION

Jones claims that the way she was first presented to the magistrate judge, after arrival in Rapid City, violated her procedural rights under the Federal Rules of Criminal Procedure. She directs the Court's attention to Rule 5, which generally requires that upon arrest a defendant must be taken before a magistrate judge "without unnecessary delay" in the district where he/she was arrested.[4] Because she did not see a magistrate judge until December 23, 2020, Jones argues that she was not promptly presented as required by the Rule. Based on this perceived defect in proper procedure, she urges the Court to dismiss the indictment against her or, at a minimum, suppress those statements made in violation of her prompt right to presentment.

A. Dismissal

1. Waiver

Although the Eighth Circuit has not previously addressed the matter, courts have concluded that a defendant can indeed waive Rule 5's procedural safeguards.[5]

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[3]*See* Mot. Hr'g Tr. 134-36, 140-43 (Apr. 26, 2021).

[4]*See* Fed. R. Crim. P. 5 (a), (c).

[5]*See United States v. McConnell*, No. 13-CR-273 (SRN/FLN), 2017 WL 396538 at *6 (D. Minn. Jan. 30, 2017) (collecting cases).

And courts have been accepting of a presentment waiver when the defendant has been given *Miranda* warnings, as was the case here.[6] Because these holdings are in keeping with the general presumption in favor of a defendant's right to waive his/her rights,[7] the Court adopts them and "joins the broad consensus in favor of upholding the validity of Rule 5 waivers."[8]

The question then becomes whether Jones' waiver was a knowing, voluntary, and intelligent one. On this record, the Court concludes that it was.

The waiver inquiry has "two dimensions": the waiver must have been (1) "voluntary in the sense that it was a free and deliberate choice rather than intimidation, corrosion, or deception" and (2) made "with a full awareness of both the nature of the right be abandoned and the consequences of the decision to abandon it."[9] The totality of the circumstances are to be considered when determining whether a person's waiver is allowed.[10]

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[6]*See e.g. United States v. Guthrie*, 256 F. App'x 478, 480-81 (9th Cir. 2008); *United States v. Ostrander*, 411 F.3d 684, 696-97 (6th Cir. 2005); *United States v. Salamanca*, 990 F.2d 629, 634 (D.C. Cir. 1993); *United States v. Duvall*, 537 F.2d 15, 23-24, n.9 (2d Cir. (1976)); *Brown v. United States*, 979 A.2d. 630, 635-36 (D.C. 2009).

[7]*See New York v. Hill*, 528 U.S. 110, 114 (2000).

[8]*See McConnell*, 2017 WL 396538 at *6.

[9]*See Berghuis v. Thompkins*, 560 U.S. 370, 382-83 (2010) *(quoting Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

[10]*See Burbine*, 475 U.S. at 421.

The record irrefutably shows that Jones waived her *Miranda* rights. She understood her rights and chose not to assert or rely on any of them when she spoke to Task Force agents.

Credible evidence proves that Jones was mindful of her rights and knew what she was doing.[11] Agent Cooper read each of them to Jones from an advice of rights form.[12] Jones then signed the form, acknowledged that she understood her rights, and was willing to speak to agents without a lawyer present.[13]

Jones's written waiver is a telling manifestation that she understood her rights and was disposed to give them up.[14] Her willingness to engage in an almost 45-minute colloquy without the benefit of counsel and to make statements was a "course of conduct indicating waiver" of her rights.[15] If Jones wanted to remain silent, confer with or have counsel present, or stop answering questions, she could have said so and ended

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[11]*See Berghuis*, 560 U.S. at 385-86; *Burbine*, 475 U.S. at 421.

[12]*See* Mot. Hr'g Exs. 1, B, C; Mot. Hr'g Tr. 21-23, 34, 51-52, 92-93, 150.

[13]*See* Mot. Hr'g Exs. 1, B, C; Mot. Hr'g Tr. 22, 38, 51-54, 93, 150-51.

[14]*See North Carolina v. Butler*, 441 U.S. 369, 373 (1979) ("an express written…statement of waiver of the right to remain silent or the right to counsel is usually strong proof of validity of that waiver").

[15]*Berghuis*, 560 U.S. at 386.

the interrogation. That she chose not to and elected to participate – by herself—in a sustained dialog with Task Force agents is corroboration of a full-fledged waiver.[16]

What's more, Jones' statements were not coerced.[17] At no time did Task Force agents threaten or intimidate Jones, raise their voices, or become hostile toward her.[18] Nor did they use any force, lay hands on Jones, lie, or employ deceptive stratagems to get her to confess.[19] Jones's age (47), education (GED and three and-a-half years of college), familiarity with the criminal justice system (misdemeanor arrests and convictions dating to 2001),[20] and conduct that day did not intimate that she was low functioning or particularly suggestable and vulnerable to inquiries by authority figures.[21]

Jones's responses to the *Miranda* advisement and statements and actions following it also established that she was not under the influence, suffering from any mental impairments, or having trouble grasping questions put to her and that she

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[16]*See id.*

[17]*See id. (citing Burbine*, 475 U.S. at 421); *Colorado v. Connelly*, 479 U.S. 157, 163-67, 170 (1986).

[18]*See* Mot. Hr'g Ex. B; Mot. Hr'g Tr. 54, 151.

[19]*See* Mot. Hr'g Ex. B; Mot. Hr'g Tr. 55-56.

[20]*See* Docket No. 51.

[21]*See* Mot. Hr'g Ex. B; Mot. Hr'g Tr. 54.

comprehended her predicament.[22] And she cooperated with agents (providing them with drug information about herself and others), asking and answering questions, and at times, correcting and clarifying what Agent Cooper said.[23]

This is not one of those isolated cases in which an arrestee, after being properly advised of her *Miranda* rights, failed to make an open and autonomous decision to speak with a probing agent. Jones did not say or do anything that conveyed an inability, on her part, to discern and appreciate her rights and the implications of what she was doing.[24] She knew of the situation she was in and was willing to answer questions. No evidence shows that agents improperly coerced her to do anything. Having waived her *Miranda* rights and given voluntary statements to agents two to three hours after her arrest, Jones cannot now seek the protection of Rule 5(a).[25]

2. Not the Remedy

Regardless, the appropriate remedy for a violation of Rule 5(a)(1)(A) is not dismissal of the indictment, but suppression of evidence illegally obtained as a result of the violation.[26] The reason is simple: since the provisions of Rule 5(a) are procedural,

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[22]*See* Mot. Hr'g Ex. B; Mot. Hr'g Tr. 55, 63, 93, 150-151, 154.

[23]*See* Mot. Hr'g Ex. B; Mot. Hr'g Tr. 23, 54-55, 93, 151.

[24]*See* Mot. Hr'g Ex. B; Mot. Hr'g Tr. 22-23, 51-55, 93, 151.

[25]*See McConnell*, 2017 WL 396538 at **6-7; *United States v. Bell*, 740 A. 2d 958, 962-67 (D.C. 1999).

[26]*See United States v. Cooke*, 853 F.3d 464, 471 (8th Cir. 2017); *United States v.* (continued. . .)

not substantive, the sanction for failure to comply with the Rule is exclusion of those statements taken during the period of unnecessary delay.[27] So Jones's only available remedy is suppression of her November 17 statements to Task Force agents.

Jones's contention that she is entitled to dismissal of the charge against her under the Due Process Clause of the Fifth Amendment cannot be reconciled with federal precedents. They consistently refer to the application of evidentiary sanctions (*e.g.*, the

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Chavez, 705 F.3d 381, 385-86 (8th Cir. 2013)*; see also United States v. Peeples,* 962 F.3d 677, 686 (2d Cir. 2020)(Rule 5(a)'s history confirms that the remedy for a violation of the Rule is the exclusion of evidence, not dismissal of a criminal case); *United States v. Bibb*, 194 F. App'x 619, 623 (11th Cir. 2006) ("we have never recognized dismissal of the indictment as a proper remedy for a Rule 5 violation"); *United States v. Garcia- Echaverria,* 374 F.3d 440, 452 (6th Cir. 2004) (noting generally that the appropriate remedy for a violation of Rule 5(a) is suppression of statements and affirming the district court's denial of defendant's motion to dismiss on that basis); *United States v. Dyer*, 325 F.3d 464, 470 n.2 (3d Cir. 2003) (observing that even if the government had violated Rule 5(a), the remedy for such a violation is not dismissal, but suppression of statements taken during the period of unnecessary delay); *United States v. Castillo,* No.1:20-cr-00061-JPH-TAB, 2020 WL 6743283 at **1-2 (S.D. Ind. Nov. 17, 2020) (117-day delay before initial appearance did not require dismissal of the indictment because dismissal was not the appropriate remedy for the conceded Rule 5(a)(1)(A) violation); *United States v. Taylor,* No.10-cr-16 2010 WL 2425922 at *2 (E.D. Wis. 2010) (absent widespread violations of Rule 5 or flagrant misconduct and prejudice to defendant, dismissal of the indictment is not justified); *United States v. Savchenko,* 201 F.R.D. 503, 509 (S.D. Cal. 2001)(Rule 5 "is not a general remedial statute, but rather a rule designed to deal with a particular problem by applying an evidentiary sanction"); *United States v. Perez-Torribio,* 987 F. Supp. 245, 247 (S.D. N.Y. 1997) ("Unnecessary delay violations of Rule 5(a) warrant suppression of evidence," not dismissal of the indictment).

[27]*See Chavez,* 705 F.3d at 385 *(citing Dyer,* 325 F.3d, 464, 470 n.2 (3d Cir. 2003)).

exclusion of evidence), not dismissal of criminal charges, as the proper remedy for the violation of the prompt presentment rule.[28]

Now the Supreme Court has validated an "outrageous conduct" defense to a criminal prosecution: "we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[29] But to warrant dismissal of an indictment, the outrageousness of such conduct must rise to the level of "violating that 'fundamental fairness' shocking to the universal sense of justice."[30]

Obnoxious police behavior, or even flagrant misconduct is not enough to establish outrageousness in a constitutional sense.[31] Rather, coercion, violence, or

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[28] *See Peeples*, 962 F.3d at 685.

[29] *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

[30] *Id.* at 432 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)); see also *United States v. Chin*, 934 F.2d 394, 398 (2d Cir. 1991) (right to due process violated where "the governmental conduct, standing alone, is so offensive that it shocks the conscience") (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)); *Savchenko*, 201 F.R.D. at 507 ("To obtain dismissal for some government misconduct, including pre-indictment delay, there must be a showing of 'outrageous conduct' under the Firth Amendment, or a violation of some other substantive right such as the Speedy Trial Act.").

[31] *See United States v. Kelly*, 707 F.2d 1460, 1467 (D.C. Cir. 1983) (Opinion of Ginsburg, J.).

brutality to the person must be shown to transgress a defendant's right to due process.[32]

Jones never faced extreme and overwhelming coercion, much less physical, or psychological harm.[33] Nor can it be said that the Task Force agents' nonfeasance—in notifying the magistrate judge of Jones's arrest – was outrageous or that they purposefully perverted a constitutionally protected right to further their investigation efforts. Hence dismissal is not the rightful course of action.[34]

B. Suppression

1. Delay in the Presentment

Assuming Jones has a basis to challenge her statements that she did not waive, she still cannot prevail on her fall-back suppression argument. Granted, the *McNabb-Mallory* rule, a judicial doctrine based in common law and not the Constitution, "generally render[s] inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of Rule 5(a)."[35] But in 1968, Congress

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[32] *See id.* (citing *Irvine v. California*, 347 U.S. 128, 132-33 (1954)); *see also Rochin*, 342 U.S. 166, 172 (physical coercion); *Watts v. Indiana*, 338 U.S. 49, 52-53 (1949) (psychological coercion).

[33] *See* Mot. Hr'g Ex. B; Mot. Hr'g Tr. 55-56.

[34] *See Savchenko*, 201 F.R.D. at 507-09.

[35] *See Corley v. United States*, 556 U.S. 303, 309 (2009) (quotation omitted).

enacted a statute[36] which limits this rule by providing a confession "shall not be inadmissible solely because of delay in bringing [the defendant] before a magistrate judge" if the confession was voluntary and was made "within six hours immediately following" the defendant's arrest or detention.[37] So if the confession came within the six-hour "safe harbor" of the statute, it is admissible if voluntary, subject to the rules of evidence and whatever weight the jury decides to give to it.[38] It is only when the confession occurred before presentment and beyond six hours that a court must decide whether delaying that long was unreasonable or unnecessary and the confession should be suppressed.[39]

Applying these principles, suppression of Jones's November 17 statements is uncalled for. She made her statements voluntarily,[40] less than six hours of being

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[36]*See* 18 U.S.C. §3501.

[37]*United States v. Casillas*, 792 F.3d 929, 930 (8th Cir. 2015) (quoting *Corley*, 556 U.S. at 309-10 and 18 U.S.C. §3501(c))

[38]*See Corley*, 556 U.S. at 322.

[39]*See id.*

[40]*See* Mot. Hr'g Ex. B. (showing that Jones's statements were of her own free will and not coerced); *see also* Mot. Hr'g Tr. 23, 54-56, 93, 151 (testimony supporting voluntariness).

arrested.[41] They thus are admissible and not subject to *McNabb-Mallory's* presentment rule.[42]

2. Voluntariness

Jones, however, insists that her statements to Task Force agents were involuntary and should be suppressed. This claim, like the presentment delay one she makes, is unsustainable and provides her with no grounds for relief.

Cases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled," when law enforcement authorities have adhered to the dictates of *Miranda*, are rare.[43] Jones still argues that the circumstances surrounding the November 17 interview in Martin, when combined with her tardy presentment before a magistrate judge, rendered her statements involuntary. The same

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[41]*See* Mot. Hr'g Tr. 19, 58-59, 91.

[42]*See Corley*, 556 U.S. at 313-14, 322*; Casillas*, 792 F.3d at 931*; see also United States v. McDowell*, 687 F.3d 904, 909 (7th Cir. 2012) ("18 U.S.C §3501(c) provides a six-hour "safe harbor" for confessions given before presentment: A confession given within six hours of arrest is admissible notwithstanding a delay in presentment if the judge finds it was voluntary."). *United States v. Carter*, 484 F. App'x 449, 457 (11th Cir. 2012) (oral confession admissible where it was made within six-hour safe harbor period of statute, voluntary, and in compliance with *Miranda); United States v. Bull Bear*, CR.18-50076-JLV, 2019 WL 4254667 at *7 (D.S.D. Sept. 9, 2019) ("A confession given within six hours of arrest cannot be suppressed due to a Rule 5(a) violation.").

[43]*See Berkemer v. McCarty*, 468 U.S. 420, 433, n. 20 (1984).

analysis applies when considering the voluntariness of statements in the context of a *Miranda* waiver and under the Fifth Amendment.[44]

The interview only lasted 44 minutes and was polite and conversational.[45] Whatever accusatory inquiries Jones may have endured did not transform the meeting into a coercive encounter that overbore her will.[46] What agents said and did (both before and after the *Miranda* waiver) had little or no effect on Jones.[47]

Undeterred, Jones maintains Agent Cooper made implied promises of leniency that persuaded her to break silence and waive her rights. But what Cooper said to Jones--about facing a ten-year mandatory minimum sentence unless she was truthful and cooperated--was not a promise (either expressed or implied). Exhortations that it would be in a suspect's best interest to tell the truth and that she would benefit from cooperating with authorities are not promises, much less ones that are false or

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[44]*See Colorado v. Connelly*, *479* U.S. 157, 169-70 (1986); *United States v. Havlik*, 710 F.3d 818, 822 (8th Cir. 2013); *United States v. Makes Room For Them*, 49 F.3d 410, 415 (8th Cir. 1995); *United States v. Brave Hawk*, 3:19-CR-30090-RAL, 2016 WL 311263 at *4 (D.S.D. Jan. 26, 2016).

[45]*See* Mot. Hr'g Ex. B; *see also* Mot. Hr'g Tr. 24-25, 55, 94 (interview was about 44-45 minutes long).

[46]*See United States v. Larrabee*, 3:16-CR-30039-RAL, 2016 WL 4987122 at *4 (D.S.D. Sept. 14, 2016); *Brave Hawk*, 2016 WL 311263 at *4; *United States v. Stoneman*, CR. 09-30101-RAL, 2010 WL 1610065 at **4-5 (D.S.D. April 20, 2010).

[47]*See United States v. Daniels* 775 F.3d 1001, 1005 (8th Cir. 2014).

unfulfillable.[48] Cooper's statements to Jones were not a promise or an impermissible hope of benefit, but encouragement to be honest in relating what she knew.[49]

The recording and Agent Cooper's testimony (which the Court found to be credible) show Jones's statements were voluntary.[50] They were ones she wanted to make and were not the offspring of any coercive environment and questioning that overwhelmed her faculties and paralyzed her ability to fend off the urge to confess. This being the case, the statements may be used against her as substantive evidence at trial.[51]

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[48]*See Simmones v. Bowersox*, 235 F.3d 1124, 1133 (8th Cir. 2001); *United States v. Pierce,* 152 F.3d 808, 810-13 (8th Cir. 1998); *Bolder v. Armontrout,* 921 F.2d 1359, 1366 (8th Cir. 1990).

[49]*See United States v. Cruse,* 59 F. App'x 72, 74-75, 78 (6th Cir. 2003); *Linares v. Yates*, CV 11-3310AG (JC), 2015 WL 1967042 at *7 (C.D. Cal. April 30, 2015); *State v. Pyles,* 166 N.H. 166, 171, 90 A.3d 1228, 1232 (2014); *Wilson v. State,* 285 Ga. 224, 227-28, 675 S.E.2d 11, 16 (2009); *Phillips v. State,* 2-02-452-CR, 2004 WL 362253 at *7 (Tex. Ct. App. Feb. 26, 2004).

[50]*See* Mot. Hr'g Ex. B; Mot. Hr'g Tr. 22-25, 54-56, 93, 151.

[51]*See United States v. Pugh,* 25 F.3d 669, 675 (8th Cir. 1994); *United States v Rohrbach,* 813 F.2d 142, 145, n.1 (8th Cir. 1987); *United States v. Jackson,* 712 F.2d 1283, 1285-87 (8th Cir. 1983); *see also United States v. Boche-Perez,* 755 F.3d 327, 343 (5th Cir. 2014) (delay did not result "in interrogation that was so lengthy, hostile, or coercive that it would tend to overwhelm [defendant's] will" and make his confession involuntary*); Lawhorn v. Allen*, 519 F.3d 1272, 1290-92 (11th Cir. 2008) (defendant arrested but judicial finding of probable cause was not made for six days, during which he confessed; held confession admissible because it was voluntary and after defendant had been given, and waived, his *Miranda* rights); *Ostrander*, 411 F.3d at 696 ("The rule in this circuit and in most others is that unnecessary delay, standing alone, is not sufficient to justify the suppression of an otherwise voluntary confession under 18 U.S.C. §3501, made during that period."); *United States v. Bear Killer*, 534 F.2d 1253, 1257 & n.3 (8th Cir. 1976) (statements given 9 ½ and 12 hours after arrest were voluntary and admissible); *United States v. Wright,* Crim No. 07-104(JRT/AJB), 2018 WL 141772 at **4-5 (D. Minn. Jan. 14, (continued. . .)

C. Supervisory Authority and Prejudice

Jones seeks dismissal, or at the very least, suppression to send a message that flaunting Rule 5(a) will not be tolerated and result in sanctions. She seemingly calls on the district court to exercise its supervisory authority and impose dismissal or suppression as punishment or as a deterrent against future presentment delays.

Federal courts have supervisory powers which, within limits, allow them to formulate procedural rules not specifically required by the Constitution or Congress.[52] The purposes underlying use of these powers are three-fold "to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy to deter illegal conduct."[53] But such powers are to be used sparingly.[54] Courts cannot punish misconduct unless it not only violated the defendant's right but also prejudiced her defense.[55]

2008) (despite four-month lapse between arrest and presentment, the statements were not made during period of unnecessary delay, but even if they were, the statements were voluntary and not subject to suppression).

[52] *See United States v. Hasting*, 461 U.S. 499, 505 (1983).

[53] *Id.* (internal citations omitted).

[54] *See United States v. Stokes*, 124 F.3d 39, 46 (1st Cir. 1997).

[55] *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (a federal court may not invoke its supervisory powers to dismiss an indictment for misconduct before the grand jury where the misconduct did not prejudice defendant); *Hasting*, 461 U.S. at 506 (supervisory powers may not be used to remedy harmless errors); *United States v.* (continued. . .)

Some courts, including the Eighth Circuit, have held that prejudice results only when the government uses the delay to subject the defendant to unwarranted interrogation.[56] Task Force agents did not detain Jones for an unnecessary period to elicit a confession from her.[57]

At any rate, the record belies any claims of prejudice. Jones has been on pretrial release, and had counsel representing her, for more than five months. She has filed discovery requests, objections, motions, and memoranda and had ample time to interview witnesses, conduct investigations, and mount a defense to the drug charge. And since a trial date has not even been set in her case, Jones can hardly claim that she was, or has been, deprived of an adequate amount of time to prepare her case. While regrettably, Jones's period in custody was far longer than it should have been and may have kept her from providing aid and comfort to her aunt and son in their times of

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Casas, 425 F.3d 23, 47-48 (1st Cir. 2005) (a court may use its supervisory powers only where there is a nexus between the improper conduct and prejudice to defendant); *United States v. Fernandez*, 388 F.3d 1199, 1239 (9th Cir. 2004) (to justify the exercise of a court's supervisory powers, the misconduct must be flagrant and cause substantial prejudice to defendant).

[56] *See, e.g., United States v. Cardenas*, 410 F.3d 287, 293-94 (5th Cir. 2005); *United States v. Garcia-Echavarria*, 374 F.3d at 452-53; *United States v. Morrison*, 153 F.3d 34, 56 (2d Cir. 1998); *Theriault v. United States*, 401 F.2d 79, 86 (8th Cir. 1968).

[57] *See Boche-Perez*, 755 F.3d at 338-39; *see also Cooke*, 853 F.3d at 471 (observing that the purpose of Rule 5(a) is to frustrate law enforcement officers from detaining an arrestee for an unnecessary time to enable them to extract a confession from him); *United States v. Jeanetta*, 533 F.3d 651, 655-56 (8th Cir. 2008) (same).

need, there is no evidence that Task Force agents acted intentionally or willfully in denying her access to the court.

Jones made no statements, and the Government obtained no additional evidence, beyond §3501(c)'s six-hour time limit. Nor does it appear that the delay caused the loss of evidence valuable to her. And because the grand jury handed down the indictment before Jones's arrest, the delay did not result in her continued detention without any probable cause determination. Finally, even if the district court's supervisory powers might be appropriate to punish or deter based on repeated violations of Rule 5(a), Jones presented no such pattern among Western Division arrestees and none appears to exist.[58]

In the end, Jones was not prejudiced by her delay in the presentment to require dismissal of her charged offense or suppression of the statements she gave to agents within a few hours of her arrest.[59]

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[58]*See* Mot. Hr'g Tr. 31-32, 39-40, 47, 73, 99; Docket No. 152 at 13-14 & n.2; *but see United States v. Theus, II*, No. 1:14-cr-10005-CBK, R&R (Mar. 19, 2021) (15-day delay); *United States v. Bobtail Bear*, No. 1:14-cr-10011-CBK, R&R (May 19, 2021) (7-day delay in supervised release case).

[59]*See Cooke*, 853 F.3d 471; *Chavez*, 705 F.3d at 385-86; *United States v. Mangual-Santiago*, 562 F.3d 411, 432 (1st Cir. 2009); *see also United States v. Jernigan*, 582 F.2d 1211, 1214 (9th Cir. 1978) (although DEA agents deliberate delay in arresting defendant until a time when, as the agent well knew, defendant would be unable to go before a magistrate, dismissal of indictment constituted too drastic of remedy where defendant was unable to point to any prejudice other than he spent time in jail); *Taylor*, 2010 WL 2425922 at *2-3 (no specific prejudice in defendant's ability to defend the case based on 26-day delay to require dismissal of his indictment); *United States v. DiGregorio*, 795 F. (continued. . .)

D. Potential Civil Recourse

That is not to say Jones has no remedy for the Rule 5(a) violation. She still can pursue a civil action and seek to hold those responsible for her delay liable.[60]

E. Admonishment

Jones's 37-day stay in jail was tragic. It should have never occurred. Task Force agents believe someone notified the magistrate judge of her arrest and incarceration, but they were mistaken. They did not, however, try and dupe anyone, have a hidden agenda, engage in bad faith, or intend to delay the presentiment process.[61] Even so, Jones paid an enormous price. She lost her liberty for more than a month. Agents, and

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Supp. 630, 634-36 (S.D. N.Y 1992) (defendants failed to show "demonstratable prejudice" for five-month delay, making dismissal of indictment "inappropriate"); *see generally* 1 Charles Alan Wright & Andrew D. Leipold, Federal Practice, and Procedure, §72, n.21 (4th ed. 2008 & 2021 Update) ("Exclusion of a confession is not required if the confession came before there had been delay; a confession given promptly upon arrest is admissible even though thereafter there is improper delay in taking the defendant before a magistrate judge."); *but see United States v Osunde*, 638 F. Supp. 171, 176-77 (N.D. Cal. 1986) (dismissing the indictment for violating Rule 5(a) where defendant was held for 106 days before appearing before a judge but noting there was no case law supporting dismissal).

[60] *See Hayes v. Faulker County, Ark.*, 388 F.3d 669, 673-75 (8th Cir. 2004); *Armstrong v. Squadrito*, 152 F.3d 564, 571-82 (7th Cir. 1998); *see also Garcia Rodriquez v. Andreu Garcia*, 403 F. Supp. 2d 174, 176, 178 (D. P.R. 2005) (where an arrestee alleged that he was not brought before a magistrate judge after his arrest and was incarcerated for five days until he was released on bail, he stated a civil claim under the Due Process Clause).

[61] *See* Mot. Hr'g Tr. 31, 39-40, 59-30, 73, 98.

their fellow officers, need to have a protocol in place for promptly notifying the magistrate judge, or someone other judicial officer, when a person has been arrested and for taking each such arrestee, without unnecessary delay, before that judge or officer. Law enforcement officers are now on notice of what they must do. A delay like Jones experienced must not happen again-- to anyone else without good reason.[62] If it does, a different remedy (than admonishment) may be called for.

CONCLUSION

Jones was advised of all her *Miranda* rights, knowingly, voluntarily, and intelligently waived those rights without ever invoking them. This waiver served also to waive her rights under Rule 5(a)(1)(A). But even if it did not, Jones's remedy is suppression of any evidence illegally obtained as a result of the Rule 5(a) violation, not dismissal of the indictment. The statements she made were neither caused by nor the product of her delay in presentment. And they were voluntary for purposes of the Fifth Amendment. The statements are therefore freely admissible at trial.

Jones's 37-day delay is by no means something that can, or should be, brushed aside. It was though an inadvertent error and is not part of a systemic problem in the District's Western Division. Admonishment, rather than a more harsh remedy, is the elixir in this case.

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[62]*See 1 Federal Practice and Procedure, § 73* (discussing reasons for delay in presentment).

RECOMMENDATION

For all of these reasons, and based on the authorities cited in this report and the record now before the Court, it is

RECOMMENDED that Jones' Motion and Amended Motion to Dismiss and to Suppress,[63] be denied in all respects.

NOTICE

The parties have 14 calendar days after service of this report and recommendation to file their objections to the same.[64] Unless an extension of time for cause is later obtained,[65] failure to file timely objections will result in the waiver of the right to appeal questions of fact.[66] Objections must "identify[] those issues on which further review is desired[.]"[67]

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[63]*See* Docket Nos. 95, 113.

[64]*See* 28 U.S.C. §636(b)(1); Fed. R. Crim. P. 59(b).

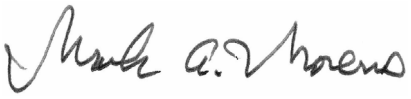
[65]*See Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990); *Nash v. Black*, 781 F.2d 665, 667 & n.3 (8th Cir. 1986) (citing *Thomas v. Arn*, 474 U.S. 140, 155 (1985)).

[66]*See Thompson*, 897 F.2d at 357; *Nash*, 781 at 667.

[67]*Arn*, 474 U.S. at 155.

Dated this 28th day of May, 2021, at Pierre, South Dakota.

BY THE COURT:



MARK A. MORENO
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. TRACY JONES, a/k/a Tracy Wilcox, Defendant.	5:20-CR-50141-03-KES ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND MOTION FOR EVIDENTIARY HEARING AND DENYING PLAINTIFF'S MOTION FOR SPECIFICATION AND GRANTING MOTION TO PREVENT RE-LITIGATION

Defendant, Tracy Jones, is charged with conspiracy to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Jones moves for reconsideration of the court's order denying her motion to dismiss indictment and order denying her motion to suppress evidence (Dockets 157, 216). Docket 307. Plaintiff, the United States of America, opposes the motion. Docket 309. Jones also moves for a second evidentiary hearing regarding the motion to reconsider. Docket 308. The United States moves for an order directing Jones to specify which elements of the crime charged she wishes to have the United States prove at trial. Docket 312. The United States also moves for an order preventing re-litigation of Jones's motion to dismiss indictment and suppress evidence at Jones's upcoming court trial. *Id.* For the following reasons, the court denies Jones's motion, and denies in part and grants in part the United States's motion.

BACKGROUND

A full factual recitation can be found in Magistrate Judge Mark A. Moreno's Report and Recommendation and the court's order adopting the Report and Recommendation. Docket 157 at 1-4; Docket 216.

DISCUSSION

I. Motion for Reconsideration and Motion to Prevent Re-Litigation

"A district court has broad discretion in determining whether to grant or deny a [motion to reconsider]." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006); *see also United States v. Harvey*, 2016 WL 7115982, at *1 (D. Neb. Dec. 6, 2016). In the civil arena, motions to reconsider serve the limited purpose of "correcting manifest errors of law or fact or presenting newly discovered evidence." *United States v. Luger*, 837 F.3d 870, 875 (8th Cir. 2016) (cleaned up) (quoting *Bradley Timberland Res. v. Bradley Lumber Co.*, 712 F.3d 401, 407 (8th Cir. 2013)). "A motion for reconsideration should not be used as a vehicle to present evidence that was available when the matter was initially adjudicated." *Id.* (citing *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 922 (8th Cir. 2015)). Although the Eighth Circuit has not held that the civil reconsideration standard is applicable in the criminal arena, courts in other circuits have applied the civil standard in criminal cases. *See id.* (listing extra-jurisdictional cases applying the civil reconsideration standard in criminal cases). This court finds those extra-jurisdictional cases persuasive and applies the civil reconsideration standard in this case.

Here, Jones seeks reconsideration of the court's order denying her amended motion to dismiss the indictment and denying her amended motion to suppress evidence. Docket 307. Jones essentially renews the same arguments that she presented in her amended motion to dismiss indictment and suppress evidence and her objections to the Report and Recommendation. *Compare* Docket 307, *with* Dockets 113, 161. In her motion for evidentiary hearing, Jones seeks to elicit testimony from an attorney in the Federal Public Defender's office who Jones expects will testify to Jones's efforts to assert her rights and obtain her liberty. Docket 308. But Jones fails to establish that this testimony is newly discovered evidence. During the evidentiary hearing on her amended motion to dismiss indictment and suppress evidence, Jones knew of the evidence from the Assistant Federal Public Defender that she now seeks to introduce in a second evidentiary hearing. *See* Docket 147 at 44-45 (cross-examining Special Agent Cooper regarding a phone call between him and the Assistant Federal Public Defender). Jones cross-examined FBI Special Agent Dan Cooper about the facts put forth in the motion for second evidentiary hearing, but she chose not to call the Assistant Federal Public Defender as a rebuttal witness. *Id.* Because the evidence was available at the first evidentiary hearing, this court finds that it is not newly discovered evidence.

Additionally, the court finds that there were no manifest errors of law or fact in the court's order adopting Magistrate Judge Moreno's Report and Recommendation. Because the court finds that there were no manifest errors of law or fact, and that there is no newly discovered evidence, the court denies

Jones's motion for reconsideration. Further, because the court's ruling on the amended motion to dismiss indictment and suppress evidence is not relevant to the elements of Jones's charge, the court grants the United States's motion to prevent re-litigation of the motion to dismiss indictment and suppress evidence at Jones's upcoming court trial.

II. Motion Specification

The United States next moves for an order directing Jones to specify which elements of the charge she is willing to admit to and which elements she wishes to have plaintiff prove at trial. Docket 312 at 1-2. The United States notes that, in Jones's motion for a court trial, Jones expressed her desire to avoid trial and enter into a conditional guilty plea. *Id.* at 1; Docket 274 ¶¶ 3-4. The United States now avers that it has offered a conditional guilty plea to Jones. Docket 312 at 2.

Here, it is not the court's role to order Jones to specify which elements she seeks to have the United States prove at trial. Rather, it is the United States's burden to prove all of the elements beyond a reasonable doubt. The parties are free to stipulate to facts or elements, but it is not the court's role to force parties to stipulate. Jones is also free to consider the conditional guilty plea offered by the United States. If the parties are not able to agree on stipulations, then the United States must proceed to trial prepared to prove all elements of the conspiracy to distribute a controlled substance charge in its case-in-chief. Thus, the United States's motion for specification is denied.

CONCLUSION

Jones fails to present new evidence or demonstrate a manifest error of law or fact. The issues regarding the court's order denying the motion to dismiss indictment and suppress evidence are not relevant to Jones's trial on conspiracy to distribute a controlled substance. Finally, it is not the court's role to order Jones to specify which elements she seeks to have the United States prove. Thus, it is

ORDERED that Jones's motion for reconsideration (Docket 307) and motion for evidentiary hearing (Docket 308) are denied.

IT IS FURTHER ORDERED that the United States's motion for specification and motion to prevent (Docket 312) re-litigation is denied in part and granted in part.

Dated March 31, 2022.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2776

United States of America

Appellee

v.

Tracy Jones, also known as Tracy Wilcox

Appellant

Appeal from U.S. District Court for the District of South Dakota - Western
(5:20-cr-50141-KES-3)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 19, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans