No.

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2024

LASHAUN CASEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Virginia G. Villa
Counsel of Record

2689 230th Avenue
St. Croix Falls, WI 54024
(207) 745-6156
villa_virginia@hotmail.com

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

This petition presents the following question:

> Whether, under the framework set out in *Strickland v. Washington*, 466 U.S. 668 (1984), trial counsel rendered ineffective assistance by not moving to suppress statements made after the expiration of the `safe harbor' recognized at 18 U.S.C. § 3501(c), where some of those statements were in response to questions posed by law enforcement and some were in response to questions by non-law enforcement?

LIST OF PARTIES AND RELATED CASES

All parties appear in the caption of the case on the cover page.

None of the parties are corporations.

Related case list:

United States v. Lashaun Casey, No. 3:05-cr-00277-ADC, United States District Court for the Puerto Rico. Criminal Judgment entered June 13, 2013.

United States v. Lashaun Casey, 825 F.3d 1 (1st Cir.), opinion on direct appeal entered June 3, 2016, cert. denied137 S.Ct. 839, S.Ct. No. 16-7241, January 23, 2017.

Lashaun Casey v. United States, No. 3:18-cv-01049-ADC, United States District Court for the District of Puerto Rico, 530 F.Supp.3d 176, 2255 judgment entered March 30, 2021.

Lashaun Casey v. United States, 100 F.4th 34 (1st Cir.). Judgment affirming denial of 2255 petition entered April 25, 2024, rehearing and rehearing en banc denied July 10, 2024.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Constitutional and Statutory Provisions:

Other:

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2024

LASHAUN CASEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR FIRST CIRCUIT

Petitioner, Lashaun Casey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceedings on April 25th, 2024.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is published at 100 F.4th 34 and is reproduced in Appendix A. The denial of Mr. Casey's *pro se* 2255 Petition is published at 530 F.Supp.3d 176, and is reproduced in Appendix B.

JURISDICTION

Lashaun Casey stands convicted of 18 U.S.C. § 2119(3)(Carjacking), 18 U.S.C. § 924(j)(1)(Use of a Firearm during Carjacking), 18 U.S.C. § 922(g)(Felon in

Possession of a Firearm), after having gone to trial in the United States District Court, District of Puerto Rico, Aida Delgado Colón, J., presiding. He filed a timely direct appeal, from which certiorari was denied. He then filed a timely *pro se* petition pursuant to 28 U.S.C. § 2255, which was denied on March 30, 2021. The district court exercised jurisdiction pursuant to 28 U.S.C. § 2255(a) and (f)(1). The United States Court of Appeals for the First Circuit issued a Certificate of Appealability on one issue raised in the *pro se* petition and, although finding ineffective assistance of counsel, did not find prejudice and so affirmed in a published opinion filed on April 25, 2024. Appendix A. The Circuit denied a timely petition for rehearing and rehearing en banc on July 10, 2024. Appendix C. The First Circuit exercised jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253(c), 2255(d), and Rule 4(a)(1)(B)(i) of the Federal Rules of Appellate Procedure. Mr. Casey invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend VI:

> In all criminal prosecutions, the accused shall enjoy the right to … have the assistance of counsel for his defense.

18 U.S.C. § 3501:

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

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

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

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.
(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

STATEMENT OF THE CASE

Agent Jesús Lizardi-Espada ("Lizardi") of the Puerto Rico Police Department ("PRPD") went undercover in February, 2005, to infiltrate the drug organizations of

two major traffickers in the Carolina area of Puerto Rico. Lizardi conducted numerous narcotics and firearm purchases from the time he began this investigation until August, 2005, two of which involved Casey. In March, 2005, he purchased a pound of marijuana from a man named Carly, to whom he was introduced by Petitioner Casey. On March 28th, Agent Lizardi purchased 31 grams of cocaine from a third party, a transaction brokered by Petitioner Casey. His supervisor, Jose Agosto Rivera ("Agosto"), or another officer, observed Lizardi while making purchases as a safety precaution.

In late July, 2005, Lizardi contacted Petitioner Casey about buying four pounds of marijuana. Casey put Lizardi in contact with Alexander Hernandez ("Hernandez"). Rather than selling the marijuana himself, as had happened in the prior two transactions with Casey, Hernandez indicated that he was getting the marijuana from yet another person with whom Lizardi would have to establish trust. Hernandez told Lizardi he would need to travel to Culebra, an island off the coast of Puerto Rico, and Casey would have to go with him. Lizardi obtained the buy money from Agosto, which included pre-recorded bribe money for unscrupulous customs officers, and went to pick up Petitioner Casey the morning of August 1, 2005 at the home Casey shared with his grandparents in Luquillo. Lizardi made several phone calls to Agosto that morning, including after picking up Casey. As Agosto felt he would compromise Lizardi's undercover status if he rode the same ferry from Fajardo, he instead traveled by air. Lizardi and Casey never showed up

at the ferry landing in Culebra. Agosto tried calling Lizardi on his cell phone. Lizardi did not answer. Agosto returned to Fajardo by ferry.

A search for Lizardi ensued, involving hundreds of PRPD officers as well as the San Juan and Ceiba offices of the FBI. PRPD officers went to Casey's home and found his car there. They went to the hotel near San Juan where he worked and found Lizardi's truck. They noted that driver's side window was missing and there were copious blood stains. PRPD officers arrested Casey just prior to midnight on August 1st as he was leaving the employee parking lot in the truck.

PRPD Officer Diana Marrero interviewed Casey in the early morning hours of August 2nd at PRPD headquarters in Hato Rey. Casey was read and waived his Miranda rights. Casey told a story that officers discovered to be untrue. Pursuant to investigating the story, Casey had been moved to the police headquarters in Canóvanas. While there, Marrero confronted Casey with evidence disproving his story and Casey responded that he no longer wished to speak with the police or to cooperate.

The United States assumed jurisdiction over the case at 6 AM on August 2nd while Casey was at Canóvanas, which is located about halfway between Ceiba and the federal courthouse in San Juan. The FBI obtained consent to search Casey's home from his grandparents and began the search of the residence in Luquillo at about 7:30 AM. During the search, officers recovered a loaded firearm, Lizardi's cell phone, and blood-stained sandals. The FBI had Casey transported to its office in

Ceiba at around noon and FBI Agent Moulier informed Casey of the evidence they had recovered from his home. He read Casey his Miranda rights and Casey invoked his right to silence. Two hours later, Agent Marrero interviewed Casey again, at which point Casey made two incriminating statements saying that Lizardi "was maybe alive or maybe he was dead," followed by his statement "that he was not going to talk any more[] because he was already sunk because of the evidence." He then invoked his right to counsel. Marrero continued to question him about Lizardi's whereabouts, telling Casey that Lizardi was a "family man." Casey responded that he was a family man too, and that he didn't know what Marrero was talking about.

At about 4:15 PM, Casey met with his wife in an interview room in the Ceiba location, in the presence of FBI Task Force Officer Vachier ("Vachier"). This was the second time Casey saw his wife that day. The visit occurred only due to FBI Agent Moulier's approval of the contact. Vachier overheard the couple's conversation and testified at trial that Casey said to his wife, among other things, that "in the house they seized a lot of evidence but that they weren't going to find the body." The agent reported that Casey also assured his wife "that he was going to come out of this case well," while referencing a prior drug case "they had come out of ... okay." Not introduced at trial was Casey's final statement that "they knew he was an undercover agent," after which he broke down in tears.

Casey was taken to the Metropolitan Detention Center in Guaynabo, arriving at about 11:30 PM on August 2, and he made his initial appearance before a federal magistrate judge in San Juan the next day, August 3, 2005 at 11:35 AM.

Several days later, Lizardi's body was found in a ravine behind an abandoned building. He had been shot twice in the head. Despite physical evidence that was tested for DNA that did not match either Lizardi or Casey and was found in areas accessible to a person who may have murdered Lizardi, the FBI did not seek a warrant to obtain DNA from Hernandez. This is in spite of Casey's statement to his wife indicating that others were aware of Lizardi's undercover status, Lizardi's investigation of two major crime organizations, and Hernandez' involvement in setting up the sale that was to occur on August 1st.

Casey was eventually charged with and went to trial on three counts: (1) carjacking with the intent to cause death or serious bodily injury, in violation of 18 U.S.C. § 2119(3); (2) possession, use, discharge, and carrying of a firearm during a crime of violence — the carjacking — and, in the course of that crime, shooting Lizardi, "thus causing his death," in violation of 18 U.S.C. § 924(j); and (3) being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The superseding indictment also contained a "Notice of Special Findings" rendering Casey eligible for the death penalty. See 18 U.S.C. §§ 3591(a), 3592(c).

Prior to trial, defense counsel moved to suppress the statements Casey made at the FBI office in Ceiba, but did not seek suppression based on undue delay in

bringing him before a magistrate judge. Except for the statement made after Casey invoked his right to counsel, the district court denied the motions.

The prosecution argued at trial that Casey acted alone in shooting Lizardi and disposing of his body. The defense argued that Hernandez had unexpectedly entered the back seat of the truck and shot Lizardi from there. The prosecution case rested on circumstantial evidence, as well as Casey's statements made at Ceiba. The defense did not address those statements in its closing, an omission the prosecution noted in rebuttal. The jury returned a guilty verdict on all three counts, but could not come to a verdict on the death penalty. The district court imposed sentences of life on Counts 1 and 2, and a term of 10 years imprisonment on Count 3, all to run concurrently.[1]

Casey appealed and, among his arguments, he claimed for the first time that his statements to Marrero and his wife should have been suppressed because the government failed to bring him promptly before a magistrate judge. The First Circuit deemed that claim waived and declined to consider it.

Casey filed a timely 2255 petition in which he raised three issues. One of those issues was a claim of ineffective assistance of counsel for failure to move to suppress the statements he made at Ceiba as a violation of the prompt presentment rule. The district court denied this claim, although finding delay in presentment, concluding that such delay "was reasonable and necessary for legitimate law

[1] Casey did not challenge his conviction for being a felon in possession of a firearm in his 2255 appeal, but he has long since completed the sentence for that charge.

enforcement purposes." *Casey v. United States*, 530 F.Supp.3d 176, 188 (D.P.R. 2021), Appendix B at 9, and denied a certificate of appealability. Casey filed a timely notice of appeal and the First Circuit issued a certificate of appealability on the following question: "[W]hether, under the framework set out in *Strickland v. Washington*, 466 U.S. 668 (1984), trial counsel rendered ineffective assistance by not moving to suppress statements made after the expiration of the `safe harbor' recognized at 18 U.S.C. § 3501(c)?" *Casey v. United States*, 100 F.4th 34, 42 n.8 (1st Cir. 2024), Appendix A at 23.

The Circuit found that Casey's trial counsel had indeed rendered ineffective assistance, finding "it beyond debate that Casey was improperly denied his right to prompt presentment." *Id.*, at 51, Appendix A at 12. It nevertheless affirmed the denial of his habeas petition. It reasoned that even though the statements made to Casey's wife were made after the statements to Marrero, and thus during the period of the Rule 5 violation, "a voluntary confession given in circumstances that do not implicate the concern about improper interrogation — the circumstances that exist on the record before us with respect to Casey's statement to his wife — is not excludable." *Id.*, at 51-52, Appendix A at 13. Given the overlap in content of these two statements, the Circuit found no reasonable likelihood that the introduction of the first set of statements made to Marrero unduly influenced the verdict of the jury, since it could consider the second set of statements. Thus, although counsel's performance was deficient, Casey could not establish prejudice. See *id.*

The First Circuit result relies on the admissibility of the statements made to Casey's wife, as the Government's case lacked evidence of intent if Hernandez killed Lizardi. All other evidence placed Casey at the scene but did not establish his involvement in perpetrating the crime. See *Casey*, 100 F.4th at 54-55, 60, Appendix A at 15. The decision makes it clear that, if both sets of statements made at Ceiba, those to Marrero as well as those to his wife, should have been suppressed, then Casey's trial "'counsel's representation fell below an objective standard of reasonableness' (the performance prong) and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' (the prejudice prong)." *Casey*, 110 F.4th at 42, quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), Appendix A at 5.

Casey sought rehearing and rehearing en banc on the basis that the record established that Casey's statements to his wife were in response to questions she asked him, and thus were not "spontaneously volunteered" as they had been in *United States v. Colon*, 835 F.2d 27, 30-31 (2nd Cir. 1987). See *Casey*, 100 F.4th at 51, Appendix A at 12. Rather, his statements were in response to "interrogation by anyone," as set forth in 18 U.S.C. § 3501(d), and thus the Circuit's decision failed to abide by the plain language of the statute. Further, he noted that the Circuit relied on a voluntariness standard addressing the contours of the "functional equivalent" of interrogation for purposes of *Miranda*. See *id.*, *citing Arizona v. Mauro*, 481 U.S. 520, 521, 530 (1987). *Corley v. United States*, 556 U.S. 303, 129 S.Ct. 1558 (2009) and other circuits rejected a voluntariness analysis as a basis to forgive a failure to

promptly present a person in custody to a magistrate judge. The First Circuit denied rehearing and rehearing en banc. Casey now requests the Court to review that decision for the following reasons.

REASONS FOR GRANTING THE WRIT

Confessions, which include incriminating statements short of "I did it," carry immense weight with juries. "Indeed, it is not an overstatement to say that self-inculpatory comments can be the most consequential evidence offered against an accused. See *Arizona v. Fulminante*, 499 U.S. 279, 296 … (1991)('A confession is like no other evidence.')." *Casey*, 100 F.4th at 52, Appendix A at 13. False confessions and bad police work have led to the convictions of suspects who later are provably innocent based on DNA or other technological evidence.[2] Studies have established that juries can be persuaded to render guilty verdicts even where DNA evidence excludes a defendant if a confession is introduced into evidence. See *Corley*, 556 U.S., at _, 129 S.Ct., at1570 ("there is mounting empirical evidence that these

[2] Instances of police misconduct in the face of an apparently dead-end investigation, later revealed by technological advances, increasingly appear in headlines. See, e.g., Lentz, Nick, and Mitchell, Kirsten, *Hennepin County Attorney calls for court to vacate murder conviction of Edgar Barrientos-Quintana*, WCCO News (Sept. 23, 2024) available online at https://www.cbsnews.com/minnesota/news/hennepin-county-attorney-edgar-barrientos-quintana/ (last visited September 26, 2024); Miller, Carlos, *Thought It Was a Trick': Atlanta Black Man Wrongfully Jailed for Murder After Detective Hides Crucial Evidence — Now He's Free, But Corrupt Cop Faces Zero Punishment*, Atlanta Black Star (Sept. 15, 2024), available online at https://atlantablackstar.com/2024/09/15/atlanta-black-man-wrongfully-jailed-for-murder/ (last visited Sept. 23, 2024); *Jury orders city of Naperville to pay $22.5M in damages connected to wrongful conviction*, AP News (Aug. 6, 2024), available online at https://apnews.com/article/arson-murder-wrongful-conviction-illinois-lawsuit-b7cfcb144bdd9fa62e7ff735793d370e#(last visited September 23, 2024).

pressures can induce a frighteningly high percentage of people to confess to crimes they never committed"), citing Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 906-907 (2004). Here, apart from Petitioner Casey's statements, a reasonable jury could not have rendered guilty verdicts on the carjacking or 924(j) murder counts. If Hernandez was the triggerman and DNA linked him to the scene of the crime, then investigators may have been able to discover how "they knew [Lizardi] was an undercover agent," and obtain evidence that would have brought down the very criminal organizations Lizardi was investigating. This, of course, would have contradicted Casey's complicity. Enforcing bright-line rules thus may foreclose officers from falling into the trap of not wishing to undermine what appears to be the easy case and engage in the harder work of finding the actual perpetrator. This case presents a factual and legal vehicle that will promote justice not only to Mr. Casey, but for future cases in which the temptation is to subvert statutory mandates to the perceived needs of the moment.

I.

THE FIRST CIRCUIT'S OPINION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, DECISIONS OF OTHER CIRCUITS, AND THE PLAIN LANGUAGE OF § 3501

The presentment rule contained in Federal Rule of Criminal Procedure 5 is based not on the Constitution, but rather on the common law. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 61-62 (1991)(Scalia, J., dissenting) and cases cited therein. Statutory-based procedural protections against isolating an arrested person to obtain evidence have existed in the federal code since at least 1879. See

McNabb v. United States, 318 U.S. 332, 342 (1943). Presentment has always been a procedural rule based on the idea that a person who is detained should be brought before a judicial officer in an expeditious manner. "It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection." *Id.*, at 344.

Since *McNabb*, this Court has maintained a bright-line rule: if a confession occurs while suspects are in police custody and during a period in which officers inexcusably fail to present them promptly to a judicial officer, any statement made during that time of illegal detention must be suppressed as "the arresting officers [will have] assumed functions which Congress has explicitly denied them." *Id.*, 318 U.S., at 341-342. The First Circuit's importation of constitutional standards of interrogation into the statutory framework merits review by this Court as it blurs clear lines Congress established, departs from controlling precedent, creates a circuit conflict, and undermines the historical purpose of the prompt presentment rule.

A. The First Circuit's opinion conflicts with *Corley v. United States*, 556 U.S. 303 (2009) and the decisions of other circuits

In *Corley*, supra, this Court entertained the question as to the effect that the enactment of 18 U.S.C. § 3501 in 1968 had on the rule of suppression announced in *McNabb*, supra. Subsection (a) of that statute declared that a voluntary confession is admissible. Subsection (b) enumerates several factors that must be considered in determining whether a confession is voluntary. Congress enacted this statute to

overrule the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), which in turn established certain procedural standards to ensure that waivers of constitutional rights was both knowing and voluntary. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court ruled that *Miranda* was based in the constitution and, as such, could not be overruled by an act of Congress. The question presented in *Corley* was whether Congress had not only tried to overrule *Miranda*, but whether it had effectively overruled *McNabb* in subsections (a) and (b). The Court determined that subsections (a) and (b) do not apply to subsection (c). Rather, the Court affirmed that "§ 3501 modified *McNabb-Mallory* without supplanting it." *Corley*, 556 U.S., at __, 129 S.Ct., at 1571.

Under the terms of the statute, *Corley* held that issue as to whether a statement must be suppressed due to a failure to promptly present a detained person to a judicial officer is straightforward:

> If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed.

Corley, 556 U.S., at __, 129 S.Ct., at 1571. There are no caveats listed once unreasonable detention has been established.

This holding is in line with prior decisions regarding the effect of lack of timely presentment on admissibility and the irrelevance of the source of interrogation on a suppression analysis. In *United States v. Mitchell*, 322 U.S. 65

(1944), the Court explained that a confession given before a presentment violation occurred is admissible, even if followed by a presentment violation. In *United States v. Bayer*, 331 U.S. 532 (1947), the Court explained that a confession given after a presentment violation had occurred, but where the accused had been released, could not be suppressed. Only statements made during the violation period are suppressible. Thus, the rule is that "a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological … .'" *Upshaw v. United States*, 335 U.S. 410, 413 (1948) quoting *Mitchell*, 322 U.S., at 68. That a *Miranda* analysis has no place once a presentment violation has been found has been explicitly adopted by at least five circuits. See *United States v. Thompson*, 772 F.3d 752, 760-764 (3rd Cir. 2014) (after *Corley*, § 3501(c) analysis does not involve a voluntariness finding and only issue is whether confession made six hours after arrest and reasonableness of delay in presentment); *United States v. Boche-Perez*, 755 F.3d 327, 334-335 (5th Cir. 2014)(same); *United States v. Casillas*, 792 F.3d 929, 930 (8th Cir. 2015)(same); *United States v. Gowadia*, 760 F.3d 989, 993 (9th Cir. 2014)(same); *United States v. Davis*, __ F.4th __, No. 23-10184 (11th Cir. Jul. 30, 2024)(same).

The First Circuit found that counsel should have lodged a § 3501(c) challenge to the statements made at Ceiba because "it [is] beyond debate that Casey was improperly denied his right to prompt presentment." *Casey*, 100 F.4th at 51, Appendix A at 12. The Circuit found no valid reason for delaying bringing Casey

before a magistrate judge. The Circuit also found the statements integral to obtaining convictions on the carjacking/use of a firearm counts. See *Casey*, 100 F.4th at 54-62 (recounting role of two sets of statements in obtaining convictions), Appendix A at 15-22. If the Circuit had followed the clear mandates of *Corley*, as adopted by the Third, Fifth, Eighth, Ninth, and Eleventh Circuits, it would have found both substandard representation as well as prejudice from counsel's failings.

The Circuit found that Casey cannot show prejudice from his counsel's failure to move to suppress based on the Rule 5 violation due to finding that the statements made to his wife were admissible:

> [T]he prompt presentment violation affects only Casey's first set of inculpatory statements — the comments to Marrero. Even though Casey's overheard comments to his wife were made later in time than the comments to Marrero, they were not inadmissible, under either § 3501 or the McNabb-Mallory rule itself, based on the FBI's delay in bringing Casey to the magistrate judge. Section 3501(d) permits "the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone." 18 U.S.C. § 3501(d) (emphasis added); see, e.g., *United States v. Colon*, 835 F.2d 27, 30-31 (2nd Cir. 1987) (holding that the defendant's incriminating statement was not excludible under § 3501 "even if the delay in arraignment was unreasonable" because the "statement was spontaneous and not the product of interrogation or its functional equivalent"). In our decision on Casey's direct appeal, we upheld the district court's finding that Casey's comments to his wife, although made in the presence of an FBI agent, did not involve interrogation. See *Casey I*, 825 F.3d at 21 (noting that "Casey offer[ed] no evidence that the FBI brought [his wife] in for interrogation purposes"); see also *Arizona v. Mauro*, 481 U.S. 520, 521 …(1987) (concluding that officers did not interrogate a suspect when they "allowed him to speak with his wife in the presence of a police officer"). Section 3501 therefore does not "bar [their] admission in evidence." 18 U.S.C. § 3501(d).

Casey, 100 F.4th at 51, Appendix A at 12-13. The reliance on *Mauro* requires importing a constitutional standard of interrogation (and voluntary waiver of Fifth

and Sixth Amendment rights) into a § 3501 analysis, a standard specifically rejected by this Court in *Corley*, supra.

Mauro involved a motion to suppress based on an argument that the police used a suspect's wife to "interrogate" him after he had invoked his right to an attorney pursuant to *Miranda*. As this was a prosecution pursued in Arizona state court, Rule 5 and § 3501 was not at issue and so the analysis had to be under constitutional standards. Those standards require questioning, or its "functional equivalent," be conducted by the police. See *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). There is no such requirement contained in § 3501.

McNabb specifically rejected a constitutional framework in a presentment violation analysis, and *Corley* affirmed that the statutory analysis for suppression under § 3501(c) is separate and apart from a *Miranda* analysis. Indeed, the First Circuit found that Casey's first set of statements at Ceiba to Marrero should have been suppressed based on a presentment violation even though they were not obtained in violation of *Miranda*. See *Casey*, 100 F.4th at 50, Appendix A at 11.

Although *Colon* did involve a § 3501 analysis, it did not determine whether there was an unreasonable delay because, at the time, voluntariness was a factor in determining suppression for a Rule 5 violation. See *Colon*, 835 F.2d at 30 ("Inculpatory statements made ... voluntarily ... without interrogation are thus exempt from the procedural requirements of Section 3501") internal quotation omitted. *Colon* was decided prior to *Corley*. Given *Corley's* holding that

voluntariness definitions of § 3501(a) and (b) do not apply to presentment violations, *Colon* has been superseded.

Uniformity in the application of statutes and rules is integral in both the orderly conduct of federal criminal proceedings, as well as maintaining the appearance of justice. By relying on the source of interrogation rather than its timing, the First Circuit's decision depends on rejecting a clear component of *Corley*, as understood by five of its sister circuits. Review is merited.

B. The First Circuit's decision fails to give effect to the plain language of § 3501(d)

Plain language analyses can be a two-edged sword, as it shown by the majority and dissenting opinions in *Corley*. The majority's opinion depends on analyzing the words of the statute and how they differ between the separate subsections. See *Corley*, 556 U.S., at __, 129 S.Ct. at 1567 ("[W]e cannot accept the Government's attempt to confuse the critically distinct terms 'involuntary' and 'inadmissible' by rewriting (c) into a bright-line rule doing nothing more than applying (a).") The dissent is equally convinced that "[u]nless the unambiguous language of § 3501(a) is ignored, petitioner's confession may not be suppressed." *Id.*, 556 U.S., at __, 129 S.Ct., at 1572 (Alito, J., dissenting).

Corley did not address whether subsections (d) and (e) apply to a presentment analysis. The First Circuit's decision clearly depends on subsection (d) in finding the statements made to Casey's wife are admissible despite being obtained during a period of illegal detention. Assuming without conceding that subsection (d) does

apply, the Circuit's analysis substitutes the constitutionally based *Miranda* standards for the clear language of the statute.

Subsection (d) provides:

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

18 U.S.C. § 3501(d)(italics added). The First Circuit's recitation of facts clearly establishes that Casey was under detention so that the final provision of subsection (d) does not apply.[3] This means that the provision relied upon must be the clause that a voluntary confession is admissible if it is made to any person (which would include non-law enforcement actors), *and* is "without interrogation by anyone." It is this last phrase that the First Circuit's decision fails to follow. Rather, the Circuit relies on two cases to find that subsection (d) permits the admission of the statements that would otherwise have to be suppressed pursuant to subsection (c). See *Casey*, 100 F.4th at 51, citing *Mauro*, supra, and *Colon*, supra, Appendix A at 12-13.

These two cases bear factual distinctions that render it difficult to identify the rationale the First Circuit sought to establish for abjuring the clear mandate contained in § 3501(c) and *Corley*. For instance, *Mauro* involved a situation in which a detainee's wife was allowed to visit him while monitored by law

[3] The requirement that a person be in detention or custody at the time the statement is made is consistent with the holding of *Bayer*, supra, and thus does not add or subtract from this Court's prior construction of the scope of the presentment rule.

enforcement after having invoked his right to counsel. During the visit, the wife expressed despair about the situation, and Mauro advised her to not speak to answer questions without a lawyer. This statement was later used to rebut an insanity defense. See *id.*, 481 U.S., at 522. These facts bear a striking similarity to those which occurred between Casey and his wife, with the exception that Mauro was not under an illegally prolonged federal detention and Casey was.

Mauro held that, unless a statement is in response to a question posed by a police officer or someone acting on behalf of an officer, it doesn't count as "interrogation" for purposes of *Miranda*. See *id.*, 481 U.S., at 529 ("Mauro was not subjected to compelling influences, psychological ploys, or direct questioning. Thus, his volunteered statements cannot properly be considered the result of *police* interrogation"(italics added).) The legal difference between *Casey* and *Mauro* is exactly the commands of § 3501(d). *Mauro* involved "volunteered" statements without interrogation by the police. Subsection 3501(d) requires that volunteered statements be "without interrogation by anyone." Here, Casey's wife clearly asked him questions which were likely to result in incriminating statements, which is the definition of "interrogation" in general. See *Innis*, 446 U.S., at 301. Because the statute, unlike *Miranda*, does not require statements to be in response to police questioning, nothing in § 3501(d) would forgive a violation of § 3501(c), and all statements in made in Ceiba were due to be suppressed. Without those statements, the jury would have had no basis to infer that Casey had been complicit in the carjacking or the murder.

Colon also proves unenlightening. Colon was arrested at 1:30 AM on a Saturday morning and invoked his right to counsel. At about 9 AM he and four others were taken to a federal courthouse for processing at the FBI offices, but were not taken before a magistrate judge, who was available until noon. The following Monday morning, while on route to the federal courthouse, Colon initiated a conversation with a law enforcement officer and made incriminating statements without any questions being posed *by anyone*, except for one small detail. See *id.*, 835 F.2d at 29. The puzzling aspect of reliance on this case is that Casey did not "volunteer" information spontaneously as did Colon, but made statements in reaction to questions asked by his wife. Other than a reliance on § 3501(d) (arguably overruled by *Corley*), *Colon* adds nothing to the analysis due to the factual dissimilarities.

The problem with the First Circuit's decision is that it creates an exception to the bright line established in § 3501(c). In turn, this allows the various devious means police have used over the years to elicit incriminating statements from suspects, but further allows them the time and space to get those statements. Here, instead of being taken to the federal courthouse in San Juan from the police office in Canóvanas, Casey was transported further from the courthouse for no legitimate reason. Officers held him away from the protections of an initial appearance during the time it took to search his home. After obtaining evidence that further linked Casey to the disappearance of Lizardi, officers then presented that evidence to him before interrogating him again. You can almost hear the questions: "Come on. We

have the gun in your house. We arrested you in the truck covered in blood. Tell us where Lizardi is. You are already sunk with the evidence." When this doesn't work, they bring back PRPD Officer Marrero. Casey, without knowing the charges that can be brought against him, tells her "I am sunk with the evidence." This is later used as a confession to having committed the murder. Only Casey wasn't informed about the possibility of murder charges at the time. When Casey asks for a lawyer, Marrero doesn't stop the interrogation but appeals to Casey's sympathy for Lizardi's family. When that doesn't work, they bring in Casey's wife, who first met with him in Luquillo and then appears again in Ceiba. Casey virtually repeats the same statements that he made to Marrero to his wife, a classic "cat out of the bag" scenario. See *Bayer*, 331 U.S., at 540-541. Because they are so similar, the First Circuit determines that introduction of the statements to his wife alone would have allowed the jury to infer he was the one who killed Lizardi. What allows all of this to happen? The detention the First Circuit found to be impermissible under the rules established by Congress.

The mandate for prompt presentment to a magistrate after detention means a suspect "is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." *Mallory v. United States*, 345 U.S. 449, 454 (1957). "In a world without *McNabb-Mallory,* federal agents would be free to question suspects for extended periods before bringing them out in the open, and we have always known what custodial secrecy leads to." *Corley*, 556 U.S. at __, 129

S.Ct., at 1570. "'[C]ustodial police interrogation, by its very nature, isolates and pressures the individual,' *Dickerson*, 530 U.S., at 435, …, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, see, *e.g.,* Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C.L.Rev. 891, 906-907 (2004)." *Id.*

Suppression based on lack of presentment has always suffered from the feeling that voluntary confessions should be able to be used and police should be given wide latitude in investigating serious cases. "The cases just cited show that statements made while under interrogation may be used at a trial if it may fairly be said that the information was given voluntarily. A frank and free confession of crime by the culprit affords testimony of the highest credibility and of a character which may be verified easily." *McNabb*, 318 U.S., at 348 (Reed, J., dissenting). The district court denied the 2255 petition by finding that "the delay in Casey's presentment was reasonable and necessary for legitimate law enforcement purposes, namely, to locate Agent Lizardi, his prompt presentment claim lacks merit." *Casey v. United States*, 530 F.Supp.3d at 188, Appendix B at 9. The Circuit's decision, despite rejecting the district court's rationale, seriously undermines the protections afforded by Congress in § 3501(c) by creating an exception not contained in the statute.

The *Corley* dissent posited that "it is certainly not clear that the *McNabb-Mallory* rule adds much protection beyond that provided by *Miranda*." *Id.*, 556

U.S., __, 129 S.Ct., at 1575 (Alito, J., dissenting). This case makes clear that there are protections a prompt appearance before a magistrate can provide that also can preclude convicting the wrong person. Initial appearances routinely are staffed by Assistant Federal Defenders who meet with detainees prior to the initial hearing so that the person may make an informed decision whether to request a detention hearing, a preliminary hearing, or both. Counsel is often present when a detainee is interviewed by Pretrial Services for purposes of a Detention Hearing Report. Preliminary and detention hearings illuminate the scope of charges that are possible, even where the initial complaint may not reflect the severity of charges that can be, and in this case were, ultimately levied. These are all stages at which a detainee may make compromising statements leading to further charges, which is why a lawyer is available to the accused. These are important procedural protections created by rule and statute so that prosecutions do not devolve into conviction by entrapment. The First Circuit's decision fails to honor those protections. Its effect on future police conduct merits review by this Court.

CONCLUSION

For the foregoing reasons, Lashaun Casey requests this Court to grant review of the First Circuit's decision in this appeal.

Dated: October 1, 2024

/s/ Virginia G. Villa

VIRGINIA G. VILLA
2689 230th Avenue
St. Croix Falls, WI 54024
(207) 745-6156
villa_virginia@hotmail.com
Attorney for Petitioner
Counsel of Record